This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

[Weekly Reporter, Oct. 27, 1900.]

THE

# WEEKLY REPORTER,

5199

## 1899-1900

(FORTY-EIGHTH YEAR),

CONTAINING

## CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

## APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1899, TO THE 12TH OF AUGUST, 1900.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. XLVIII.

EDITED BY

MARTIN JOSEPH BLAKE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

LONDON: 27, CHANCERY LANE, W.C.

1900.

ALEXANDER & SHEPHEARD, LTD.,
Printers,
IONSDALE BUILDINGS, CHANCERY LANE.

94310

# JUDGES AND LAW OFFICERS

FROM THE 24TH OF OCTOBER, 1899, TO THE 12TH OF AUGUST, 1900.

---

LORD HALSBURY, LORD CHANCELLOR.

LORD WATSON,
LORD MACNAGHTEN,
LORD MORRIS,
LORD DAVEY,
LORD ROBERTSON,
LORD LINDLEY,
} LORDS OF APPEAL IN ORDINARY.

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

THE LORD CHANCELLOR.
THE LORDS OF APPEAL IN ORDINARY.
LORD HOBHOUSE,
LORD SHAND,
LORD BRAMPTON,
SIR RICHARD COUCH,
SIR HENRY STRONG,
SIR FORD NORTH,
} ADDITIONAL JUDGES ORDINARILY ATTENDING.

## SUPREME COURT OF JUDICATURE—COURT OF APPEAL.

SIR NATHANIEL LINDLEY, MASTER OF THE ROLLS,
LORD ALVERSTONE, MASTER OF THE ROLLS,
SIR ARCHIBALD LEVIN SMITH,
SIR JOHN RIGBY,
SIR RICHARD HENN COLLINS,
SIR ROLAND VAUGHAN WILLIAMS,
SIR ROBERT ROMER,
} LORDS JUSTICES OF APPEAL.

## HIGH COURT OF JUSTICE—CHANCERY DIVISION.

SIR FORD NORTH.
SIR JAMES STIRLING.
SIR ARTHUR KEKEWICH.
SIR ROBERT ROMER.
SIR EDMUND WIDDRINGTON BYRNE.
SIR HERBERT HARDY COZENS-HARDY.
SIR ROBERT S. WRIGHT.
SIR GEORGE FARWELL.
SIR HENRY BURTON BUCKLEY.

## QUEEN'S BENCH DIVISION.

LORD RUSSELL OF KILLOWEN, CHIEF JUSTICE.
SIR JAMES CHARLES MATHEW.
SIR JOHN CHARLES DAY.
SIR ALFRED WILLS.
SIR WILLIAM GRANTHAM.
SIR JOHN COMPTON LAWRANCE.
SIR ROBERT SAMUEL WRIGHT.
SIR GAINSFORD BRUCE.
SIR WILLIAM RANN KENNEDY.
SIR EDWARD RIDLEY.
SIR JOHN CHARLES BIGHAM.
SIR CHARLES JOHN DARLING.
SIR ARTHUR MOSELEY CHANNELL.
SIR WALTER GEORGE FRANK PHILLIMORE.
SIR THOMAS TOWNSEND BUCKNILL.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

SIR FRANCIS HENRY JEUNE, PRESIDENT.
SIR JOHN GORELL BARNES.

---

SIR RICHARD EVERARD WEBSTER,
SIR ROBERT BANNATYNE FINLAY,
} ATTORNEY-GENERAL.

SIR ROBERT BANNATYNE FINLAY,
SIR EDWARD CARSON,
} SOLICITOR-GENERAL.

# EDITOR AND REPORTERS.

## 1899—1900.

### EDITOR.

MARTIN JOSEPH BLAKE,

BARRISTER-AT-LAW.

### REPORTERS.

| | | |
|---|---|---|
| HOUSE OF LORDS | | CHARLES HARDMAN GRAFTON, Barrister-at-Law. |
| PRIVY COUNCIL | | CHARLES HARDMAN GRAFTON, Barrister-at-Law. |
| COURT OF APPEAL (No. I.) | | WILLIAM FREDERICK BARRY, FREDERICK GEORGE RÜCKER, FRANCIS OCTAVIUS ROBINSON, and EDWARD G. STILLWELL, Barristers-at-Law. |
| COURT OF APPEAL (No. II.) | | JAMES IRVINE STIRLING, JOSEPH ERNEST MORRIS, PAUL STRICKLAND, WARWICK H. DRAPER, and ROBERT CUNNINGHAM MACKENZIE, Barristers-at-Law. |
| CHANCERY DIVISION. | *Mr. Justice North* | RICHARD SILLEM and JOHN HUMPHREYS DAVIES, Barristers-at-Law. |
| | *Mr. Justice Stirling* | PAUL STRICKLAND and WARWICK H. DRAPER, Barristers-at-Law. |
| | *Mr. Justice Kekewich* | CHARLES CARRINGTON HENSLEY, SIDNEY E. WILLIAMS, and JOSEPH E. MORRIS, Barristers-at-Law. |
| | *Mr. Justice Byrne* | J. ARTHUR PRICE, R. LEIGH RAMSBOTHAM, and RALEGH B. PHILLPOTTS, Barristers-at-Law. |
| | *Mr. Justice Cozens-Hardy* | RICHARD SILLEM, JOHN HUMPHREYS DAVIES, NEVILLE TEBBUTT, and JOHN FELIX WALEY, Barristers-at-Law. |
| | *Mr. Justice Farwell and Mr. Justice Wright* | CHARLES WALTER MEAD and JOHN FREDERICK ISELIN, Barristers-at-Law. |
| | *Mr. Justice Buckley* | NEVILLE TEBBUTT and JOHN FELIX WALEY, Barristers-at-Law. |
| QUEEN'S BENCH DIVISION | | Sir SHERSTON BAKER, Bart., and THOMAS REGINALD COLQUHOUN DILL, Barristers-at-Law.<br>WILLIAM ERSKINE REID and CECIL G. WILBRAHAM, Barristers-at-Law.<br>FRANCIS OCTAVIUS ROBINSON and EDWARD G. STILLWELL, Barristers-at-Law. |
| " (CASES IN BANKRUPTCY) | | PAUL M. FRANCKE, Barrister-at-Law. |
| PROB., DIV., and ADM. DIVISION | | (Prob. & Div.)...JOHN GERARD LAING, Barrister-at-Law.<br>(Adm.) .....CHARLES FUHR. JEMMETT, Barrister-at-Law. |
| CROWN CASES RESERVED | | THOMAS REGINALD COLQUHOUN DILL, Barrister-at-Law. |

# A TABLE

OF

# THE NAMES OF CASES

## REPORTED AND DIGESTED IN THIS VOLUME,

WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

## VOL. XLVIII

NOTE.—In the following Table the cases are arranged in the Alphabetical order of the PLAINTIFFS' names; but for convenience of reference, with respect to cases having double titles—*e.g.*, *In re Smith*, *Brown* v. *Jones*—this Table gives the names of such cases under both titles.

| Name of Case | Court. | Page in W. R. 1899-00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| A. B. & Co., *In re* | C.A. | 424 | 15 | [1900] 1 Q. B. 541; 69 L. J. Q. B. 375; 82 L. T. 169 |
| ———. *Ex parte* Richardson | C.A. | 485 | 16 | [1900] 2 Q. B. 429; 69 L. J. Q. B. 568; 82 L. T. 544 |
| Abbott Fund Trusts, *In re*. Smith v Abbott | CH.D. STI. J. | 541 | 193 | [1900] 2 Ch. 326; 69 L. J. Ch. 539 |
| Abergarw Brewery (John Brothers) v Holmes | CH.D. KEK. J. | 236 | 127 | [1900] 1 Ch. 188; 69 L. J. Ch. 149; 81 L. T. 771 |
| African Gold Concessions Co., *In re*. Markham and Darter's case | C.A. | — | 38 | [1899] 2 Ch. 480; 68 L. J. Ch. 724; 81 L. T. 145 |
| Agnese, In the Goods of | P.D. & A.D. | — | 155 | [1900] P. 60; 69 L. J. P. 27; 82 L. T. 204 |
| Ainsworth v Wilding | CH.D. STI. J. | 539 | 149 | [1900] 2 Ch. 315 |
| Alexander v Automatic Telephone Co. | C.A. | 546 | 41 | [1900] 2 Ch. 56; L. J. Ch. 428; 82 L. T. 400 |
| Allen v Gold Reefs of West Africa | C.A. | 452 | 37 | [1900] 1 Ch. 656; 69 L. J. Ch. 266; 82 L. T. 210 |
| Anctil v Manufacturers' Life Insurance Co. | P.C. | — | 26 | [1899] A. C. 604; 68 L. J. P. C. 123; 81 L. T. 279 |
| Anderson v Beard | Q.B.D. | — | 185 | [1900] 2 Q. B. 260; 69 L. J. Q. B. 610; 82 L. T. 714 |
| ——— v Vicary | C.A. | 593 | 87 | [1900] 2 Q. B. 287; 69 L. J. Q. B. 713 |
| Anglo-Argentine Live Stock Agency v Temperley Steamship Co. | Q.B.D. | 64 | 179 | [1899] 2 Q. B. 403; 68 L. J. Q. B. 900; 81 L. T. 296 |
| Annaly v Agar-Ellis. Clifden (Lord), *In re* | CHD BYRNE, J | 428 | 129 | [1900] 1 Ch. 774; 69 L. J. Ch. 478; 82 L. T. 558 |
| Apted, In the Goods of | P. D. & A.D. | — | 158 | [1899] P. 472; 68 L. J. P. 123; 81 L. T. 459 |
| "Argo," The | C.A. | — | 178 | 82 L. T. 602 |
| Armitage v Moore | Q.B.D. | — | 71 | [1900] 2 Q. B. 363; 69 L. J. Q. B. 614; 82 L. T. 618 |
| Armstrong v London County Council | Q.B.D. | 367 | 123 | [1900] 1 Q. B. 416; 69 L. J. Q. B. 267; 81 L. T. 638 |
| Ashby v Wilson | CH.D. KEK J. | 105 | 87 | [1900] 1 Ch. 66; 69 L. J. Ch. 47; 81 L. T. 480 |
| Ashton v Ross. *In re* Ross | CH.D. NOR. J. | 264 | 2 | [1900] 1 Ch. 162; 69 L. J. Ch. 192; 81 L. T. 578 |
| Ashton's Trade-Mark, *In re* | CH.D. STI. J. | 389 | 188 | |
| Ashwin v Bullock | Q.B.D. | — | 9 | 81 L. T. 48 |
| Assets Development Co. v Close | CH.D. BUCK. J. | 699 | 147 | |
| Atholl (Duke) v Glover Incorporation of Perth. Wedderburn v Atholl | H.L. (SC.) | — | 64 | [1900] A. C. 403 |
| Atkins, *In re*. Newman v Sinclair | CH.D. NOR. J | — | 193 | 81 L. T. 421 |
| Atkinson v Lord. *In re* Taylor | CH.D. STI. J. | — | 192 | 81 L. T. 812 |
| Attorney-General v Brighton Supply Association | C.A. | 314 | 67 | [1900] 1 Ch. 276; 69 L. J. Ch. 204; 81 L. T. 762 |
| ——— v Clarkson | C.A. | 216 | 70 | [1900] 1 Q. B. 156; 69 L. J. Q. B. 81; 81 L. T. 617 |
| ——— v Day | CH.D. NOR. J | — | 28 | [1900] 1 Ch. 31; 69 L. J. Ch. 8; 81 L. T. 806 |
| ——— v De Preville | C.A. | 193 | 70 | [1900] 1 Q. B. 223; 69 L. J. Q. B. 283; 81 L. T. 690 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Attorney-General v Dobree | Q.B.D. | 413 | 69 | [1900] 1 Q. B 442; 69 L. J. Q. B 223; 81 L. T. 607 |
| ——— v Hanwell District Council | CH.D. KEK.J. | 69 | 102 | [1900] 1 Ch. 51; 69 L. J. Ch. 39 |
| ——— | C.A. | 690 | 102 | 82 L. T. 778 |
| ——— v Hughes | CH.D. HDY. J | 150 | 29 | 81 L. T. 679 |
| ——— v Jewish Colonization Association | Q.B.D. | — | 71 | 69 L. J. Q. B. 692; 82 L. T. 679 |
| ——— v London County Council | C.A. | 294 | 73 | [1900] 1 Q. B. 192; 69 L. J. Q. B. 241; 81 L. T. 698 |
| ——— (No. 2) | CH.D. HDY. J | — | 191 | 82 L. T. 671 |
| ——— v London and North-Western Railway Co. | C.A. | — | 159 | [1900] 1 Q. B. 78; 69 L. J. Q. B. 26; 81 L. T. 649 |
| ——— v Margate Pier and Harbour Commissioners | CH.D. KEK. J. | 518 | 30 | [1900] 1 Ch. 749; 69 L. J. Ch. 331; 82 L. T. 448 |
| ——— v Merthyr Tydfil Union | C.A. | 403 | 141 | [1900] 1 Ch. 516; 69 L. J. Ch. 299; 82 L. T. 662 |
| ——— Midland Railway Co. | Q.B.D. | — | 79 | [1900] 2 Q. B. 353; 69 L. J. Q. B. 669; 82 L. T. 716 |
| ——— v Newcastle-upon-Tyne (Mayor) | C.A. | 38 | 148 | [1899] 2 Q. B. 478; 68 L. J. Q. B. 1012; 81 L. T. 311 |
| ——— v Smith-Marriott | C.B D. | 12 | 69 | [1899] 2 Q. B. 595; 69 L. J. Q. B. 59; 81 L. T. 359 |
| ——— v Tyne Improvement Commissioners | Q.B.D. | — | 61 | 81 L. T. 174 |
| Bagshaw v Pimm | C A. | 422 | 147 | [1900] P. 148; 69 L. J. P. 45; 82 L. T. 175 |
| Bailey v Isle of Thanet Light Railways Co. | Q B.D. | 589 | 159 | [1900] 1 Q. B. 722; 69 L. J. Q. B. 442; 82 L. T. 713 |
| Baldwyn v Smith | CHD. BYRNE, J | 346 | 107 | [1900] 1 Ch. 588; 69 L. J. Ch. 336; 82 L. T. 616 |
| Bamfield v Rogers. *In re* Glubb | C.A. | — | 202 | [1900] 1 Ch. 354; 69 L. J. Ch. 278; 82 L. T. 412 |
| Bank of New Zealand v Simpson | P.C. | 591 | 48 | [1900] A. C. 182; 69 L. J. P. C. 22; 82 L. T. 102 |
| Bank of Syria, *In re*. Owen and Ashworth's Claim | CH.D. WRI. J | — | 35 | [1900] 2 Ch. 272; 69 L. J. Ch. 412 |
| Bankruptcy Petition, A, *In re* | C.A. | — | 17 | 69 L. J. Q. B. 222; 81 L. T. 798 |
| Banks v Wooler | Q.B.D. | — | 7 | 81 L. T. 785 |
| Barber v Mexican Land Co. | CH.D. STI. J. | 235 | 150 | |
| Barnacle v Clark | Q.B.D. | 336 | 162 | [1900] 1 Q. B. 279; 69 L. J. Q. B. 15; 81 L. T. 484 |
| Barnard v De Charleroy | P.C. | — | 196 | 81 L. T. 497 |
| Barnet v Eccles Corporation | C.A. | — | 101 | [1900] 2 Q. B. 423; 69 L. J. Q. B. 556 |
| Baron v Portslade District Council | Q.B.D. | 191 | 104 | |
| ——— | C A. | 641 | 104 | |
| Barretto v Young | CHD. BYRNE, J | — | 143 | [1900] 2 Ch. 339; 69 L. J. Ch. 605 |
| Barron v Willis | CH.D. HDY. J. | 26 | 183 | [1899] 2 Ch. 578; 81 L. T. 321 |
| ——— | C.A. | 579 | 183 | [1900] 2 Ch. 121; 69 L. J. Ch. 532; 82 L. T. 729 |
| Barsht v Tagg | CH.D. HDY. J. | 220 | 195 | [1900] 1 Ch. 231; 69 L. J. Ch. 91; 81 L. T. 777 |
| Barton, *Ex parte*. *In re* Phillips | BKCY. | — | 14 | [1900] 2 Q B. 329; 69 L. J. Q. B. 604; 82 L. T. 691 |
| Baschet v London Illustrated Standard Co. | CH.D KEK.J | 56 | 51 | [1900] 1 Ch. 73; 69 L. J. Ch. 35; 81 L. T. 509 |
| Bateman (Lady) v Faber | CH.D. KEK. J. | 165 | 166 | 81 L. T. 675 |
| ——— | C.A. | 625 | 166 | |
| Batt v Mattinson | Q.B.D. | — | 8 | 82 L. T. 800 |
| Bat'ams, *Ex parte*. *In re* Wenham | C.A | 627 | 17 | |
| Baumgarten, *In re*. Bevan v Rosenbaum | CH.D. FAR. J. | — | 4 | 82 L. T. 711 |
| Bavins v London and South-Western Bank | C.A. | 210 | 13 | [1900] 1 Q. B. 270; 69 L. J. Q. B. 164; 81 L. T. 655 |
| Beard v London General Omnibus Co. | C.A. | 658 | 118 | |
| Beardsley v Walton | Q.B D. | — | 7 | [1900] 2 Q. B. 1; 69 L. J. Q. B. 344; 82 L. T. 119 |
| Beaumont v Bowers | Q.B.D. | 557 | 73 | [1900] 2 Q. B. 204; 69 L. J. Q. B. 600 |
| Bebro, *In re*. *Ex parte* Gibbons | C.A. | 561 | 16 | [1900] 2 Q. B. 316; 69 L. J. Q. B. 618; 82 L. T. 778 |
| Beckhusen v Hamblet | Q.B.D. | — | 185 | [1900] 2 Q. B. 18; 69 L. J. Q. B. 431; 82 L. T. 459 |
| Beddington, *In re*. Michol's v Samuel | CHD BYRNE, J | 552 | 205 | [1900] 1 Ch. 771; 69 L. J. Ch. 374; 82 L. T. 557 |
| Bennett v Harding | Q B.D. | 647 | 121 | [1900] 2 Q. B. 397; 69 L. J. Q. B. 701 |
| ——— v Tyler | Q.B.D. | — | 6 | 81 L. T. 787 |
| Bennicourt v Le Gendre | P.C. | — | 144 | [1900] A. C. 173; 69 L. J. P. C. 21 |
| Bernicia Steamship Co., *In re* | CH.D HDY, J | — | 33 | 69 L. J. Ch. 194; 81 L. T. 816 |
| Berry, *Ex parte*. *In re* Flack | BKCY. | 446 | 204 | [1900] 2 Q. B. 32; 69 L. J. Q. B. 458; 82 L. T. 503 |
| Berwick (Lord) v Lane | C.A. | — | 145 | 81 L. T. 797 |
| Bethell v Trench Tubeless Tyre Co. *In re* Trench Tubeless Tyre Co. | CH.D. KEK.J. | 200 | 43 | |
| ——— | C.A. | 310 | 43 | [1900] 1 Ch. 408; 69 L. J. Ch. 213; 82 L. T. 247 |
| Bevan v Rosenbaum. *In re* Baumgarten | CH.D. FAR. J. | — | 4 | 82 L. T. 711 |
| Bew v Bew | C.A. | 124 | 144 | [1899] 2 Ch. 467; 81 L. T. 284 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Bird v Philpott | CH.D. FAR.J. | — | 18 | [1900] 1 Ch. 822; 69 L. J. Ch. 487; 82 L. T. 110 |
| Birks, *In re.* Kenyon v Birks | C.A. | — | 209 | [1900] 1 Ch. 417; 69 L. J. Ch. 124; 81 L. T. 741 |
| Bishop & Sons, *In re* | CH.D. FAR.J. | — | 43 | [1900] 2 Ch. 254; 69 L. J. Ch. 513; 82 L. T. 756 |
| Bishop v Wandsworth Board of Works | Q.B.D. | — | 124 | 67 L. J. Q. B. 682; 82 L. T. 766 |
| Blackburn, *In re.* Buckley's case | CH.D. WRI. J. | 186 | 43 | [1899] 2 Ch. 725; 81 L. T. 520 |
| Blackburne v Hope-Edwardes | CH.D.BUCK.J | 701 | 167 | |
| "Blackcock," The. The "Morgengry" | C.A. | 121 | 179 | [1900] P. 1; 69 L. J. P. 3; 81 L. T. 417 |
| Bland, *In re.* Miller v Bland | CH.D. STI. J. | — | 210 | [1899] 2 Ch. 336 |
| Bond, *In re.* Panes v Attorney-General | CH.D. KEK. J. | — | 166 | 82 L. T. 612 |
| Booker & Co. v Pocklington Steamship Co. | Q.B.D. | — | 176 | [1899] 2 Q. B. 690; 69 L. J. Q. B. 10; 81 L. T. 524 |
| Boosey v Whight | C.A. | 228 | 52 | [1900] 1 Ch. 122; 69 L. J. Ch. 66; 81 L. T. 571 |
| Booth, *In re.* Pickard v Booth | CHD. BYRNE, J | 566 | 205 | [1900] 1 Ch. 768; 69 L. J. Ch. 474 |
| Boots' Cash Chemists v Grundy | Q.B.D. | 638 | 190 | 82 L. T. 769 |
| Born v Turner | CHD. BYRNE, J | 697 | 130 | [1900] 2 Ch. 211; 69 L. J. Ch. 593 |
| Bostock v Ramsey District Council | Q.B.D. | 254 | 146 | [1900] 1 Q. B. 357; 69 L. J. Q. B 103; 81 L. T. 756 |
| Bowes, *In re.* Strathmore v Vane | CH.D HDY. J. | 604 | 183 | [1900] 2 Ch. 251; 69 L. J. Ch. 544; 82 L. T. 673 |
| Bowman v Bowman | H.L. (SC.) | — | 163 | [1899] A. C. 518 |
| Bowstead, *Ex parte.* Reg. v Horrocks | Q.B.D. | — | 85 | 69 L. J. Q. B. 688; 82 L. T. 767 |
| Brenchley v Higgins | CH.D. FAR. J. | — | 200 | 82 L. T. 143 |
| Brenda Steamship Co. v Green | C.A. | 321 | 173 | [1900] 1 Q. B. 518; 69 L. J. Q. B. 445; 82 L. T. 66 |
| Briggs v Ryan. *In re* Wheeler's Settlement | CH.D. HDY. J. | 10 | 110 | [1899] 2 Ch. 717; 81 L. T. 172 |
| Bright v River Plate Construction Co. | CH.D. HDY. J. | — | 12 | 82 L. T. 793 |
| Bristol Tramways Co. v National Telephone Co. | CH.D. NOR. J. | — | 186 | [1899] 2 Ch. 282; 80 L. T. 836 |
| British Marine Insurance Co. v Jenkins | Q.B.D. | — | 82 | [1900] 1 Q. B. 299; 69 L. J. Q. B. 177; 82 L. T. 297 |
| British Motor Syndicate v Taylor | CH.D. STI. J. | 345 | 136 | [1900] 1 Ch. 577; 69 L. J. Ch. 377; 82 L. T. 106 |
| Brown, *In re* | CH.D. HDY. J. | 461 | 107 | [1900] 1 Ch. 489; 69 L. J. Ch. 234; 82 L. T. 83 |
| ——— v Peto | Q.B.D. | — | 129 | [1900] 1 Q. B. 299; 69 L. J. Q. B. 141; 82 L. T. 264 |
| "Brunel," The | C.A. | 243 | 5 | [1900] P. 24; 69 L. J. P. 8; 81 L. T. 500 |
| Bryant v Hancock | H.L. | — | 88 | [1899] A. C. 442; 81 L. T. 96 |
| Buckland v Buckland | CH.D.BUCK.J. | 637 | 109 | 82 L. T. 759 |
| Buckley's case. *In re* Blackburn | CH.D. WRI. J. | 186 | 43 | [1899] 2 Ch. 725; 81 L. T. 520 |
| Bullock, *In re.* *Ex parte* Ward | Q.B.D. | 46 | 24 | [1899] 2 Q. B. 517; 81 L. T. 268 |
| Burchell v Wilde | C.A. | 491 | 134 | [1900] 1 Ch. 551; 69 L. J. Ch. 314; 82 L. T. 576 |
| Burdett-Coutts v True Blue (Hannan's) Gold Mine | C.A. | 1 | 37 | [1899] 2 Ch. 616; 81 L. T. 29 |
| Burge v Ashley | C.A. | 438 | 66 | [1900] 1 Q. B. 744; 69 L. J. Q. B. 538; 82 L.T. 518 |
| Burger v Indemnity Mutual Marine Assurance Co. | C.A. | 643 | 81 | [1900] 2 Q. B. 348; 82 L. T. 831 |
| Burrows v Barnes | Q.B.D. | — | 136 | 82 L. T. 721 |
| ——— v Rhodes | Q.B.D. | 13 | 64 | [1899] 1 Q. B. 816; 68 L. J. Q. 545; 80 L. T. 591 |
| Burton v St. Giles-in-the-Fields Union | Q.B.D. | 222 | 139 | [1900] 1 Q. B. 389; 69 L. J. Q. B. 184; 82 L. T. 24 |
| Buxton Lime Firms Co. v Howe | Q.B.D. | 472 | 118 | [1900] 2 Q. B. 232; 69 L. J. Q. B. 498; 82 L. T. 422 |
| Calne Union v St. Mary, Islington | Q.B.D. | — | 142 | 69 L. J. Q. B. 400; 82 L. T. 121 |
| Cambridge Union v Edmonton Union | Q.B.D. | 559 | 142 | [1900] 2 Q. B. 111; 69 L. J. Q. B. 584; 82 L. T. 495 |
| Campbell v Gillespie | CH.D. HDY. J. | 151 | 148 | [1900] 1 Ch. 225; 69 L. J. Ch. 223; 81 L. T. 514 |
| Campion, In the Goods of | P.D. & A.D. | 288 | 157 | [1900] P. 13; 69 L. J. P. 19; 81 L. T. 790 |
| Canadian Pacific Railway Co. v Parke | P.C. | 118 | 185 | [1899] A. C. 535; 81 L. T. 127 |
| Cannan v Abingdon (Earl) | Q.B.D. | 470 | 22 | [1900] 2 Q. B. 66; 69 L. J. Q. B. 517; 82 L. T. 382 |
| Canning Jarrah Timber Co., *In re* | C.A. | — | 36 | [1900] 1 Ch. 708; 69 L. J. Ch. 416; 83 L. T. 409 |
| Carr v Lynch | CH.D. FAR. J. | 616 | 65 | [1900] 1 Ch. 613; 69 L. J. Ch. 345; 82 L. T. 381 |
| Carter, *In re.* Dodds v Pearson | CH.D. HDY. J. | 555 | 209 | [1900] 1 Ch. 801; 69 L. J. Ch. 426; 82 L. T. 526 |
| Cartwright v Sculcoates Union | H.L. | 394 | 140 | [1900] A. C. 150; 69 L. J. Q. B. 403; 82 L. T. 157 |
| Casey v Rose | Q.B.D. | — | 69 | 82 L. T. 616 |
| Cash v Cash | CH.D. KEK.J | — | 190 | 82 L. T. 555 |
| Cass v Butler | C.A. | 309 | 117 | [1900] 1 Q. B. 777; 69 L. J. Q B. 362; 82 L. T. 182 |
| "Cathay," The (No. 1) | P.D. & A.D. | — | 178 | 81 L. T. 391 |
| ——— (No. 2) | P.D. & A.D. | — | 5 | 69 L. J. P. 89; 82 L. T. 823 |
| "Cawdor," The | C.A. | 293 | 4 | [1900] P. 47; 69 L. J. P. 23; 81 L. T. 705 |
| Central De Kaap Gold Mines, *In re* | CH.D. WRI. J | — | 42 | 69 L. J. Ch. 18 |
| Chant, *In re.* Chant v Lemon | CH.D. HDY. J. | 646 | 205 | [1900] 2 Ch. 345; 69 L. J. Ch. 601 |

| Name of Case. | Court. | Page in W. R. 1899-00 | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Charman v Brandon | CH.D. KEK. J. | — | 148 | 82 L. T. 369 |
| Charnock v Merchant | Q.B.D. | 334 | 53 | [1900] 1 Q. B. 474; 69 L. J. Q. B. 221; 82 L. T. 89 |
| Christie, *In re. Ex parte* Christie | BKCY. | 94 | 20 | [1900] 1 Q. B. 5; 69 L. J. Q. B. 31; 81 L. T. 528 |
| ——— v Cooper | Q.B.D. | — | 187 | 69 L. J. Q. B. 708 |
| City of London Electric Lighting Co. v London (Mayor) | CH.D. FAR. J. | — | 48 | 82 L. T. 530 |
| Clarkson v Dixon. *In re* Robinson | CH.D BUCK.J | 698 | 193 | |
| Clement et Cie's Trade-Mark, *In re* | C.A. | 67 | 189 | [1900] 1 Ch. 114; 60 L. J. Ch. 52; 81 L. T. 400 |
| Clemow, *In re.* Yeo v Clemow | CH.D. KEK. J. | 541 | 3 | [1900] 2 Ch. 182; 69 L. J. Ch. 522; 82 L. T. 550 |
| Clifden (Lord), *In re.* Annaly v Agar-Ellis | CHD.BYRNE,J | 428 | 129 | [1900] 1 Ch. 774; 69 L. J. Ch. 478; 82 L. T. 558 |
| Coates v Reg. | P.C. | — | 132 | [1900] A. C. 217; 69 L. J. P. C. 26; 82 L. T. 162 |
| Cobb v Cobb | P.D. & A.D. | — | 57 | [1900] P. 145; 69 L. J. P. 52; 82 L. T. 626 |
| Coburg Hotel v London County Council | Q B.D. | — | 120 | 81 L. T. 450 |
| Cocker v McMullen | Q.B.D. | — | 97 | 81 L. T. 784 |
| Cohen v Tennar | C.A. | 642 | 92 | |
| Collyer-Bristow, *In re. Ex parte* Fletcher | CH.D. NOR. J. | — | 182 | 81 L. T. 110 |
| Consolidated Exploration and Finance Co., *In re* | CH.D WRI. J. | — | 41 | [1899] 2 Ch. 599; 81 L. T. 522 |
| Consolidated Exploration Co. v Mungrove | CH.D. NOR.J. | 298 | 48 | [1900] 1 Ch. 37; 69 L. J. Ch. 11; 81 L. T. 747 |
| Cook v Sprigg | P.C. | — | 27 | [1899] A. C. 572; 81 L. T. 281 |
| Coolgardie Gold Fields, *In re. Ex parte* Fleming | CH.D. HDY. J. | 461 | 184 | [1900] 1 Ch. 475; 69 L. J. Ch. 215; 82 L. T. 23 |
| Cooper-King v Cooper-King | P.D. & A.D. | — | 58 | [1900] P. 65; 69 L. J. P. 33 |
| Coote v Cadogan. *In re* Eyre-Coote | CH.D. NOR. J. | — | 164 | 81 L. T. 535 |
| Copland's Settlement, *In re.* Johns v Carden | CHD.BYRNE,J | — | 102 | [1900] 1 Ch. 326; 69 L. J. Ch. 240; 82 L. T. 194 |
| Cornfoot v Carlton Bank | C.A. | — | 108 | [1900] 1 Q. B. 22; 81 L. T. 415 |
| Cornwall v Henson | CH.D. HDY.J. | 42 | 201 | [1899] 2 Ch. 710; 81 L. T. 113 |
| ——— | C.A. | — | 201 | [1900] 2 Ch. 298; 69 L. J. Ch. 581; 82 L. T. 735 |
| Cory's case. *In re* National Bank of Wales | C.A. | 99 | 31 | [1899] 2 Ch. 629; 81 L. T. 363 |
| Cossey v Cossey | P.D. & A.D. | — | 158 | 69 L. J. P. 17; 82 L. T. 203 |
| Costa Rica Railway Co. v Forwood | CHD.BYRNE,J | 553 | 30 | [1900] 1 Ch. 756; 69 L. J. Ch. 408 |
| Cowley v Cowley | P.D. & A.D. | 463 | 136 | [1900] P. 118; 69 L. J. P. 59; 82 L. T. 466 |
| Craig v Nicholas | Q B.D. | — | 187 | 69 L. J. Q. B. 608; 82 L. T. 765 |
| "Crimdon," The | P.D. & A.D. | 623 | 5 | [1900] P. 171; 69 L. J. P. 103; 82 L. T. 660 |
| Cross v West Derby Union | Q.B.D. | — | 139 | 81 L. T. 645 |
| Crossfield v Tanian | C.A. | 609 | 117 | 82 L. T. 813 |
| Cruddas, *In re.* Cruddas v Smith | C.A. | — | 142 | [1900] 1 Ch. 730; 69 L. J. Ch. 355; 82 L. T. 514 |
| Crumpe v Crumpe | H.L. | — | 208 | [1900] A. C. 127; 69 L. J. P. C. 7; 82 L. T. 130 |
| Crystal Palace Gas Co. v Idris | Q.B.D. | — | 66 | 82 L. T. 200 |
| D—— v A. & Co. | CH.D. HDY. J. | 429 | 154 | [1900] 1 Ch. 484; 69 L. J. Ch. 382; 82 L. T. 47 |
| Daglish v Barton | C.A. | 50 | 144 | [1900] 1 Q. B. 284; 81 L. T. 551 |
| Daintrey, *In re. Ex parte* Mant | C.A. | — | 20 | [1900] 1 Q. B. 546; 69 L. J. Q. B. 207; 82 L. T. 239 |
| Dalgleish v Lowther | C.A. | 37 | 149 | [1899] 2 Q. B. 590 |
| Dalton Overseers v North-Eastern Railway Co. | H.L. | — | 67 | [1900] A. C. 345; 69 L. J. Q. B. 650; 82 L. T. 693 |
| Daly v Edwardes | CH.D. KEK.J. | 360 | 91 | 82 L. T. 372 |
| Daniel v Ocean Coal Co. | C.A. | 467 | 116 | [1900] 2 Q. B. 250; 69 L. J. Q. B. 567; 82 L. T. 523 |
| Daniell, *Ex parte. In re* Deakin | C.A. | 678 | 181 | 69 L. J. Q. B. 725; 82 L. T. 776 |
| Danson, *In re* | CHD.BYRNE,J | 73 | 193 | |
| Dash, *In re.* Solicitor to Treasury v Lewis | CH.D. STI. J. | 694 | 60 | |
| Daventry District Council v Parker | C.A. | 68 | 101 | [1900] 1 Q. B. 1; 69 L. J. Q. B. 105; 81 L. T. 403 |
| Davies v Jenkins | Q.B.D. | 286 | 22 | [1900] 1 Q. B. 133; 69 L. J. Q. B. 187; 81 L. T. 788 |
| Davies v Taggart. *In re* Weeton | CH.D. STI. J | 467 | 20 | [1900] 2 Ch. 164; 69 L. J. Ch. 555; 82 L. T. 591 |
| Davis v Harris | Q.B.D. | 445 | 86 | [1900] 1 Q. B. 729; 69 L. J. Q. B. 232; 81 L. T. 780 |
| ——— v Woodfield | Q.B.D. | — | 138 | 81 L. T. 782 |
| Davy v Waller | CH.D. NOR.J. | — | 154 | 81 L. T. 107 |
| Dawney, *In re* | CH.D. KEK. J. | 600 | 40 | |
| Dawson v Higgins. *In re* Grainger | C.A. | 673 | 207 | |
| Day v Kelland | CH.D. HDY. J. | — | 127 | 82 L. T. 142 |
| ——— v Riley | CH.D BUCK.J. | 556 | 188 | |
| ——— v Singleton | C.A. | 18 | 199 | [1899] 2 Ch. 320; 81 L. T. 306 |
| Day and Night Advertising Co., *In re.* Upward v Day and Night, &c., Co. | CH.D. HDY. J | 362 | 153 | |
| Deakin, *In re. Ex parte* Daniell | C.A. | 678 | 181 | 69 L. J. Q. B. 725; 82 L. T. 776 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| De Braam v Ford | C.A. | — | 24 | [1900] 1 Ch. 203; 69 L. J. Ch. 82; 81 L. T. 568 |
| "Debtor," The, *Ex parte. In re* Roberts | C.A. | 132 | 19 | [1900] 1 Q. B. 122; 69 L. J. Q. B. 19; 81 L. T. 467 |
| De Nicols v Curlier | H.L. | 269 | 59 | [1900] A. C. 21; 69 L. J. Ch. 109; 81 L. T. 733 |
| De Nicols, *In re.* De Nicols v Curlier | CH.D. KEK.J. | 602 | 59 | 82 L. T. 840 |
| Devonshire v Brookshaw | CH.D KEK.J | — | 197 | 81 L. T. 83 |
| De Wilton, *In re.* De Wilton v Montefiore | CH.D. STI. J. | 645 | 109 | |
| Dicks v Dicks | P.D. & A.D. | 302 | 59 | [1899] P. 275; 81 L. T. 462 |
| Didisheim v London and Westminster Bank | C.A. | 501 | 107 | [1900] 2 Ch. 15; 69 L. J. Ch. 443; 82 L. T. 738 |
| Dillon v Bath (Marquis) | Q.B.D. | — | 75 | 81 L. T 186 |
| Dixon, *In re.* Heynes v Dixon | CHD.BYRNE.J. | 71 | 24 | [1899] 2 Ch. 561 |
| ——— | C.A. | 665 | 24 | 69 L. J. Ch. 609 |
| ——— v Kennaway | CH.D. FAR. J. | — | 40 | [1900] 1 Ch. 833; 69 L. J. Ch. 501; 82 L. T. 527 |
| ——— v Winch | C.A. | 612 | 131 | [1900] 1 Ch. 736; 69 L. J. Ch. 465; 82 L. T. 437 |
| Dobell v Dutton. *In re* Goulding's Settlement | CH.D. HDY. J. | 183 | 210 | |
| ——— v Green | C.A. | — | 173 | [1900] 1 Q. B. 526; 69 L. J. Q. B. 454; 82 L. T. 314 |
| Dodds v Pearson. *In re* Carter | CH.D. HDY. J. | 555 | 209 | [1900] 1 Ch. 801; 69 L. J. Ch. 426; 82 L. T. 526 |
| "Dora Forster," The | P.D. & A.D. | — | 83 | 69 L. J. P. 85 |
| Dormer (otherwise Ward) v Ward | P.D. & A.D. | 524 | 56 | [1900] P. 130; 69 L. J. P. 65; 82 L. T. 469 |
| Dowson v Macfarlane | C.A. | — | 66 | 81 L. T. 67 |
| Driefontein Consolidated Mines v Janson. West Rand Gold Mines v De Rougemont | Q.B.D. | 619 | 80 | [1900] 2 Q. B. 339; 69 L. J. Q. B. 771 |
| Druce, In the Goods of | P.D. & A.D. | — | 155 | 81 L. T. 458 |
| Duckham v Gibbs | Q.B.D. | 239 | 179 | [1900] 1 Q. B. 394; 69 L. J. Q. B. 127 |
| Durant v Roberts | C.A. | 476 | 154 | [1900] 1 Q. B. 629; 69 L. J. Q. B. 382; 81 L. T. 217 |
| Earle v Kingscote | CHD.BYRNE,J | — | 110 | [1900] 1 Ch. 203; 69 L. J. Ch. 202; 81 L. T. 775 |
| Eastwood v Honley Council | CHD BYRNE,J | 614 | 104 | [1900] 1 Ch. 781; 69 L. J. Ch. 470 |
| Ebbetts v Conquest | Q.B.D. | — | 88 | 82 L. T. 560 |
| Ecclesiastical Commissioners v Pinney | CHD BYRNE,J | — | 198 | [1899] 2 Ch. 729; 69 L. J. Ch. 139; 81 L. T. 536 |
| Eddy v Eddy | P.C. | — | 27 | [1900] A. C. 299; 69 L. J. P. C. 58 |
| Edgar v Plomley | P.C. | — | 3 | [1900] A. C. 431; 82 L. T. 573 |
| Elliott v Yates | C.A. | 610 | 74 | [1900] 2 Q. B. 370; 82 L. T. 812 |
| Ellis v Bromley District Council | Q.B.D. | — | 103 | 81 L. T. 224 |
| ——— v Camberwell Committee | C.A. | 162 | 121 | [1900] 1 Q. B. 68; 69 L. J. Q B. 202; 81 L. T. 661 |
| ——— v Rowbotham | C.A. | 423 | 93 | [1900] 1 Q. B. 740; 69 L. J. Q. B. 379; 82 L. T. 191 |
| Ely, *In re. Ex parte* The "Trustee" | C.A. | 693 | 15 | |
| Equitable Life Assurance Society of United States v Bishop | C.A. | 341 | 74 | [1900] 1 Q. B. 177; 69 L. J. Q. B. 252; 81 L. T. 693 |
| Espuela Land and Cattle Co., *In re* | CHD.BYRNE,J | 684 | 32 | |
| Evans v Conway Justices | C.A. | 577 | 96 | [1900] 2 Q. B. 224; 69 L. J. Q. B. 636; 82 L. T. 704 |
| ——— v Griffiths. *In re* Thomas | CH.D. STI. J. | 299 | 182 | [1900] 1 Ch. 454; 69 L. J. Ch. 219; 82 L. T. 105 |
| ——— v Woods. *Ex parte* Woods | P.C. | — | 62 | [1900] A. C. 338 |
| Eversley (Lord), *In re.* Mildmay v Mildmay | CHD BYRNE,J | 249 | 210 | [1900] 1 Ch. 96; 69 L. J. Ch. 14; 81 L. T. 600 |
| Ewart v Fryer | CH.D. KEK.J. | 443 | 91 | 82 L. T. 415 |
| Eynon, *Ex parte. In re* Wiltshire | BKCY. | 256 | 23 | [1900] 1 Q. B. 96; 69 L. J. Q. B. 145; 61 L. T. 616 |
| Falck v Williams | P.C. | — | 51 | [1900] A. C. 176; 69 L. J. P. C. 17 |
| Falkingham v Victorian Railways Commissioner | P.C. | — | 10 | [1900] A. C. 452; 82 L. T. 506 |
| Farina v Fickers. *In re* Fickers | CH.D. HDY. J. | 250 | 47 | [1900] 1 Ch. 331; 69 L. J. Ch. 161; 81 L. T. 749 |
| Farlow v Stevenson | C.A. | 213 | 89 | [1900] 1 Ch. 128; 69 L. J. Ch. 106; 81 L. T. 589 |
| Farmer v Goy & Co. *In re* Goy & Co. | CH.D. STI. J. | 425 | 30 | [1900] 2 Ch. 149; 69 L. J. Ch. 481 |
| ——— v Wilson | Q.B.D. | — | 46 | 69 L. J. Q. B. 496; 82 L. T. 566 |
| Farnham Flint, &c., Co. v Farnham Union | Q B.D. | 376 | 138 | 82 L. T. 123 |
| Farrelly v Corrigan | P.C. | — | 157 | [1899] A. C. 563 |
| Felton v Bower | Q.B.D. | 349 | 146 | [1900] 1 Q. B. 598; 69 L. J. Q. B. 351; 82 L. T. 419 |
| Fenn v Miller | C.A. | 339 | 113 | [1900] 1 Q. B. 788; 69 L. J. Q. B. 439; 82 L. T. 284 |
| Fenner v Blake | Q.B.D. | 393 | 93 | [1900] 1 Q. B. 426; 69 L. J. Q. B. 257; 82 L. T. 149 |
| Fernley v Limehouse Board of Works | CH.D. KEK.J. | — | 124 | 82 L. T. 524 |
| Fickers, *In re.* Farina v Fickers | CH.D. HDY. J. | 250 | 47 | [1900] 1 Ch. 331; 69 L. J. Ch. 161; 81 L. T. 749 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Field v Wagel Syndicate. *In re* Field's Trade-Mark | CH.D.BUCK J. | 390 | 188 | [1900] 1 Ch. 651; 69 L. J. Ch. 365; 82 L. T. 231 |
| Fielding v Morley Corporation | H.L. | 545 | 146 | [1900] A. C. 133; 69 L. J. Ch. 314; 82 L. T. 29 |
| Flack, *In re. Ex parte* Berry | BKCY. | 446 | 204 | [1900] 2 Q. B. 32; 69 L. J. Q. B. 458; 82 L. T. 503 |
| Flatau v Cullen | C.A. | 36 | 148 | 81 L. T. 402 |
| Fleming, *Ex parte. In re* Coolgardie Gold Fields | CH.D. HDY. J. | 461 | 184 | [1900] 1 Ch. 475; 69 L. J. Ch. 215; 82 L. T. 23 |
| Fletcher, *Ex parte. In re* Collyer Bristow | CH.D. NOR. J. | — | 182 | 81 L. T. 110 |
| Flinn, *Ex parte* | Q.B.D. | 29 | 94 | [1899] 2 Q. B. 607; 81 L. T. 221 |
| Foakes v Jackson | CH.D. FAR. J. | 616 | 143 | [1900] 1 Ch. 807; 69 L. J. Ch. 352 |
| Ford, *In re. Ex parte* Official Receiver | BKCY. | 173 | 14 | [1900] 1 Q. B. 264; 69 L. J. Q. B. 74; 81 L. T. 648 |
| Ford, *In re. Ex parte* The Trustee | BKCY. | 688 | 16 | [1900] 2 Q. B. 211; 69 L. J. Q. B. 690; 82 L. T. 625 |
| Forest Steamship Co. v Iberian Iron Ore Co. | H.L. | — | 176 | 81 L. T. 563 |
| Forget v Baxter | P.C. | — | 26 | [1900] A. C. 467; 82 L. T. 510 |
| Forman v "Liddesdale," The | P.C. | — | 50 | [1900] A. C. 190; 69 L. J. P. C. 44; 82 L. T. 331 |
| Foster v Globe Venture Syndicate | CH.D. FAR. J. | — | 150 | [1900] 1 Ch. 811; 69 L. J. Ch. 375; 82 L. T. 253 |
| Fox v Star Newspaper | H.L. | 321 | 151 | [1900] A. C. 19; 69 L. J. Q. B. 117; 81 L. T. 562 |
| Foxwell v Van Grutten | H.L. | 653 | 207 | 82 L. T. 272 |
| Fracis v Carr | C.A. | — | 45 | 82 L. T. 698 |
| Francis v Turner | C.A. | 228 | 114 | [1900] 1 Q. B. 478; 69 L. J. Q. B. 182; 81 L. T. 770 |
| Frankenberg v Great Horseless Carriage Co. | C.A. | — | 152 | [1900] 1 Q. B. 504; 69 L. J. Q. B. 147; 81 L. T. 684 |
| Freeman v Laing | CHD.BYRNE,J. | 9 | 128 | [1899] 2 Ch. 355; 81 L. T. 167 |
| Frid v Fenton | C.A. | — | 110 | 69 L. J. Q. B. 436; 82 L. T. 193 |
| Frost & Co., *In re* | C.A. | 39 | 39 | [1899] 2 Ch. 207; 68 L. J. Ch. 544; 80 L. T. 849 |
| Frost v Fulham Vestry | Q.B.D. | — | 120 | 82 L. T. 720 |
| Fuller v McMahon. *In re* McMahon | CH.D. STI. J. | — | 18 | [1900] 1 Ch. 173; 69 L. J. Ch. 142; 81 L. T. 715 |
| Furber v Taylor | C.A. | 689 | 147 | |
| "Gannet," The | H.L. | — | 177 | [1900] A. C. 234; 69 L. J. P. 49; 82 L. T. 329 |
| Gardner v Hodgson's Kingston Breweries Co. | CH.D. HDY. J. | 469 | 60 | [1900] 1 Ch. 592; 69 L. J. Ch. 368; 82 L. T. 455 |
| Garnett v Inland Revenue Commissioners | Q.B.D. | 303 | 78 | 81 L. T. 633 |
| Gartsides v Inland Revenue Commissioners | Q.B.D. | — | 78 | 82 L. T. 686 |
| Gathercole v Norfolk. *In re* Jolly | C.A. | 657 | 97 | |
| Gedge v Royal Exchange Assurance Association | Q.B.D. | — | 83 | [1900] 2 Q. B. 214; 69 L. J. Q. B. 506; 82 L. T. 463 |
| "Gemma," The | C.A. | — | 4 | [1899] P. 285; 81 L. T. 379 |
| General Railway Syndicate, *In re.* Whiteley's case | C.A. | 440 | 41 | [1900] 1 Ch. 365; 69 L. J. Ch. 250; 82 L. T. 134 |
| Gentle v Faulkner | C.A. | — | 89 | [1900] 2 Q. B. 267; 69 L. J. Q. B. 777; 82 L. T. 708 |
| George v Grose. *In re* West | CH.D. KEK.J. | 138 | 206 | [1900] 1 Ch. 84; 69 L. J. Ch. 71; 81 L. T. 720 |
| Gibbons, *Ex parte. In re* Bebio | C.A. | 561 | 16 | [1900] 2 Q. B. 316; 69 L. J. Q. B. 618; 82 L. T. 773 |
| Gibbs v Neville | C.A. | 532 | 152 | [1900] 2 Q. B. 181; 69 L. J. Q. B. 514; 82 L. T. 446 |
| Giles v Giles | P.D. & A.D. | 288 | 58 | [1900] P. 17; 69 L. J. P. 26; 81 L. T. 823 |
| Gillingham v Beddow | CH.D. HDY. J. | — | 134 | [1900] 2 Ch. 242; 69 L. J. Ch. 527; 82 L. T. 791 |
| Gladstone, *In re.* Gladstone v Gladstone | C.A. | 531 | 165 | [1900] 2 Ch. 101; 69 L. J. Ch. 455; 82 L. T. 515 |
| Glasgow Corporation v McEwan | H.L. (SC.) | — | 164 | [1900] A. C. 91 |
| Glubb, *In re.* Bamfield v Rogers | C.A. | — | 202 | [1900] 1 Ch. 354; 69 L. J. Ch. 278; 82 L. T. 412 |
| Gluckstein v Barnes | H.L. | — | 34 | [1900] A. C. 240; 69 L. J. Ch. 385; 82 L. T. 393 |
| Godman v Moses | C.A. | 689 | 144 | |
| Goldberg v Liverpool (Mayor) | C.A. | — | 191 | 82 L. T. 362 |
| Goodbody and Balfour's Arbitration, *In re* | C.A. | — | 172 | 82 L. T. 484 |
| Goodfellow v Gray | C.A. | — | 148 | [1899] 2 Q. B. 498; 81 L. T. 314 |
| Gordon v Street | C.A. | 158 | 48 | [1899] 2 Q. B. 641; 69 L. J. Q. B. 45; 81 L. T. 237 |
| Gosford (Earl) v Irish Land Commission | H.L. | — | 144 | 81 L. T. 330 |
| Gosling, *In re.* Gosling v Smith | CHD.BYRNE,J | 300 | 29 | |
| Goulding's Settlement. Dobell v Dutton | CH.D. HDY. J. | 183 | 210 | |
| Goy & Co., *In re.* Farmer v Goy & Co. | CH.D. STI. J. | 425 | 30 | [1900] 2 Ch. 149; 69 L. J. Ch. 481 |
| Grainger, *In re.* Dawson v Higgins | C.A. | 673 | 207 | |
| Graham v Clinton (Lord) | CH.D. STI. J. | — | 134 | 81 L. T. 717 |
| Grant v Gold Exploration Syndicate | C.A. | 278 | 195 | [1900] 1 Q. B. 233; 69 L. J. Q. B. 150; 82 L. T. 5 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Dig-st. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Grant v Langston . . . | H.L. (SC.) | — | 75 | [1900] A. C. 383; 69 L. J. P. C. 66; 82 L. T. 629 |
| Great Northern Railway Co. v Inland Revenue Commissioners | Q.B.D. | 170 | 80 | [1899] 2 Q. B. 652; 81 L. T. 385 |
| Great North of Scotland Railway Co. v Fife (Duke) | H.L. (SC.) | — | 160 | 82 L. T. 425 |
| Great Western Railway Co. v London and County Banking Co. | Q.B.D. | 144 | 12 | |
| ——— . . . . . | C.A. | 662 | 12 | 69 L. J. Q. B. 741; 82 L. T. 746 |
| Greaves' Settled Estates, *In re*. Jones v Greaves | CH.D. FAR. J. | — | 167 | 69 L. J. Ch. 596; 82 L. T. 799 |
| Green v Thompson . . . | Q.B.D. | 31 | 110 | |
| Greenwell v Howell . . | C.A. | 307 | 100 | [1900] 1 Q. B. 535; 69 L. J. Q. B. 461; 82 L. T. 183 |
| Greenwood & Co., *In re* . . . | Q.B.D. | 607 | 42 | [1900] 2 Q. B. 306; 69 L. J. Q. B. 751; 82 L. T. 843 |
| Greenwood v Leather Shod Wheel Co. | C.A. | — | 35 | [1900] 1 Ch. 421; 69 L. J. Ch. 131; 81 L. T. 595 |
| Gresham Life Assurance Society v Bishop | Q.B.D. | — | 73 | 81 L. T. 442 |
| Greville Nugent v Mackenzie . . | H.L. (SC.) | — | 126 | [1900] A. C. 83; 69 L. J. P. C. 1; 81 L. T. 793 |
| Grey (Earl) v Attorney-General . | H.L. | 383 | 70 | [1900] A. C. 124; 69 L. J. Q. B. 308; 82 L. T. 62 |
| Griffiths (John) Cycle Co. v Humber & Co. | C.A. | — | 65 | [1899] 2 Q. B. 414; 81 L. T. 310 |
| "Haabet," The . . . | P.D. & A.D. | 223 | 170 | [1899] P. 295; 81 L. T. 463 |
| Haas v Durant. *In re* Overweg . | CHD.BYRNE,J | — | 186 | [1900] 1 Ch. 209; 69 L. J. Ch. 255; 81 L. T. 776 |
| Haddock v Humphreys . . | C.A. | 292 | 115 | [1900] 1 Q. B. 609; 69 L. J. Q. B. 327; 82 L. T. 72 |
| Halford v Hardy . . | CH.D. KEK.J. | — | 146 | 81 L. T. 721 |
| Hall v Norfolk (Duke) . . | CH.D. KEK.J. | 565 | 126 | 69 L. J. Ch. 571; 82 L. T. 836 |
| Hammersley, *In re*. Heasman v Hammersley | CH.D STI. J. | — | 206 | 81 L. T. 150 |
| Hampton Urban Council v Southwark and Vauxhall Water Co. | H.L. | 209 | 105 | [1900] A. C. 3; 69 L. J. Q. B. 72; 81 L. T. 547 |
| Hand v Blow . . . | CH.D. STI. J. | — | 87 | 82 L. T. 750 |
| Hargreaves, *In re* . . | C.A. | 241 | 42 | [1900] 1 Ch. 347; 69 L. J. Ch. 183; 82 L. T. 132 |
| Harling, In the Goods of . . | P.D. & A.D. | — | 157 | [1900] P. 59; 69 L. J. P. 32; 81 L. T. 791 |
| Harrison, *In re*. *Ex parte* Whinney . | BKCY. | — | 21 | 82 L. T. 623 |
| Harrowing Steamship v Toohey . . | Q.B.D. | — | 180 | [1900] 2 Q. B. 28; 69 L. J. Q. B. 447; 82 L. T. 677 |
| Hartley, *In re*. Williams v Williams . | CH.D. NOR. J. | 245 | 99 | [1900] 1 Ch. 152; 69 L. J. Ch. 79; 81 L. T. 804 |
| Hawkins v Bridgwater Justices . | Q.B.D. | 587 | 96 | [1900] 2 Q. B. 382; 69 L. J. Q. B. 663; 82 L. T. 847 |
| Hay v Northcote . . . | CH.D. FAR. J | 615 | 45 | [1900] 2 Ch. 262; 69 L. J. Ch. 586; 82 L. T. 656 |
| Haycraft v Gold Reduction and Mining Co. | CH.D. HDY. J. | — | 43 | [1900] 2 Ch. 230; 69 L. J. Ch. 497 |
| Hayes, *In re*. Turnbull v Hayes . | CHD.BYRNE,J | — | 143 | [1900] 2 Ch. 332 |
| Hayley v Taylor . . . | Q.B.D. | — | 204 | 82 L. T. 803 |
| Heasman v Hammersley. *In re* Hammersley | CH.D. STI. J. | — | 206 | 81 L. T. 150 |
| Henderson v Merthyr Tydfil Council . | Q.B.D. | 332 | 181 | [1900] 1 Q. B. 434; 69 L. J. Q. B. 335 |
| Hennessey v McCabe . . | C.A. | 231 | 114 | [1900] 1 Q. B. 491; 69 L. J. Q. B. 173; 81 L. T. 575 |
| Hensey v White . . . | C.A. | 257 | 118 | [1900] 1 Q. B. 481; 69 L. J. Q. B. 188; 81 L. T. 767 |
| Hepworth v Pickles . . | CH.D. FAR. J. | 184 | 198 | [1900] 1 Ch. 108; 69 L. J. Ch. 55; 81 L. T. 818 |
| Hertfordshire (Sheriff), *Ex parte*. *In re* Mackenzie | C.A. | — | 14 | [1899] 2 Q. B. 566; 81 L. T. 214 |
| Hexter v Pearce . . . | CH.D. FAR. J | 330 | 90 | [1900] 1 Ch. 341; 69 L. J. Ch. 146; 82 L. T. 109 |
| Heyl-Dia v Edmunds . . | CH.D. KEK.J. | 167 | 68 | 81 L. T. 579 |
| Heynes v Dixon. *In re* Dixon . . | CHD.BYRNE,J | 71 | 24 | [1899] 2 Ch. 561 |
| ——— . . . . | C.A. | 665 | 24 | 69 L. J. Ch. 609 |
| Hickman v Maisey . . . | C.A. | 385 | 68 | [1900] 1 Q. B. 752; 69 L. J. Q. B. 511; 82 L. T. 321 |
| Hildesheimer v Faulkner . . | CH.D. KEK.J. | 682 | 52 | |
| Hoffe's Estate Act, 1855, *In re*. . | CH.D. KEK.J. | 507 | 152 | 82 L. T. 556 |
| Hogarth v Walker . . | Q.B.D. | 47 | 82 | [1899] 2 Q. B. 401 |
| ——— . . . . | C.A. | 545 | 82 | [1900] 2 Q. B. 283; 69 L. J. Q. B. 634; 82 L. T. 744 |
| Holmes v Great Northern Railway Co. . | C.A. | 681 | 113 | [1900] 2 Q. B. 409 |
| Honour v Equitable Life Assurance Society of United States | CH.D.BUCK.J | 347 | 81 | [1900] 1 Ch. 852; 69 L. J. Ch. 420; 82 L. T. 144 |
| Hood v Jones . . . | CH.D. HDY. J | — | 51 | 81 L. T. 169 |
| Hooley, *In re*. *Ex parte* United Ordnance Co. | BKCY. | — | 18 | [1899] 2 Q. B. 579 |
| Hope v Walter . . . | C.A. | — | 201 | [1900] 1 Ch. 257; 69 L. J. Ch. 166; 82 L. T. 30 |
| Hopkinson v Newspaper Proprietary Syndicate. *In re* Newspaper Proprietary Syndicate | CH.D. HDY.J. | — | 17 | [1900] 2 Ch. 349; 59 L. J. Ch. 578 |
| Hucklesby v Hook . . . | CH.D.BUCK.J. | — | 65 | 82 L. T. 117 |
| Hudson v Swiftsure (Owners of) . | P.D. & A.D. | — | 131 | 82 L. T. 389 |
| Hyderabad (Deccan) Co. v Willoughby . | Q.B.D. | — | 81 | [1899] 2 Q. B. 530 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Illingworth v Walmsley | C.A. | — | 117 | [1900] 2 Q. B. 142; 69 L. J. Q. B. 519; 82 L. T. 647 |
| Ind v Hamblin | CH.D.BUCK.J. | 238 | 197 | 81 L. T. 779 |
| Ingle v Vaughan-Jenkins | CH.D. FAR. J. | 684 | 118 | [1900] 2 Ch. 368; 69 L. J. Ch. 618 |
| Inman v Ackroyd | Q.B.D. | — | 32 | 82 L. T. 621 |
| Iredale v China Traders' Insurance Co. | Q.B.D. | 48 | 180 | [1899] 2 Q. B. 356; 69 L. J. Q. B. 783; 81 L. T. 231 |
| Irving v Turnbull | Q.B.D. | — | 200 | [1900] 2 Q. B. 129; 69 L J. Q. B. 593 |
| Isis Steamship Co. v Bahr | H.L. | — | 172 | [1900] A. C. 340; 69 L. J. Q. B. 660; 82 L. T. 571 |
| Jacob v Down | CH.D. STI. J. | 441 | 88 | [1900] 2 Ch. 156; 69 L. J. Ch. 493 |
| ——— v Jacob | H.L. | — | 207 | 82 L. T. 270 |
| Jobson v Henderson | Q.B.D. | — | 137 | 82 L. T. 260 |
| John Brothers (Abergarw Brewery) v Holmes | CH.D. KEK.J. | 236 | 127 | [1900] 1 Ch. 188; 69 L. J. Ch. 149; 81 L. T. 771 |
| "John Hollway," The | P.D. & A.D. | 416 | 177 | [1900] P. 37; 69 L. J. P. 15; 81 L. T. 726 |
| Johns v Carden. *In re* Copland's Settlement | CHD.BYRNE,J | — | 102 | [1900] 1 Ch. 326; 69 L. J. Ch. 240; 82 L. T. 194 |
| ——— v Pink | CH.D. STI. J. | 247 | 86 | [1900] 1 Ch. 296; 69 L. J. Ch. 98; 81 L. T. 712 |
| Johnson v Johnson | P.D. & A.D. | — | 58 | [1900] P. 19; 69 L. J. P. 13; 81 L. T. 791 |
| Jolly, *In re.* Gatheroole v Norfolk | C.A. | 657 | 97 | |
| Jones, *Ex parte. In re* London and Northern Bank | CH.D. HDY. J. | — | 50 | [1900] 1 Ch. 220; 69 L. J. Ch. 24; 81 L. T. 512 |
| ——— v Barnett | C.A. | 280 | 200 | [1900] 1 Ch. 370; 69 L. J. Ch. 242; 82 L. T. 37 |
| ——— v Biernstein | C.A. | 232 | 86 | [1900] 1 Q. B. 100; 69 L. J. Q. B. 1; 81 L. T. 553 |
| ——— v Greaves. *In re* Greaves' Settled Estates | CH.D. FAR. J. | — | 167 | 69 L. J. Ch. 596; 82 L. T. 799 |
| ——— v Joyner | Q.B.D. | — | 162 | 82 L. T. 768 |
| ——— v Short | Q.B.D. | 251 | 66 | 69 L. J. Q. B. 473; 82 L. T. 197 |
| Jordeson v Sutton Gas Co. | C.A. | — | 132 | [1899] 2 Ch. 217; 68 L. J. Ch. 457; 80 L. T. 815 |
| Kelcey, *In re.* Tyson v Kelcey | CH.D. KEK.J. | 59 | 127 | [1899] 2 Ch. 530; 81 L. T. 354 |
| Kemble v Addison | Q.B.D. | 331 | 24 | [1900] 1 Q. B. 430; 69 L. J. Q. B. 299; 82 L. T. 91 |
| Kenrick v Mountsteven | CH.D. HDY. J | 141 | 134 | |
| Kensit v Rector of St. Ethelburga | CONSIST. CT. OF LONDON. | — | 63 | [1900] P. 80 |
| Kenyon v Birks. *In re* Birks | C.A. | — | 209 | [1900] 1 Ch. 417; 69 L. J. Ch. 124; 81 L. T. 741 |
| Kimber v Admams | C.A. | 322 | 197 | [1900] 1 Ch. 412; 69 L. J. Ch. 296; 82 L. T. 136 |
| King, *Ex parte. In re* Woodd | BKCY. | — | 19 | 82 L. T. 504 |
| ——— v Hutton | BKCY. | 95 | 21 | [1899] 2 Q. B. 555 |
| ——— v Smith | CH.D. FAR. J. | — | 129 | 69 L. J. Ch. 598; 82 L. T. 815 |
| King's Lynn Dock Co., *Ex parte.* Reg. v De Grey | Q.B.D. | 348 | 138 | [1900] 1 Q. B. 521; 69 L. J. Q. B. 341; 82 L. T. 324 |
| Kingwell, In the Goods of | P.D. & A.D. | — | 154 | 81 L. T. 461 |
| Knight's Deep v Inland Revenue Commissioners | C.A. | 198 | 77 | [1900] 1 Q. B. 217; 69 L. J. Q. B. 66; 81 L. T. 625 |
| Knowles v Bolton (Mayor) | C.A. | 433 | 9 | [1900] 2 Q. B. 253; 69 L. J. Q. B. 481; 82 L. T. 229 |
| Ladies' Dress Association v Pulbrook | C.A. | — | 38 | [1900] 2 Q. B. 376; 69 L. J. Q. B. 705 |
| Lagunas Nitrate Co. v Lagunas Nitrate Syndicate | C.A. | 74 | 34 | [1899] 2 Ch. 392; 81 L. T. 334 |
| Lancashire Asylums Board v Manchester (Mayor) | C.A. | 356 | 100 | [1900] 1 Q. B. 458; 69 L. J. Q. B. 234; 82 L. T. 1 |
| Lane v Rendall | Q.B.D. | 153 | 204 | [1899] 1 Q. B. 673; 69 L. J. Q. B. 8; 81 L. T. 445 |
| Lane-Fox, *In re. Ex parte* The "Trustee" | BKCY. | 650 | 22 | 69 L. J. Q. B. 722 |
| Langley v Bombay Tea Co. | Q.B.D. | — | 187 | 69 L. J. Q. B 752 |
| Lascelles v Swansea School Board | Q.B.D. | — | 10 | 69 L. J. Q. B. 24 |
| Lawson v Atlantic Transport Co. | C.A. | — | 115 | 82 L. T. 77 |
| Lee District Board v London County Council | C.A. | — | 123 | 82 L. T. 306 |
| Leith Council v Leith Harbour Commissioners | H.L. (SC.) | — | 163 | [1899] A. C. 508; 81 L. T. 98 |
| Lewis, *In re.* Lewis v Smith | CH.D. KEK. J. | 426 | 1 | [1900] 2 Ch. 176; 69 L. J. Ch. 406; 82 L. T. 291 |
| Linotype Co.'s Trade-Mark, *In re* | CH.D. HDY. J. | — | 188 | [1900] 2 Ch. 238; 82 L. T. 794 |
| Linotype Co. v British Empire Typesetting Machine Co. | H.L. | — | 94 | 81 L. T. 331 |
| Littledale v Liverpool College | C.A. | 177 | 98 | [1900] 1 Ch. 19; 69 L. J. Ch. 87; 81 L. T. 564 |
| Llandudno District Council v Hughes | Q.B.D. | 366 | 109 | [1900] 1 Q. B. 472; 69 L. J. Q. B. 303; 82 L. T. 147 |
| ——— v Wood | CH.D. HDY.J. | 43 | 65 | [1899] 2 Ch. 705; 81 L. T. 170 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Digest | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Lloyd v Barnett | Q.B.D. | — | 95 | 82 L. T. 804 |
| ——— v Sugg | C.A. | 257 | 118 | [1900] 1 Q. B. 481; 69 L. J. Q. B. 190; 81 L. T. 768 |
| Lloyds Bank v Princess Royal Colliery Co. (No. 1) | CHD. BYRNE, J | 460 | 151 | 82 L. T. 559 |
| ——— (No. 2) | CHD. BYRNE, J | 427 | 153 | |
| Logsdon v Booth | Q.B.D. | 266 | 29 | [1900] 1 Q. B. 401; 69 L. J. Q. B. 131; 81 L. T. 602 |
| ——— v Trotter | Q.B.D. | 365 | 29 | [1900] 1 Q. B. 617; 69 L. J. Q. B. 312; 82 L. T. 151 |
| London County Council v East London Waterworks Co. | Q.B.D. | 252 | 203 | [1900] 1 Q. B. 330; 69 L. J. Q. B. 304; 82 L. T. 268 |
| ——— v Hirsch | Q.B.D. | — | 121 | 81 L. T. 447 |
| ——— v Lewis | Q.B.D. | — | 64 | 69 L. J. Q. B. 277; 82 L. T. 195 |
| ——— v Read | Q.B.D. | 393 | 25 | [1900] 1 Q. B. 288; 69 L. J. Q. B. 39; 81 L. T. 452 |
| ——— v Wandsworth Gas Co. | Q.B.D. | — | 120 | 82 L. T. 562 |
| London Finance Corporation v Kaufman | CH. D. NOR. J. | 458 | 153 | 69 L. J. Ch. 196 |
| London and Northern Bank, *In re*. *Ex parte* Jones | CH. D. HDY. J. | — | 50 | [1900] 1 Ch. 220; 69 L. J. Ch. 24; 81 L. T. 512 |
| London and North-Western Railway Co. v Walker | H.L. | 384 | 11 | [1900] A. C. 109; 69 L. J. Q. B. 367; 82 L. T. 93 |
| London and Westminster Bank v Inland Revenue Commissioners | C.A. | 195 | 79 | [1900] 1 Q. B. 166; 69 L. J. Q. B. 102; 81 L. T. 630 |
| Lord v Lord | P.D. & A.D. | — | 57 | 69 L. J. P. 54 |
| Lord Advocate v Wemyss | H.L. (SC.) | — | 125 | [1900] A. C. 48 |
| Loustalan v Loustalan. *In re* Martin | C.A. | 509 | 209 | [1900] P. 211; 69 L. J. P. 75; 82 L. T. 806 |
| Loveday, In the Goods of | P.D. & A.D. | — | 155 | [1900] P. 154; 69 L. J. P. 48; 82 L. T. 692 |
| Ludington Cigarette Machine Co. v Baron Cigarette Machine Co. | C.A. | 505 | 136 | [1900] 1 Ch. 508; 69 L. J. Ch. 321; 82 L. T. 173 |
| Lyle Shipping Co. v Cardiff Corporation | Q.B.D. | — | 174 | 69 L. J. Q. B. 93; 81 L. T. 642 |
| Lysons v Knowles | C.A. | 408 | 117 | [1900] 1 Q. B. 780; 69 L. J. Q. B. 449; 82 L. T. 189 |
| Mackenzie, *In re*. *Ex parte* Hertfordshire (Sheriff) | C.A. | — | 14 | [1899] 2 Q. B. 566; 81 L. T. 214 |
| Mackrell v Brentford Justices | Q.B.D. | 648 | 95 | [1900] 2 Q. B. 387; 69 L. J. Q. B. 748 |
| Madden v Nelson Railway Co. | P.C. | — | 25 | [1899] A. C. 626; 81 L. T. 276 |
| Main Colliery Co. v Davies | H.L. | — | 113 | [1900] A. C. 358; 69 L. J. Q. B. 755 |
| Manchester Brewery Co. v Coombs | CH. D. FAR. J. | — | 92 | 82 L. T. 347 |
| Manchester Real Ice Skating Co., *In re* | C.A. | 490 | 152 | [1900] 1 Ch. 573; 69 L. J. Ch. 421; 82 L. T. 513 |
| Manchester Ship Canal Co. v Manchester Racecourse Co. | CH. D. FAR. J. | — | 49 | [1900] 2 Ch. 352 |
| ——— v Pearson | C.A. | 689 | 12 | |
| ——— v Rochdale Canal Co. | C.A. | — | 202 | 81 L. T. 472 |
| Mant, *Ex parte*. *In re* Daintrey | C.A. | — | 20 | [1900] 1 Q. B. 546; 69 L. J. Q. B. 207; 82 L. T. 239 |
| Markey v Tolworth Joint Hospital District Board | Q.B.D. | — | 99 | 69 L. J. Q. B. 738 |
| Markham and Darter's case. *In re* African Gold Concessions Co. | C.A. | — | 38 | [1899] 2 Ch. 480; 81 L. T. 145 |
| Marley v Marley | Q.B.D. | — | 14 | 82 L. T. 692 |
| Marriott v Reid | CH. D. KEK. J. | — | 196 | 82 L. T. 369 |
| Marshall and Salt's Contract, *In re* | CHD. BYRNE, J | 508 | 199 | [1900] 2 Ch. 202; 69 L. J. Ch. 542 |
| Martin, *In re*. Loustalan v Loustalan | C.A. | 509 | 209 | [1900] P. 211; 69 L. J. P. 75; 82 L. T. 806 |
| Maryon-Wilson, *In re*. Wilson v Maryon-Wilson | C.A. | 338 | 70 | [1900] 1 Ch. 565; 69 L. J. Ch. 310; 82 L. T. 171 |
| Mason, *In re*. Ogden v Mason | CH. D. KEK. J. | 493 | 210 | [1900] 2 Ch. 196; 69 L. J. Ch. 475; 82 L. T. 554 |
| ——— v Cowdary | Q.B.D. | — | 8 | [1900] 2 Q. B. 419; 69 L. J. Q. B. 667; 82 L. T. 802 |
| ——— v Dean | C.A. | 353 | 111 | [1900] 1 Q. B. 770; 69 L. J. Q. B. 358; 82 L. T. 139 |
| ——— v Schuppisser | CH. D. STI. J. | — | 151 | 81 L. T. 147 |
| Massey, In the Goods of | P.D. & A.D. | — | 158 | [1899] P. 270; 81 L. T. 493 |
| Masters v Great Western Railway Co. | Q.B.D. | — | 160 | 69 L. J. Q. B. 673; 82 L. T. 819 |
| Matthews v Usher | Q.B.D. | — | 91 | 81 L. T. 542 |
| Maude v Brooke | C.A. | 290 | 111 | [1900] 1 Q. B. 575; 69 L. J. Q. B. 322; 82 L. T. 39 |
| Maudslay, *In re*. Maudslay v Maudslay | CH. D. HDY. J. | 568 | 30 | [1900] 1 Ch. 602; 69 L. J. Ch. 347; 82 L. T. 378 |
| May v Platt | CH. D. FAR. J. | 617 | 196 | [1900] 1 Ch. 616; 69 L. J. Ch. 357 |
| Maynard's Settled Estates, *In re* | CH. D. KEK. J. | 60 | 125 | [1899] 2 Ch. 347 |
| McLeod v St. Aubyn | P.C. | 173 | 46 | [1899] A. C. 549 |
| McMahon, *In re*. Fuller v McMahon | CH. D. STI. J. | — | 18 | [1900] 1 Ch. 173; 69 L. J. Ch. 142; 81 L. T. 715 |
| Measure v Inland Revenue Commissioners | Q.B.D. | — | 76 | 82 L. T. 689 |
| "Mediana," The | H.L. | 398 | 177 | [1900] A. C. 113; 69 L. J. P. 35; 82 L. T. 95 |
| Medway v Medway | P.D. & A.D. | 622 | 57 | [1900] P. 141; 69 L. J. P. 56; 82 L. T. 627 |
| Mercantile Bank of London v Evans | C.A. | — | 145 | [1899] 2 Q. B. 613; 81 L. T. 376 |
| Mersey Docks v Birkenhead Union | C.A. | 259 | 139 | [1900] 1 Q. B. 143; 69 L. J. Q. B. 260; 81 L. T. 798 |
| "Metropolis," The | P.D. & A.D. | — | 182 | 81 L. T. 236 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Metropolitan Bank of England and Wales v Vivian & Co. | CH.D. HDY. J. | 636 | 30 | 82 L. T. 674 |
| Metropolitan Railway Co. v Great Western Railway Co. | CH. D. KEK. J. | — | 61 | 82 L. T. 451 |
| Micholls v Samuel. *In re* Beddington | CHD. BYRNE, J | 552 | 205 | [1900] 1 Ch. 771; 69 L. J. Ch. 374; 82 L. T. 557 |
| Milbank v Milbank | C.A. | 339 | 149 | [1900] 1 Ch. 376; 69 L. J. Ch. 287; 82 L. T. 63 |
| Mildmay v Mildmay. *In re* Everaley (Lord) | CHD. BYRNE, J | 249 | 210 | [1900] 1 Ch. 96; 69 L. J. Ch. 14; 81 L. T. 600 |
| Miller v Bland. *In re* Bland | CH.D. STI. J. | — | 210 | [1899] 2 Ch. 336 |
| ——— v Borner | Q.B.D. | 588 | 171 | [1900] 1 Q. B. 691; 89 L. J. Q. B. 429; 82 L. T. 258 |
| Milner v Great Northern Railway Co. | C.A. | 387 | 116 | [1900] 1 Q. B. 795; 69 L. J. Q. B. 427; 82 L. T. 187 |
| Milward & Co., *In re* | C.A. | — | 148 | [1900] 1 Ch 405; 69 L. J. Ch. 247; 82 L. T. 339 |
| Moffatt, In the Goods of | P.D. & A.D. | — | 155 | [1900] P. 152; 69 L. J. P. 98 |
| Mohan v Broughton | C.A. | 371 | 156 | [1900] P. 56; 69 L. J. P. 20; 82 L. T. 29 |
| Monckton v Payne | Q.B.D. | 44 | 98 | [1899] 2 Q. B. 603 |
| Montreal Gas Co. v Cadieux | P.C. | — | 26 | [1899] A. C. 589; 81 L. T. 274 |
| Montreal Lithographic Co. v Sabiston | P.C. | — | 189 | [1899] A. C. 610; 81 L. T. 135 |
| Morgan, *In re*. Smith v May | CH.D. STI. J. | 670 | 133 | |
| "Morgengry," The. The "Blackcock" | C.A. | 121 | 179 | [1900] P. 1; 69 L. J. P. 3; 81 L. T. 417 |
| Mostyn v Atherton | CHD. BYRNE, J | 168 | 203 | [1899] 2 Ch. 360; 81 L. T. 356 |
| Moxham v Grant | C.A. | 130 | 44 | [1900] 1 Q. B. 88; 69 L. J. Q. B. 97; 81 L. T. 431 |
| Muller's Margarine v Inland Revenue Commissioners | C.A. | — | 77 | [1900] 1 Q. B. 310; 69 L. J. Q. B. 291; 81 L. T. 667 |
| Mutton v Peat | CHD. BYRNE J | 62 | 13 | [1899] 2 Ch. 556 |
| ——— | C.A. | 486 | 13 | [1900] 2 Ch. 79; 69 L. J. Ch. 484; 82 L. T. 440 |
| Naismith v Boyes | H.L. (SC.) | — | 164 | [1899] A. C. 495 |
| Nalder v Harman | CH.D. KEK. J. | — | 194 | 82 L. T. 594 |
| Nash v De Freville | C.A. | 434 | 22 | [1900] 2 Q. B. 72; 69 L. J. Q. B. 484; 82 L. T. 642 |
| National Bank of Wales, *In re*. Cory's case | C.A. | 99 | 31 | [1889] 2 Ch. 629; 81 L. T. 363 |
| National Company for Distribution of Electricity, &c. v Gibbs | C.A. | 499 | 135 | [1900] 2 Ch. 280; 67 L. J. 457; 82 L. T. 443 |
| National Sporting Club v Cope | Q.B.D. | 446 | 96 | 82 L. T. 352 |
| National Stores, *In re* | CH.D. WRI. J. | 185 | 44 | [1899] 2 Ch. 773; 69 L. J. Ch. 16 |
| ——— | C.A. | — | 44 | [1900] 1 Ch. 27; 81 L. T. 529 |
| National Telephone Co. v Constables of St. Peter Port | P.C. | — | 106 | [1900] A. C. 317; 82 L. T. 398 |
| ——— v Inland Revenue Commissioners | H.L. | 210 | 76 | [1900] A. C. 1; 69 L. J. Q. B. 43; 81 L. T. 546 |
| ——— v Tunbridge Wells (Mayor) | Q.B.D. | 686 | 186 | |
| Neald v Hendon Council | C.A. | — | 67 | 81 L. T. 405 |
| Nevill and Newell's Contract, *In re* | CH.D. KEK. J. | 181 | 165 | [1900] 1 Ch. 90; 69 L. J. Ch. 94; 81 L. T. 581 |
| Newman, *In re*. *Ex parte* Official Receiver | BKCY. | 94 | 15 | [1899] 2 Q. B. 587; 81 L. T. 527 |
| ——— v Sinclair. *In re* Atkins | CH.D. NOR. J. | — | 193 | 81 L. T. 421 |
| Newport Union v Ystradyfodwg Sewerage Board | Q.B.D. | 376 | 140 | [1900] 1 Q. B. 365; 69 L. J. Q. B. 280; 82 L. T. 58 |
| New Sharlston Collieries Co. v Westmoreland (Earl) | H.L. | — | 126 | 82 L. T. 725 |
| Newspaper Proprietary Syndicate, *In re*. Hopkinson v Newspaper Proprietary Syndicate | CH D. HDY. J. | — | 17 | [1900] 2 Ch. 349; 69 L. J. Ch. 578 |
| Newton-in-Makerfield Council v Lynn | Q.B.D. | 222 | 108 | 69 L. J. Q. B. 230; 81 L. T. 756 |
| New York Breweries Co. v Attorney-General | H.L. | 32 | 76 | [1899] A. C. 62; 68 L. J. Q. B. 135; 79 L. T. 568 |
| Nicholls v Nicholls | CH.D. STI. J. | — | 47 | 81 L. T. 811 |
| Nickoll v Ashton | Q.B.D. | — | 49 | [1900] 2 Q. B. 298; 69 L. J. Q. B. 640; 82 L. T. 761 |
| Norfolk's (Duke) Parliamentary Estates, *In re* | CHD. BYRNE, J | 328 | 166 | [1900] 1 Ch. 461; 69 L. J. Ch. 236; 82 L. T. 613 |
| North-Eastern Railway Co. v Hastings | H.L. | — | 161 | [1900] A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429 |
| ——— v York Union | Q.B.D. | — | 140 | [1900] 1 Q. B. 733; 69 L. J. Q. B. 376; 82 L. T. 201 |
| North of England Iron Steamship Insurance Association, *In re* | CH.D. HDY. J. | 604 | 32 | [1900] 1 Ch. 481; 69 L. J. Ch. 211; 82 L. T. 598 |
| Norton v Norton | CHD. BYRNE, J | 140 | 134 | [1900] 1 Ch. 101; 69 L. J. Ch. 31; 81 L. T. 724 |
| Nott v Williams | CHD. BYRNE, J | 316 | 163 | |
| Nutt v Easton | C.A. | — | 130 | [1900] 1 Ch. 29; 69 L. J. Ch. 46; 81 L. T. 530 |
| Nuttall v Lynton and Barnstaple Railway Co. | C.A. | — | 11 | 82 L. T. 17 |
| Oakvill Steamship Co. v Holmes | Q.B.D. | 152 | 174 | |
| O'Brien, In the Goods of | P.D. & A.D. | — | 157 | 1900] P. 208; 69 L. J. P. 55 |

| Name of Case. | Court. | Page in W. R. 1899-00 | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Official Receiver, *Ex parte*. *In re* Ford | BKCY. | 173 | 14 | [1900] 1 Q. B. 264; 69 L. J. Q. B. 74; 81 L. T 648 |
| ———. *In re* Newman | BKCY. | 94 | 15 | [1899] 2 Q. B. 587; 81 L. T. 527 |
| Ogden v Mason. *In re* Mason | CH.D. KEK. J. | 493 | 210 | [1900] 2 Ch. 196; 69 L. J. Ch. 475; 82 L. T. 554 |
| Oliver v Hinton | C.A. | 3 | 128 | [1899] 2 Ch. 264; 81 L. T. 212 |
| Osborn v Vickers, Son, & Maxim | C.A. | — | 115 | [1900] 2 Q. B. 91; 69 L. J. Q. B. 606; 82 L. T. 491 |
| Osmond v Mutual Cycle Manufacturing and Supply Co. | C.A. | 125 | 183 | [1899] 2 Q. B. 488; 81 L. T. 254 |
| Over v Harwood | Q.B.D. | 608 | 194 | [1900] 1 Q. B. 803; 69 L. J. Q. B. 272 |
| Overweg, *In re*. Haas v Durant | CHD. BYRNE, J | — | 186 | [1900] 1 Ch. 209; 69 L. J. Ch. 255; 81 L. T. 776 |
| Owen and Ashworth's Claim. *In re* Bank of Syria | CH. D. WRI. J. | — | 35 | [1900] 2 Ch. 272; 69 L. J. Ch. 412 |
| Palmer v Moore | P.C. | — | 125 | [1900] A. C. 293; 69 L. J. P. C. 64; 82 L. T. 166 |
| ——— v Snow | Q.B D. | 351 | 186 | [1900] 1 Q. B. 725; 69 L. J. Q. B. 356; 82 L. T. 199 |
| Panes v Attorney-General. *In re* Bond | CH. D. KEK. J. | — | 166 | 82 L. T. 612 |
| Pannell v City of London Brewery Co. | CH. D. BUCK. J. | 264 | 90 | [1900] 1 Ch. 496; 69 L. J. Ch. 244; 82 L. T. 53 |
| Pardoe v Pardoe | CH. D. STI. J. | — | 210 | 82 L. T. 547 |
| Parry and Hopkins' Arbitration, *In re* | CH. D. NOR. J. | 345 | 210 | [1900] 1 Ch. 160; 69 L. J. Ch. 190; 81 T. 807 |
| Parry v Liverpool Malt Co. | C.A. | — | 10 | [1900] 1 Q. B. 339; 69 L. J. Q. B. 161; 81 L. T. 621 |
| Parsons v New Zealand Shipping Co. | Q.B.D. | — | 169 | [1900] 1 Q. B. 714; 69 L. J. Q. B. 419; 82 L. T. 327 |
| Pawley and London and Provincial Bank's Contract, *In re* | CH. D. KEK. J. | 107 | 198 | [1900] 1 Ch. 58; 69 L. J. Ch. 6; 81 L. T. 507 |
| Payne v Cork Co. | CH. D. STI. J. | 325 | 44 | [1900] 1 Ch. 308; 69 L. J. Ch. 156; 82 L. T. 44 |
| ——— v Hogg | C.A. | 417 | 159 | [1900] 2 Q. B. 43; 69 L. J. Q. B. 579; 82 L. T. 584 |
| Pearce v London and South-Western Railway Co. | C.A. | 599 | 116 | [1900] 2 Q. B. 100; 69 L. J. Q. B. 683; 82 L T. 487 |
| Pearson and I'Anson's Arbitration, *In re* | Q.B.D. | 154 | 92 | [1899] 2 Q. B. 618; 81 L. T. 289 |
| Peel, *In re*. Woodcock v Holroyd | CH. D. KEK. J. | — | 3 | 81 L. T. 504 |
| Peninsular and Oriental Co. v Leslie | C.A. | — | 74 | 82 L. T. 137 |
| Pepin v Bruyère | CH. D. KEK. J. | 671 | 208 | |
| Percival v Garner | C.A. | — | 117 | [1900] 2 Q. B. 406 |
| Pharmaceutical Society v White | Q B.D. | 335 | 137 | [1900] 1 Q. B. 454; 81 L. T. 821 |
| "Philadelphian," The | P.D. & A.D. | 431 | — | [1900] P. 43 |
| ——— | C.A. | 514 | 177 | 69 L. J. P. 101; 82 L. T. 601 |
| Phillips, *In re*. *Ex parte* Barton | BKCY. | — | 14 | [1900] 2 Q. B. 329; 69 L. J. Q. B. 604; 82 L. T. 691 |
| Pickard v Booth. *In re* Booth | CHD. BYRNE, J | 566 | 205 | [1900] 1 Ch. 768; 69 L. J. Ch. 474 |
| Plummer, *In re*. *Ex parte* The Trustee | C.A. | 634 | 21 | |
| Potter, In the Goods of | P.D. & A.D. | — | 158 | [1899] P. 265; 69 L. J. P. 53; 81 L. T. 234 |
| Pouey v Hordern | CH. D. FAR. J. | — | 208 | [1900] 1 Ch. 492; 69 L. J. Ch. 231; 82 L. T. 51 |
| Powell v Main Colliery Co. | C.A. | 534 | 112 | [1900] 2 Q. B. 145; 69 L. J. Q. B. 542; 82 L. T. 340 |
| ——— | H.L. | — | 112 | [1900] A. C. 366; 69 L. J. Q. B. 758 |
| ——— v Powell | CH. D FAR. J. | — | 68 | [1900] 1 Ch. 243; 69 L. J. Ch. 164; 82 L. T. 84 |
| Price, *In re*. Tomlin v Latter | CH. D. STI. J. | 373 | 208 | [1900] 1 Ch. 442; 69 L. J. Ch. 225; 82 L. T. 79 |
| Pryor v Pryor | P.D. & A.D. | — | 56 | [1900] P. 157; 69 L. J. P. 99 |
| Pullen v St. Saviour's Union | Q.B.D. | 186 | 122 | [1900] 1 Q. B. 138; 69 L. J. Q. B. 139; 81 L. T. 583 |
| Queen's Hotel Co., Cardiff, *In re*. *In re* Vernon Tin Plate Co. | CH. D. HDY. J. | 567 | 147 | [1900] 1 Ch. 792; 69 L. J. Ch. 414; 82 L. T. 675 |
| Quinlan v Child | P.C. | — | 145 | [1900] A. C. 496 |
| Ramage v Womack | Q.B.D. | — | 89 | [1900] 1 Q. B. 116; 69 L. J. Q. B. 40; 81 L. T. 526 |
| Raphael, *In re*. *Ex parte* Salomon | C.A. | — | 182 | 81 L. T. 479 |
| Raybould, *In re*. Raybould v Turner | CHD. BYRNE, J | 301 | 4 | [1900] 1 Ch. 199; 69 L. J. Ch. 249; 82 L. T. 46 |
| Rayner v Drewitt | Q.B.D. | — | 105 | 82 L. T. 718 |
| Reg. v Baines | C.C.R. | — | 54 | 69 L. J. Q. B. 681; 82 L. T. 724 |
| ——— v Bell | Q.B.D. | — | 107 | [1900] 2 Q. B. 391; 69 L. J. Q. B. 622; 82 L. T. 711 |
| ——— v Bullivant | C.A. | — | 149 | [1900] 2 Q. B. 163; 69 L. J. Q. B. 657; 82 L. T. 493 |
| ——— v Button | C.C.R. | 708 | 54 | |
| ——— v De Grey. *Ex parte* King's Lynn Dock Co. | Q.B.D. | 348 | 138 | [1900] 1 Q. B. 521; 69 L. J. Q. 341; 82 L. T. 324 |
| ——— v Demers | P.C. | — | 144 | [1900] A. C. 103; 69 L. J. P. C. 5; 81 L. T. 795 |
| ——— v Glamorgan County Council | C.A. | 112 | 100 | [1899] 2 Q. B. 536; 81 L. T. 372 |
| ——— v Gray | Q.B.D. | 474 | 46 | [1900] 2 Q. B. 36; 69 L. J. Q. B. 502; 82 L. T. 534 |
| ——— v Horrocks. *Ex parte* Bowstead | Q.B.D. | — | 85 | 69 L. J. Q. B. 688; 82 L. T. 767 |

| Name of Case. | Court. | Page in W. R. 1899–00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Reg. v Law | Q.B.D. | 411 | 53 | [1900] 1 Q. B. 605; 69 L. J. Q. B. 348; 82 L. T. 145 |
| ——— v Leicester Union | Q.B.D. | — | 194 | [1899] 2 Q. B. 632; 81 L. T. 559 |
| ——— v London Justices | Q.B.D. | 319 | 84 | [1900] 1 Q. B. 438; 69 L. J. Q. B. 364; 82 L. T. 296 |
| ——— v Nash | Q.B.D. | 188 | 63 | [1900] 1 Q. B. 103; 69 L. J. Q. B. 77; 81 L T. 489 |
| ——— v Neat | C.C.R. | — | 54 | 69 L. J. Q. B. 118; 81 L. T. 680 |
| ——— v Nicholson | C.A. | 52 | 96 | [1899] 2 Q. B. 455; 81 L. T. 257 |
| ——— v Shiel | C.A. | — | 151 | 82 L. T. 587 |
| ——— v Somerset Justices | Q.B.D. | — | 85 | 69 L. J. Q. B. 311 |
| ——— v Stoke Parish Council | Q.B.D. | — | 101 | 82 L. T. 198 |
| ——— v Streeter | C.C.R. | 702 | 55 | |
| ——— v Truscott | Q.B.D. | — | 84 | 81 L. T. 188 |
| ——— v West Riding Justices | Q.B.D. | — | 85 | [1900] 1 Q. B. 291; 69 L. J. Q. B. 13 |
| ——— v Willesden Guardians | Q.B.D. | — | 141 | 82 L. T. 385 |
| ——— v Winder | Q.B.D. | 605 | 95 | 69 L. J. Q. B. 729 |
| Reid & Sons, *In re* | Q.B.D. | — | 44 | 69 L. J. Q. B. 736 |
| Rendall v Hill's Dry Docks Co. | C.A. | 530 | 113 | [1900] 2 Q. B. 245; 69 L. J. Q. B. 554; 82 L. T. 521 |
| Rew, *In re.* Rew v Wippel | CH.D. KEK. J. | — | 142 | [1899] 2 Ch. 536; 81 L. T. 384 |
| Ribble (River) Joint Committee v Halliwell | C.A. | 22 | 162 | [1899] 2 Q. B. 385; 81 L. T. 38 |
| Rice v Noakes | CH.D. HDY. J. | 110 | 130 | [1900] 1 Ch. 213; 69 L. J. Ch. 43 |
| ——— | C.A. | 629 | 130 | 82 L. T. 784 |
| ——— v Reed | C.A. | — | 192 | [1900] 1 Q. B. 54; 69 L. J. Q. B. 33; 81 L. T. 410 |
| Richardson, *Ex parte. In re* A. B. & Co. | C.A. | 485 | 16 | [1900] 2 Q. B. 429; 69 L. J. Q. B. 568; 82 L. T. 544 |
| ——— v Stormont | C.A. | 451 | 185 | [1900] 1 Q. B. 701; 69 L. J. Q. B. 369; 82 L. T. 316 |
| Rixsom v Pritchard | C.A. | — | 112 | [1900] 1 Q. B. 800; 69 L. J. Q. B. 494; 82 L. T. 186 |
| Roberts, *In re. Ex parte* The "Debtor" | C.A. | 132 | 19 | [1900] 1 Q. B. 122; 69 L. J. Q. B. 19; 61 L. T. 467 |
| ——— v Gwyrfai District Council | C.A. | 51 | 104 | [1899] 2 Ch. 608; 81 L. T. 465 |
| Robertson v Bristol (Mayor) | C.A. | 498 | 104 | [1900] 2 Q. B. 198; 69 L. J. Q. B. 590; 82 L. T. 516 |
| ——— v Harris | Q.B.D. | 571 | 8 | [1900] 2 Q. B. 117; 69 L. J. Q. B. 526; 82 L. T. 536 |
| Robinson, *In re.* Clarkson v Dixon | CH.D.BUCK.J. | 698 | 193 | |
| Roche v London and South-Western Railway Co. | C.A. | 1 | 5 | [1899] 2 Q. B. 502; 81 L. T. 315 |
| "Rodney," The | P.D. & A.D. | 527 | 170 | [1900] P. 112; 69 J. P. 29; 82 L. T. 27 |
| Rogers v Hosegood | CH.D. FAR. J. | 202 | 197 | 69 L. J. Ch. 59; 81 L. T. 515 |
| ——— | C.A. | 659 | 197 | |
| "Rondane," The | P.D & A.D. | — | 178 | 82 L. T. 828 |
| Rosenbaum v Belson | CH.D.BUCK.J. | 522 | 200 | [1900] 2 Ch. 267; 69 L. J. Ch. 569; 82 L. T. 658 |
| Ross, *In re.* Ashton v Ross | CH.D. NOR. J. | 264 | 2 | [1900] 1 Ch. 162; 69 L. J. Ch. 192; 81 L. T. 578 |
| Rowell v Rowell | C.A. | — | 59 | [1900] 1 Q. B. 9; 69 L. J. Q. B. 55; 81 L. T. 429 |
| Rowlls v Bebb | C.A. | 562 | 212 | [1900] 2 Ch. 107; 69 L. J. Ch. 562; 82 L. T. 633 |
| Royal Mail Steam Packet Co. v George | P.C. | — | 84 | [1900] A. C. 480; 82 L. T. 539 |
| Ruabon Steamship Co. v London Assurance | H.L. | 225 | 83 | [1900] A. C. 6; 69 L. J. Q. B. 86 |
| Rudd v Lascelles | CH.D. FAR. J. | 586 | 201 | [1900] 1 Ch. 815; 69 L. J. Ch. 396; 82 L. T. 256 |
| Rutland (Duke) Settled Estates, *In re.* Rutland (Duke) v Bristol (Marquis) | CHD.BYRNE,J | — | 165 | [1900] 2 Ch. 206; 69 L. J. Ch. 603 |
| Saccharin Corporation v Anglo-Continental Chemical Works | CH.D.BUCK.J. | 444 | 135 | |
| ——— v Quincey | CH.D. HDY. J. | — | 135 | [1900] 2 Ch. 246; 69 L. J. Ch. 530; 82 L. T. 792 |
| Saffery, *Ex parte. In re* Vautin | BKCY. | 96 | 15 | [1899] 2 Q. B. 549 |
| ——— (No. 2) | BKCY. | 652 | 15 | [1900] 2 Q. B. 325; 69 L. J. Q. B. 703; 82 L. T. 722 |
| Sagar v Clare | Q.B.D. | — | 63 | 82 L. T. 599 |
| St. Botolph, Aldersgate (Vicar) v Parishioners of Same | CONSIST. CT. OF LONDON. | — | 62 | [1900] P. 69 |
| St. Mary, Islington, Vestry v Hornsey District Council | C.A. | 401 | 122 | [1900] 1 Ch. 695; 69 L. J. Ch. 324; 82 L. T. 580 |
| St. Marylebone Vestry v Sheriff of London | Q.B.D. | — | 168 | [1900] 1 Q. B. 111; 69 L. J. Q. B. 69 |
| St. Saviour's Union v Burbridge | Q.B.D. | 685 | 194 | |
| Salomon, *Ex parte. In re* Raphael | C.A. | — | 182 | 81 L. T. 479 |
| ——— v Naudszus | Q.B.D. | — | 169 | 81 L. T. 325 |
| Salton v New Beeston Cycle Co. | CH.D. STI. J. | 92 | 184 | [1900] 1 Ch. 43; 60 L. J. Ch. 20; 81 L. T. 487 |
| Sanders-Clark v Grosvenor Mansions Co. | CH.D.BUCK.J. | 570 | 133 | [1900] 2 Ch. 373; 69 L. J. Ch. 579; 82 L. T. 758 |
| Sanitary Burial Association, *In re. Ex parte* Wingfield | C.A. | 529 | 44 | [1900] 2 Ch. 289; 69 L. J. Ch. 551; 82 L. T. 639 |
| "Sanspariel," The | C.A. | — | 179 | 82 L. T. 606 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Santley v Wilde | C.A. | 90 | 130 | [1899] 2 Ch. 474; 81 L. T. 393 |
| "Savona," The | P.D. & A.D. | — | 171 | 62 L. J. P. 95 |
| Savoy Hotel Co. v London County Council | Q.B.D. | 351 | 180 | [1900] 1 Q. B. 665; 69 L. J. Q. B. 274; 82 L. T. 56 |
| Saxon Steamship Co. v Union Steamship Co. Union Steamship Co. v Davis | C.A. | — | 174 | 81 L. T. 246 |
| Scott (John), *In re* | Q.B.D. | 205 | 71 | [1900] 1 Q. B. 372; 69 L. J. Q. B. 121; 81 L. T. 610 |
| Scott v Carritt | C.A. | — | 119 | 82 L. T. 67 |
| ——— v Glasgow Corporation | H.L. (SC.) | — | 108 | [1899] A. C. 470; 81 L. T. 302 |
| ——— v Moxon | CH.D. KEK. J. | — | 150 | 81 L. T. 774 |
| Seaton v Burnand. Burnand v Seaton | H.L. | — | 80 | [1900] A. C. 135; 69 L. J. Q. B. 409; 82 L. T. 205 |
| Shamrock Steamship Co. v Storey | C.A. | — | 176 | 81 L. T. 413 |
| Shanghai Council v McMurray | P.C. | — | 168 | [1900] A. C. 206; 69 L. J. P. C. 19; 82 L. T. 101 |
| Sherman v Mason | Q.B.D. | 142 | 20 | [1899] 2 Q. B. 679; 69 L. J. Q. B. 3; 81 L. T. 485 |
| Shaw v Holland | C.A. | 680 | 32 | [1900] 2 Ch. 305; 69 L. J. Ch. 621; 82 L. T. 782 |
| Sherrard v Gascoigne | Q.B.D. | 557 | 87 | [1900] 2 Q. B. 279; 69 L. J. Q. B. 720; 82 L. T. 850 |
| Shoolbred v Roberts | Q.B.D. | — | 19 | [1899] 2 Q. B. 560; 81 L. T. 522 |
| Shuttleworth v Murray | CH.D. HDY. J. | — | 205 | [1900] 1 Ch. 795; 69 L. J. Ch. 423; 82 L. T. 668 |
| Sickert v Sickert | P.D. & A.D. | 268 | 55 | [1899] P. 278; 81 L. T. 495 |
| Silkstone Haigh Moor Coal Co. v Edey | CH.D. STI. J. | 137 | 193 | [1900] 1 Ch. 167; 69 L. J. Ch. 73 |
| Simmonds v Fulham Vestry | Q.B.D. | 574 | 123 | [1900] 2 Q. B. 188; 69 L. J. Q. B. 560; 82 L. T. 497 |
| Simms v Registrar of Probates | P.C. | — | 184 | [1900] A. C. 323; 69 L. J. P. C. 51; 82 L. T. 433 |
| Sion College v London Corporation | Q.B.D. | — | 121 | 69 L. J. Q. B. 766 |
| Slater v Slater | P.D. & A.D. | — | 56 | 69 L. J. P. 48 |
| Sleigh v Tyser | Q.B.D. | — | 83 | [1900] 2 Q. B. 333; 69 L. J. Q. B. 626; 82 L. T. 804 |
| Smith v Abbott. *In re* Abbott Fund Trust | CH.D. STI. J. | 541 | 193 | [1900] 2 Ch. 326; 69 L. J. Ch. 539 |
| ——— v Baxter | CH.D. STI. J. | 458 | 60 | [1900] 2 Ch. 138; 69 L. J. Ch. 437; 82 L. T. 651 |
| ——— v Butler | C.A. | 583 | 196 | [1900] 1 Q. B. 694; 69 L. J. Q. B. 521; 82 L. T. 281 |
| ——— v Dean | Q.B.D. | — | 76 | 69 L. J. Q. B. 331; 81 L. T. 755 |
| ——— v Kerr | CH.D. HDY. J. | — | 28 | 82 L. T. 795 |
| ——— v May. *In re* Morgan | CH.D. STI. J. | 670 | 133 | |
| ——— v Richmond | H.L. | 115 | 139 | [1899] A. C. 448; 81 L. T. 269 |
| ——— v Smith | P.D. & A.D. | — | 58 | [1900] P. 66; 69 L. J. P. 44 |
| "Snark," The | C.A. | 279 | 178 | [1900] P. 105; 69 L. J. P. 41; 82 L. T. 42 |
| Solicitor to Treasury v Lewis. *In re* Dash | CH.D. STI. J. | 694 | 60 | |
| Somerset Drainage Commissioners v Bridgwater Corporation | H.L. | — | 103 | 81 L. T. 729 |
| South African Breweries v King | C.A. | 289 | 46 | [1900] 1 Ch. 273; 69 L. J. Ch. 171; 82 L. T. 32 |
| Southampton Tramways Co. v Southampton Corporation | C.A. | — | 191 | 81 L. T. 652 |
| South Mimms Rural District Council v Barnet Urban District Council | Q.B.D. | — | 10 | 82 L. T. 421 |
| Spearman, *In re*. Spearman v Lowndes | C.A. | — | 167 | 82 L. T. 302 |
| Spencer v Livett | C.A. | 323 | 115 | [1900] 1 Q. B. 498; 69 L. J. Q. B. 338; 82 L. T. 75 |
| Stamford, &c., Banking Co. v Knight | CH.D. NOR. J. | 244 | 199 | [1900] 1 Ch. 287; 69 L. J. Ch. 127; 81 L. T. 708 |
| Stanley of Alderley (Lord) v Wild | C.A. | 242 | 55 | [1900] 1 Q. B. 256; 69 L. J. Q. B. 318; 82 L. T. 14 |
| Stanton v Brown | Q.B.D. | 333 | 91 | [1900] 1 Q. B. 671; 69 L. J. Q. B. 301 |
| Stead, *In re*. Whitham v Andrew | CH.D. FAR. J. | 221 | 210 | [1900] 1 Ch. 237; 69 L. J. Ch. 49; 81 L. T. 751 |
| ——— v Tillotson | Q.B.D. | 431 | 64 | 69 L. J. Q. B. 240 |
| Stegmann v O'Connor | C.A. | — | 50 | 81 L. T. 627 |
| "Stella," The | P.D. & A.D. | — | 5 | [1900] P. 161; 69 L. J. P. 70; 82 L. T. 390 |
| Stephenson v Yorke | CH.D. BUCK. J. | 430 | 151 | [1900] 1 Ch. 505; 69 L. J. Ch. 253; 82 L. T. 55 |
| Stewart v Rhodes | CH.D. STI. J. | 233 | — | |
| ——— | C.A. | 354 | 150 | [1900] 1 Ch. 386; 69 L. J. Ch. 174; 82 L. T. 337 |
| Stock v Meakin | CH.D. KEK. J. | 6 | 104 | [1899] 2 Ch. 496; 81 L. T. 80 |
| ——— | C.A. | 420 | 104 | [1900] 1 Ch. 683; 69 L. J. Ch. 401; 82 L. T. 248 |
| Strathmore v Vane. *In re* Bowes | CH.D. HDY. J. | 604 | 183 | [1900] 2 Ch. 251; 69 L. J. Ch. 544; 82 L. T. 673 |
| Street v Street | C.A. | 450 | 147 | [1900] 2 Q. B. 57; 69 L. J. Q. B. 574; 82 L. T. 648 |
| Stuart v Nixon | C.A. | 598 | 117 | [1900] 2 Q. B. 95; 69 L. J. Q. B. 598; 82 L. T. 489 |
| Styles v Middle Temple Society | C.A. | 164 | 75 | 81 L. T. 426 |
| Swayne v Inland Revenue Commissioners | C.A. | 197 | 77 | [1900] 1 Q. B. 172; 69 L. J. Q. B. 63; 81 L. T. 623 |
| Sykes v Sowerby District Council | C.A. | — | 104 | [1900] 1 Q. B. 584; 69 L. J. Q. B. 464; 82 L. T. 177 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Synge v Synge | P.D. & A.D. | — | 56 | [1900] P. 180 |
| Tallerman v Dowsing Radiant Heat Co. | CH.D. STI. J. | 146 | 68 | [1900] 1 Ch. 1; 68 L. J. Ch. 618 |
| ——— | C.A. | — | 68 | 69 L. J. Ch. 46 |
| Taylor, *In re.* Atkinson v Lord | CH.D. STI. J. | — | 192 | 81 L. T. 812 |
| ——— v Sturrock. Sturrock v Taylor | P.C. | — | 131 | [1900] A. C. 225; 69 L. J. P. C. 29; 82 L. T. 97 |
| ——— v Taylor | P.D & A.D. | — | 58 | 81 L. T. 494 |
| Teacher v Calder | H.L. (SC). | — | 46 | [1899] A. C. 451 |
| Tebb v Cave | CH.D. BUCK. J | 318 | 86 | [1900] 1 Ch. 642; 69 L. J. Ch. 282; 82 L. T. 115 |
| Thacker, In the Goods of | P.D. & A.D. | — | 156 | [1900] P. 15; 69 L. J. P. 1; 81 L. T. 790 |
| Thalmann v Texas Star Flour Mills | C.A. | — | 171 | 82 L. T. 833 |
| Thellusson v Liddard | CH.D. STI. J. | — | 118 | 82 L. T. 753 |
| Thiery v Chalmers | CH.D. KEK. J | 148 | 107 | [1900] 1 Ch. 80; 69 L. J. Ch. 122; 81 L. T. 511 |
| Thomas, *In re.* Evans v Griffiths | CH.D. STI. J. | 299 | 182 | [1900] 1 Ch. 454; 69 L. J. Ch. 219; 82 L. T. 105 |
| ———, *In re.* Weatherall v Thomas | CHD BYRNE, J. | 409 | 164 | [1900] 1 Ch. 319; 69 L. J. Ch. 198 |
| ——— v Devonport Corporation | C.A. | 89 | 99 | [1900] 1 Q. B. 16; 69 L. J. Q. 51; 81 L. T. 427 |
| ——— v Sutters | C.A. | 133 | 99 | [1900] 1 Ch. 10; 69 L. J. Ch. 27; 81 L. T. 469 |
| ——— v Van Oss | Q.B.D. | — | 121 | 69 L. J. Q. B. 665; 82 L. T. 845 |
| Thomson v Clanmorris (Lord) | CH.D. KEK. J. | 39 | 97 | [1899] 2 Ch. 523 |
| ——— | C.A. | 488 | 97 | [1900] 1 Ch. 718; 69 L J. Ch. 337; 81 L. T. 277 |
| Timothy v Crown | CH.D. HDY. J. | — | 152 | 82 L. T. 142 |
| Titchmarsh v Royston Water Co. | CH.D. KEK. J. | 201 | 62 | 81 L. T. 673 |
| Tomlin v Latter. *In re* Price | CH.D. STI. J. | 373 | 208 | [1900] 1 Ch. 442; 69 L. J. Ch. 225; 82 L. T. 79 |
| Transvaal Exploring Co. v Albion Gold Mines | CHD. BYRNE, J | 108 | 36 | [1899] 2 Ch. 370 |
| Treasure, *In re.* Wild v Stanham | CH.D. KEK. J. | 696 | 1 | |
| Trench Tubeless Tyre Co., *In re.* Bethell v Trench Tubeless Tyre Co. | CH.D. KEK. J. | 200 | 43 | |
| ——— | C.A. | 310 | 43 | [1900] 1 Ch. 408; 69 L. J. Ch. 213; 82 L. T. 247 |
| Trigg, In the Goods of | P.D. & A.D. | — | 156 | 69 L. J. P. 47; 82 L. T. 626 |
| Trinidad Asphalte Co. v Ambard | P.C. | 116 | 60 | [1899] A. C. 594; 81 L. T. 132 |
| Trustee, The, *Ex parte. In re* Ely | C.A. | 693 | 15 | |
| ———. *In re* Ford | BKCY. | 688 | 16 | [1900] 2 Q. B. 211; 69 L. J. Q. B. 690; 82 L. T. 625 |
| ———. *In re* Lane-Fox | BKCY. | 650 | 22 | 69 L. J. Q. B. 722 |
| ———. *In re* Plummer | C.A. | 634 | 21 | |
| ———. *In re* Warren | BKCY. | 523 | 15 | [1900] 2 Q. B. 138; 69 L. J. Q. B. 425; 82 L. T. 502 |
| Turnbull, *In re.* Turnbull v Nicholas | CH.D. STI. J. | 136 | 146 | [1900] 1 Ch. 180; 69 L. J. Ch. 187; 81 L. T. 439 |
| ——— v Hayes. *In re* Hayes | CHD. BYRNE, J | — | 143 | [1900] 2 Ch. 332 |
| ——— v Hull Underwriters Association | Q.B.D. | — | 81 | [1900] 2 Q. B. 402; 69 L. J. Q. B. 588; 82 L. T. 818 |
| ——— v Lambton Collieries Co. | C.A. | — | 114 | 82 L. T. 589 |
| Turney, *In re.* Turney v Turney | C.A. | 97 | 206 | [1899] 2 Ch. 739; 69 L. J. Ch. 1; 81 L. T. 548 |
| Tweed, *Ex parte* | C.A. | 4 | 181 | [1899] 2 Q. B. 167; 68 L. J. Q. B. 794; 81 L. T. 1 |
| Tye, *In re* | LUN. | 276 | 108 | [1900] 1 Ch. 249; 69 L. J. Ch. 153; 81 L. T. 743 |
| Tyler v Kingham | Q.B.D. | — | 7 | [1900] 2 Q. B. 413; 69 L. J. Q. B. 630 |
| Tyne Shipowning Co. v Leach | Q.B.D. | 590 | 175 | [1900] 2 Q. B. 12; 69 L. J. Q. B. 353 |
| Tyrell v Woodhouse | CH.D. HDY. J. | — | 200 | 82 L. T. 675 |
| Tyson v Kelcey. *In re* Kelcey | CH.D. KEK. J. | 59 | 127 | [1899] 2 Ch. 530; 81 L. T. 354 |
| Uckfield District Council v Crowborough Water Co. | Q.B.D. | 63 | 105 | [1899] 2 Q. B. 664; 81 L. T. 539 |
| Union Colliery Co. of British Columbia v Bryden | P.C. | — | 26 | [1899] A. C. 580; 81 L. T. 277 |
| United Ordnance Co., *In re. Ex parte* Hooley | BKCY. | — | 18 | [1899] 2 Q. B. 579 |
| Universal Life Assurance Society v Bishop | Q.B.D. | — | 72 | 81 L. T. 422 |
| Upperton v Ridley | Q.B.D. | 494 | 137 | [1900] 1 Q. B. 680; 69 L. J. Q. B. 475; 82 L. T. 233 |
| Upward v Day and Night Advertising Co. *In re* Day and Night, &c., Co. | CH.D. HDY. J. | 362 | 153 | |
| Valentine's Meat Juice Co. v Valentine Extract Co. | CH.D. STI. J. | 127 | 189 | |
| Varley v Whipp | Q.B.D. | 363 | 162 | [1900] 1 Q. B. 513; 69 L. J. Q. B. 333 |
| Vautin, *In re. Ex parte* Saffery | BKCY. | 96 | 15 | [1899] 2 Q. B. 549 |
| ——— (No. 2) | BKCY. | 652 | 17 | [1900] 2 Q. B. 325; 69 L. J. Q. B. 703; 82 L. T. 722 |
| Vavasour, *In re. Ex parte* Vavasour | BKCY. | 543 | 17 | [1900] 2 Q. B. 309; 69 L. J. Q. B. 685; 82 L. T. 622 |
| Vernon Tin Plate Co., *In re. In re* Queen's Hotel Co., Cardiff | CH.D. HDY. J. | 567 | 147 | [1900] 1 Ch. 792; 69 L. J. Ch. 414; 82 L. T. 675 |
| Vickers v Mellor | CH.D. KEK. J. | — | 205 | 81 L. T. 719 |
| Victoria Corporation v Patterson & Lang | P.C. | — | 25 | [1899] A. C. 615; 81 L. T. 270 |
| Vidiz v O'Hagan | C.A. | 516 | 166 | [1900] 2 Ch. 87; 69 L. J. Ch. 507; 82 L. T. 480 |
| Vimbos, *In re* | CH.D. HDY. J. | 520 | 42 | [1900] 1 Ch. 470; 69 L. J. Ch. 209; 82 L. T. 597 |
| Vizetelly v Mudie's Library | C.A. | — | 94 | [1900] 2 Q. B. 170; 69 L. J. Q. B. 645 |

| Name of Case. | Court. | Page in W. R. 1899–00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Vogan v Oulton | C.A. | — | 49 | 81 L. T. 435 |
| Waldegrave (Earl) v Selborne (Earl) | CH.D. NOR. J. | — | 165 | 81 L. T. 632 |
| Wales v Wales | P.D. & A.D. | — | 57 | [1900] P. 63; 69 L. J. P. 34 |
| Walker v Lilleshall | C.A. | 257 | 118 | [1900] 1 Q. B. 481; 69 L. J. Q. B. 192; 81 L. T. 769 |
| Wallis and Barnard's Contract, *In re* | CH.D. KEK. J. | 57 | 197 | [1899] 2 Ch. 515; 81 L. T. 382 |
| Walter v Lane | C.A. | 218 | 52 | [1899] 2 Ch. 749; 81 L. T. 395 |
| Walters v Green | CH.D. STI. J. | 23 | 190 | [1899] 2 Ch. 696; 81 L. T. 151 |
| Walton v Walton | P.D. & A.D. | 622 | 57 | [1900] P. 147; 69 L. J. P. 54; 82 L. T. 627 |
| Ward, *Ex parte*. *In re* Bullock | Q.B.D. | 46 | 24 | [1899] 2 Q. B. 517; 81 L. T. 268 |
| ——— v Wallis | Q.B.D. | — | 126 | [1900] 1 Q. B. 675; 69 L. J. Q. B. 423; 82 L. T. 261 |
| Warren, *In re*. *Ex parte* The Trustee | BKCY. | 523 | 15 | [1900] 2 Q. B. 138; 69 L. J. Q. B. 425; 82 L. T. 502 |
| Wassell v Wassell | P.D. & A.D. | — | 57 | 81 L. T. 496 |
| Wasteneys v Wasteneys | P.C. | — | 59 | [1900] A. C. 446 |
| Watson (Robert) & Co., *In re* | CH.D. KEK. J. | 40 | 40 | [1899] 2 Ch. 509; 81 L. T. 85 |
| Watts v Driscoll | CH.D. FAR. J | 521 | 134 | 82 L. T. 255 |
| Weatherall v Thomas. *In re* Thomas | CH.D. BYRNE, J | 409 | 164 | [1900] 1 Ch. 319; 69 L. J. Ch. 198 |
| Wedderburn v Atholl (Duke). Atholl (Duke) v Glover Incorporation of Perth | H.L. (SC.) | — | 64 | [1900] A. C. 403 |
| Weir v Girvin | C.A. | 179 | 171 | [1900] 1 Q. B. 45; 69 L. J. Q. B. 168; 81 L. T. 687 |
| ——— v Union Steamship Co. | C.A. | — | 172 | [1900] 1 Q. B. 28; 69 L. J. Q. B. 193; 81 L. T. 553 |
| Wellborne, *In re* | CH.D KEK. J. | 375 | 183 | [1900] 1 Ch. 857; 69 L. J. Ch. 462; 82 L. T. 375 |
| Welsbach Incandescent Gas Light Co. v Incandescent Gas Lighting Co. | CH.D. BUCK. J. | 362 | 136 | [1900] 1 Ch. 843; 82 L. T. 293 |
| ——— v New Sunlight Incandescent Co. | C.A. | 595 | 149 | [1900] 2 Ch. 1; 69 L. J. Ch. 546; 82 L. T. 293 |
| Welsh v West Ham Corporation | Q.B.D. | — | 102 | [1900] 1 Q. B. 324; 69 L. J. Q. B. 114; 82 L. T. 262 |
| Wenham, *In re*. *Ex parte* Battams | C.A. | 627 | 17 | |
| Wentworth v Mathieu | P.C. | — | 27 | [1900] A. C. 212; 69 L. J. P. C. 11; 82 L. T. 161 |
| ——— v Wentworth | P.C. | — | 204 | [1900] A. C. 163; 69 L. J. P. C. 13; 81 L. T. 632 |
| West, *In re*. George v Grose | CH.D. KEK. J | 138 | 206 | [1900] 1 Ch. 84; 69 L. J. Ch. 71; 81 L. T. 720 |
| ——— v Diprose | CH.D. HDY. J. | 389 | 23 | [1900] 1 Ch. 337; 69 L. J. Ch. 169; 82 L. T. 20 |
| ——— v Newing | Q.B.D. | — | 48 | 82 L. T. 260 |
| West Ham Charity Board v East London Waterworks Co. | CH.D. BUCK. J. | 284 | 93 | [1900] 1 Ch. 624; 69 L. J. Ch. 257; 82 L. T. 85 |
| Westminster Vestry v Hoskins | Q.B.D. | — | 124 | [1899] 2 Q. B. 474 |
| Weston, *In re*. Davies v Taggart | CH.D. STI. J. | 467 | 20 | [1900] 2 Ch. 164; 69 L. J. Ch. 555; 82 L. T. 591 |
| West Rand Gold Mines v De Rougemont. Driefontein Consolidated Mines v Janson | Q.B.D. | 619 | 80 | [1900] 2 Q. B. 339; 69 L. J. Q. B. 771 |
| Wheeler's Settlement, *In re*. Briggs v Ryan | CH.D. HDY. J. | 10 | 110 | [1899] 2 Ch. 717; 81 L. T. 172 |
| Whinney, *Ex parte*. *In re* Harrison | BKCY. | — | 21 | 82 L. T. 623 |
| Whitehead Brothers, *In re* | CH.D. HDY. J. | 585 | 38 | [1900] 1 Ch. 804; 69 L. J. Ch. 607; 82 L. T. 670 |
| Whitelegg, In the Goods of | P.D. & A.D. | — | 157 | [1899] P. 267; 81 L. T. 234 |
| Whiteley's case. *In re* General Railway Syndicate | C.A. | 440 | 41 | [1900] 1 Ch. 365; 69 L. J. Ch. 250; 82 L. T. 134 |
| Whitham v Andrew. *In re* Stead | CH.D. FAR. J. | 221 | 210 | [1900] 1 Ch. 237; 69 L. J. Ch. 49; 81 L. T. 751 |
| Whittington v Seale-Hayne | CH.D. FAR. J. | — | 90 | 82 L. T. 49 |
| Whitton v Whitton | P.D. & A.D. | — | 58 | [1900] P. 178 |
| Wild v Stanham. *In re* Treasure | CH.D. KEK. J. | 696 | 1 | |
| Williams v London and North-Western Railway Co. | C.A. | — | 106 | [1900] 1 Q. B. 760; 69 L. J. Q. B. 531; 82 L. T. 287 |
| ——— v Scott | P.C. | — | 202 | [1900] A. C. 499; 82 L. T. 727 |
| ——— v Williams. *In re* Hartley | CH.D. NOR. J. | 245 | 99 | [1900] 1 Ch. 152; 69 L. J. Ch. 77; 81 L. T. 804 |
| Wilson v Maryon-Wilson. *In re* Maryon-Wilson | C.A. | 338 | 70 | [1900] 1 Ch. 565; 69 L. J. Ch. 310; 82 L. T. 171 |
| Wiltshire, *In re*. *Ex parte* Eynon | BKCY. | 256 | 23 | [1900] 1 Q. B. 96; 69 L. J. Q. B. 145; 81 L. T. 616 |
| Wingfield, *Ex parte*. *In re* Sanitary Burial Association | C.A. | 529 | 44 | [1900] 2 Ch. 289; 69 L. J. Ch. 551 |
| Witham v Andrew. *In re* Stead | CH.D. FAR. J. | 221 | 210 | [1900] 1 Ch. 237 |
| Woodcock v Holroyd. *In re* Peel | CH.D. KEK. J. | — | 8 | 81 L. T. 504 |
| Woodd, *In re*. *Ex parte* King | BKCY. | — | 19 | 82 L. T. 504 |
| Woods, *Ex parte*. Evans v Woods | P.C. | — | 62 | [1900] A. C. 338 |
| Woolfe v De Braam | C.A. | 161 | 154 | 81 L. T. 533 |
| Woolston v Ross | CH.D. HDY. J. | 556 | 128 | [1900] 1 Ch. 788; 69 L. J. Ch. 363; 82 L. T. 21 |
| Wrexham, Mold, &c., Railway Co., *In re* | C.A. | 311 | 161 | [1900] 1 Ch. 261; 69 L. J. Ch. 291; 82 L. T. 33 |
| Wride v Dyer | Q.B.D. | 73 | 94 | [1900] 1 Q. B. 23; 69 L. J. Q. B. 17; 81 L. T. 453 |
| Wright v Bagnall (John) | C.A. | 533 | 112 | [1900] 2 Q. B. 240; 69 L. J. Q. B. 551; 82 L. T. 346 |
| ——— v Bull | Q.B.D. | — | 53 | [1900] 2 Q. B. 124; 69 L. J. Q. B. 529; 82 L. T. 568 |

| Name of Case. | Court. | Page in W. R. 1899-00. | Column in Digest. | References to Contemporaneous Reports. |
|---|---|---|---|---|
| Wright and Crossley's Application. *In re* Royal Baking Powder Co. of New York | CHD. BYRNE, J | — | 187 | [1900] 2 Ch. 218; 69 L. J. Ch. 589 |
| Wyman v Paterson . . . . . | H.L. (SC.) | — | 193 | [1900] A. C. 271; 69 L. J. P. C. 32; 82 L. T. 473 |
| Yeo v Clemow. *In re* Clemow . | CH. D. KEK. J. | 541 | 3 | [1900] 2 Ch. 182; 69 L. J. Ch. 522; 82 L. T. 550 |
| Young v Kershaw . . . | C.A. | — | 154 | 81 L. T. 531 |
| Zumbeck v Biggs . . | CH. D. KEK. J. | 507 | 150 | 82 L. T. 654 |

THE

# WEEKLY REPORTER,

1899-1900.

1074

## Court of Appeal.

From Q. B. Div.
(A. L. Smith and Vaughan Williams, L.JJ.) July 31, 1899.

ROCHE *v.* LONDON AND SOUTH-WESTERN RAILWAY CO. (*a.*)

*Ship—Limitation of liability—Sum paid into Admiralty Division—Actions under Lord Campbell's Act in the Queen's Bench Division—Transfer of actions.*

*The owners of a ship, on which great loss of life had occurred in consequence of the negligence of their servants, obtained in the Admiralty Division an order limiting their liability to £15,400, and they paid that sum into the Admiralty Division. Actions under Lord Campbell's Act having been commenced against the owners in the Queen's Bench Division,*

*Held, that there was no reason for transferring such actions to the Admiralty Division.*

Appeal from the refusal of Lawrance, J., to order the transfer of an action from the Queen's Bench Division to the Admiralty Division.

The action was brought under Lord Campbell's Act against the London and South-Western Railway Co., as the owners of the steamship *Stella*, to recover damages in respect of the death of the plaintiff's husband, which was caused by the negligence of the defendants' servants in the navigation of *The Stella*, whereby the ship and a great number of lives were lost.

Before the issue of the writ the defendants had commenced proceedings in the Admiralty Division under section 504 of the Merchant Shipping Act, 1894, for limitation of their liability, and Bucknill, J., made an order limiting their liability to £15 for each ton of the ship's tonnage, which amounted to £15,404. The defendants paid this sum into the Admiralty Division.

Other similar actions having been commenced in the Queen's Bench Division, and more being anticipated, the defendants, treating this action as a test case, applied at chambers for an order for the transfer of the action to the Admiralty Division, on the ground that the sum to be distributed being in the Admiralty Division, it would be more convenient and less expensive if all the actions arising out of the matter were tried in that division. Lawrance, J., dismissed the application.

The defendants appealed.

*R. B. D. Acland*, for the defendants.

*Rawlinson, Q.C.*, and *F. M. Abrahams*, for the plaintiff.

A. L. SMITH, L. J.—In my opinion Lawrance, J., has exercised his discretion rightly. There is no reason why the plaintiff should not have her claim assessed by a jury as she wishes. A jury, and not a registrar and merchants, is the proper tribunal to assess damages in an action like this. I think the proper course for the defendants is to let judgment go by default in each of the actions, and the plaintiffs will then go to the Sheriff's Court and have their damages assessed by a sheriff's jury. The defendants have paid into court the sum at which their liability is limited, and it is inmaterial to them what proportion each plaintiff receives. They are entitled to have execution stayed in each action until damages have been assessed in all, and then the total sum will be divided into sums proportionate to the amounts at which the damages of the various plaintiffs have been assessed. The decision in *The Nereid*, 37 W. R. 688, 14 P. D. 78, is in favour of the course which I am now adopting.

VAUGHAN WILLIAMS, L.J., concurred.

*Appeal dismissed.*

Solicitors for the plaintiff, *Biggs, Roche, & Co.*

Solicitors for the defendants, *Bircham & Co.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

---

From Chan. Div.
(Lindley, M.R., and Romer, L.J.) July 14, 1899.

BURDETT-COUTTS *v.* THE TRUE BLUE (HANNAN'S) GOLD MINE (LIMITED). (*a.*)

*Company—Reconstruction scheme—Validity — Limited time for application for shares by old shareholders—Shares at the disposal of new company—Application after the limited time—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

*A scheme for liquidation and reconstruction of a limited company, which provides, as part of the consideration for the sale of the assets, for the issue to members of the old company of shares in the new company, but also provides that to obtain the shares members must apply within a limited time* (e.g., *twenty-one days*) *after receiving notice, that shares not applied for within that time shall be otherwise allotted, and generally that all the shares shall be at the disposal of the new company, is authorized by section* 161 *of the Companies Act,* 1862. *A member of the old company, therefore, who, having by accident omitted to make an application in due time, applies for shares after the limited*

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

*period has expired, and is refused an allotment, is not entitled to an injunction to restrain the two companies and the liquidator from carrying out such a scheme without providing for the claim of such member.*

*Decision of* Kekewich, J., *reversed.*

Dicta *of* Lord Esher, M.R., *in* Nicholl *v.* Eberhardt Co., 61 *L. T. Rep.* 489, 38 *W. R. Dig.* 46, *dissented from.*

Appeal from Kekewich, J.

On the 29th of March, 1899, the plaintiff was the duly registered holder of 500 fully-paid shares of £1 each in the True Blue (Hannan's) Gold Mine (Limited).

At meetings of the company held on the 29th of March, 1899, and the 19th of April, 1899, at which the plaintiff was not present, a special resolution was duly passed and confirmed providing for the reconstruction and voluntary winding up of the company, the appointment of a liquidator, and the registration of a new company to be called by the same name.

By an agreement dated the 24th of April, 1899, and made between the old company and the liquidator of the one part and the new company of the other, it was agreed that the old company and the liquidator should transfer, and the new company should take over all the property and business of the old company as therein set out; that, as part of the consideration for the transfer, the new company should undertake to satisfy the debts and liabilities of the old company, and that the new company should pay the costs and expenses of winding up the old company. By clause 4 it was provided that, as the residue of the consideration for the transfer, every member of the old company should in respect of each share held by him be entitled as of right to claim an allotment for himself or his nominee of one £1 share in the new company with the sum of 17s. credited as paid up thereon, and that the new company should allot the shares so claimed. Clause 5 provided as follows: "A member entitled to claim an allotment as aforesaid must claim the same within twenty-one days from the date hereof or such further time (not exceeding fourteen days) as the new company shall determine, by sending in to the new company a claim in writing for the allotment of the shares, and such claim must be signed by the member making the same, and must be accompanied by the sum of one shilling per share claimed; and where it requests that the allotment be made to a nominee of such member, it must be countersigned by such nominee." Clause 6 provided that the liquidator should, within the next seven days, give notice in writing of the agreement to each member of the old company; and by clause 7 the liquidator, when sending such notice, was to invite the members of the old company, other than dissentient members within the meaning of section 161 of the Companies Act, 1862, to apply for such shares of the new company as, but for their dissent, would have been claimed by the dissentient members, and also for such of the shares of the new company as members of the old company other than dissentient members should be entitled to claim but should not claim within the limited period (all of which shares were referred to as surplus shares); and in the event of more than the surplus shares being applied for the new company were to accept the applications, and allot the surplus shares rateably according to the holding in the old company of the number applying. The new company were to be under no obligation to accept any such application, and if any such application were refused, or accepted in part only, the sum remitted with the application, or the due proportion thereof, was to be returned to the member. Under clause 8 such of the surplus shares as the members of the old company, other than dissentient members, should be entitled to claim, but should not within twenty-one days claim, and as should not be allotted under clause 7, were to be allotted to W. F. Turner under a prior underwriting agreement.

At the end of April, 1899, the plaintiff received notice of the agreement, and a form of application for shares in the new company. He went abroad on the 19th of May, and through inadvertence did not send in his form of application for shares in the new company until the 26th of May. The defendants refused to allot him any shares in the new company on the ground that he was out of time.

The plaintiff therefore brought this action against the two companies and the liquidator, and moved before Kekewich, J., for an injunction to restrain the old company and the liquidator from transferring or dealing with, and the new company from allotting, any shares in the new company until the plaintiff's claim to have shares allotted to him was first provided for.

Kekewich, J., granted the injunction asked for, and the defendants appealed.

*Rowden, Q.C.*, and *B. K. R. Wilkinson*, for the appeal, referred to *Postlethwaite* v. *Port Philip and Colonial Gold Mining Co.*, 38 W. R. 246, 43 Ch. D. 452; *Griffith* v. *Paget*, 25 W. R. 821, 6 Ch. D. 511; and section 161 of the Companies Act, 1862. [They were then stopped.]

*P. O. Lawrence, Q.C.*, and *Austen Cartmell*, for the plaintiff, referred to *Wall* v. *London and Northern Assets Corporation*, 47 W. R. 219, [1898] 2 Ch. 469; *Nicholl* v. *Eberhardt Co.*, 61 L. T. Rep. 489, 38 W. R. Dig. 46; Buckley on Companies (7th ed.), p. 428, where *Weston* v. *New Guston Co.*, 62 L. T. 275, 38 W. R. Dig. 45, is cited.

*Warrington, Q.C.*, and *Peterson; A. R. Kirby; Ashton Cross;* and *Eustace Smith*, for other parties.

*Rowden, Q.C.*, replied.

LINDLEY, M.R., said: In this case it appears to me that the appellants are entitled to succeed. I think that, when you come to look at it, it is impossible to take the view that this scheme is open to the objections in point of law which Mr. Lawrence has urged against it. First of all it must be borne in mind that we are not asked to approve of a scheme. It is said that the working of some of these provisions is or may be a hardship upon the plaintiff or other persons similarly situated. If we were asked to approve the scheme, it may be that we ought to listen to that; but our function here is quite different. The scheme has been considered and duly passed by meetings of shareholders, and has become binding upon all concerned if it can be made binding, that is, if it is not *ultra vires*. What we have now to decide is a pure question of law. In order to settle that question of law we must look at the section—section 161 of the Companies Act, 1862—which authorizes, or is supposed to authorize, what has here been done, and see whether the provisions of this agreement come within the authority the Legislature has conferred upon majorities of shareholders. [His lordship read the section, stated the material provisions of the agreement, and proceeded:] It is in practice, and as a business matter, impossible to work out a matter of this kind unless a time for sending in claims is fixed. If the time fixed were so short as to be unreasonable it would, of course, be set aside by the court; but without some time limit you cannot work this arrangement through. If no time limit was fixed the law would imply that the claims must be sent in within a reasonable time, and there would

be endless disputes about what was a reasonable time. There can therefore be no objection to a provision of that sort. Clause 6 of the agreement requires that the liquidator of the old company shall, within seven days from the date thereof, give notice in writing of the agreement to each member of the old company. It is plain from the terms of the agreement itself that it was foreseen that there may be, and probably will be, some persons, members of the old company, who have not sent in their claims within that period, and, if so, invitations are to be sent out to the shareholders of the old company to apply for the surplus shares. Then it is further stated that the application made to the new company must mention the number of surplus shares which the member is willing to take, and must be delivered to the new company within twenty-one days. The new company, of course, is not under any obligation to accept those applications. That is plain, and in fact the agreement says so expressly. Suppose the new company did not accede to any of the applications made to them: the result is that they have got the shares and the assets of the old company, and they are therefore the masters of the situation. Then comes clause 8. When you look at that clause and consider that this is a scheme by which the new company took over the assets of the old, which were transferred upon the consideration of certain obligations undertaken by the new company as to allotment of shares and so on, one of the provisions of the scheme being that the shares shall be at the disposal of the new company, I confess that I think that scheme is quite warranted by section 161. The objection is that this is a provision for forfeiting the shares of the old company; and in a sense, no doubt, you may use that language. But the real effect of the offer is: You, the shareholders, shall have shares in the new company if you choose to take the trouble of applying for them; if you do not apply, you may be treated as saying that you do not care to have them. It appears to me that this is a scheme which is sanctioned in principle by the decision in *Postlethwaite* v. *Port Philip and Colonial Gold Mining Co.* I think, indeed, that this case goes one step farther. I have not before seen any scheme worked out in such detail; but, having looked at it, it appears to me that it is warranted by the section. If that is so, this injunction cannot be sustained. The view upon which the learned judge proceeded in granting this injunction has been encouraged by the query in Mr. Buckley's book on Companies (7 ed.), at p. 428, and the doubt raised by him. My predecessor, Lord Esher, in *Nicholl* v. *Eberhardt Co.*, expressed some doubt as to whether a stipulation in an agreement of this kind that shares not applied for should be at the disposal of the new company was not inconsistent with section 161 of the Companies Act, and therefore void. I now answer the query, and at the same time dissent from the observations of my predecessor. He was not considering a case like this, and he was careful to say that he did not decide the question.

The appeal must be allowed, and the order of the learned judge granting an injunction must be discharged.

ROMER, L.J.—I agree with the Master of the Rolls in thinking that this injunction should be dissolved. In the first place, if the agreement of the 24th of April is valid, the plaintiff has no right to an injunction at all, for the defendants are certainly not doing anything contrary to the provisions of the agreement, or anything outside of its provisions. Therefore, the question in the case comes to this: Was this agreement valid and binding, or was it outside of the powers conferred by section 161 of the Companies Act, 1862? It is not suggested that the transaction is not a perfectly honest one. The agreement was honestly entered into by the liquidator and the shareholders as a whole. It is not suggested that it was entered into for any improper purpose. If what has been done is within section 161 of the Companies Act, there is nothing which should induce the court to refuse to allow it to be carried out. I think that when that section is considered it is clear that this agreement is within it. It appears to me that in those circumstances any shareholder who does not like the scheme ought to attend at the meeting and vote against it. If he is outvoted, his next course is to dissent in accordance with section 161. It is no answer to say, "I was ill, or abroad, or careless and negligent, and did not dissent." That is the shareholders' own fault or misfortune; but he has to abide by the provisions of section 161. He cannot claim shares unless he applies for them within the proper time. The truth is that the argument urged before us is based on this, that this scheme ought to be treated as invalid, because sufficient protection is not afforded by it to those shareholders who are ill, or abroad, or weak-minded, or negligent. But the scheme cannot be upset or held invalid on such considerations. It is useless to suppose that a scheme otherwise good would be held bad because it might bear hardly upon certain shareholders who, owing to their own fault or misfortune, were unable to apply for shares within twenty-one days. Really, the case before us has already been decided in principle by prior authorities. There is really no distinction in principle between the present case and some prior cases. If, then, it is only a question of degree, and not of principle, if the agreement is within section 161, there is no reason on the face of it why that agreement should not be acted upon. We must act upon the agreement unless we can show conclusively that it is not within section 161, either because it is a dishonest transaction, or as going beyond what that section authorizes. I have endeavoured to show that it does not go beyond what the section authorizes. It appears to me that it is *intra vires*, and must be enforced. On that ground the plaintiff's case fails, and he has no right to come to the court and ask for an injunction.

*Appeal allowed.*

Solicitors, *Kimbers & Boatman; Lawrence, Graham, & Co.; Hays, Schmettau, & Dunn; Ashurst, Morris, Crisp, & Co.; Russell & Arnholz; Moore, Hewitt, & Farmer.*

---

From Chan. Div. (Lindley, M.R., Jeune, P., and Rigby, L.J.) — June 29, 1899.

OLIVER v. HINTON. (a.)

*Mortgage—Deposit of deeds—Subsequent purchaser for value without notice—Gross negligence—Priority.*

*Gross negligence on the part of a subsequent purchaser for value without notice will disentitle him to protection against a prior incumbrancer, even though there is no question of fraud on his part.*

*A purchaser for value without notice of any incumbrance obtained a conveyance of the legal estate in certain houses, but did not require an abstract of title or production of the title deeds. He did ask where the deeds were, and was told that they were in*

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*the possession of the vendor, but would not be delivered up as they related to other property. It was subsequently discovered by the purchaser that the deeds had been deposited with a prior equitable mortgagee.*

*Held, that the purchaser had acted with gross carelessness and would not be allowed to deprive the mortgagee of her security.*

Ratcliffe *v.* Barnard, 19 *W. R.* 764, *L. R.* 6 *Ch. App.* 652, *commented on.*

*Decision of* Romer, J., *affirmed.*

This was an appeal against a decision of Romer, J.

The plaintiff Mrs. Oliver was an equitable mortgagee by deposit of title deeds of some houses, which the mortgagor, Hill, subsequently sold to the defendant Mary Ann Hinton without notice of the mortgage. The defendant did not employ a solicitor, but managed the transaction through an agent named Price. Price gave evidence that no abstract of title was furnished, and that he did not require one. He did ask to see the deeds, but he was told by the mortgagor that the deeds were in his possession, but would not be delivered to the purchaser because they also related to other property of the mortgagor. Price accepted this assurance, and made no further inquiry whatever. As a result the purchaser was never aware of the existence of the plaintiff's mortgage. The plaintiff having brought an action against the purchaser to enforce her charge, Romer, J., held that she was entitled to priority over the purchaser, on the ground that there had been gross negligence in not requiring the production of the title deeds.

The defendant appealed.

*Cavanagh*, for the appellant.—In this case there is no question of fraud. It has been repeatedly held that to deprive a purchaser for value without notice of his property there must be gross negligence amounting to fraud. Here an inquiry was made for the deeds, and the purchaser was put off with a reasonable excuse. According to the authorities this would relieve him from a charge of gross negligence.

He referred to *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Plumb* v. *Fluitt*, 2 Anstr. 432; *Birch* v. *Ellames*, 2 Anstr. 427; *Hewitt* v. *Loosemore*, 9 Hare 449; *Espin* v. *Pemberton*, 7 W. R. 123, 221, 3 De G. & J. 547; *Farrand* v. *Yorkshire Banking Co.*, 37 W. R. 318, 40 Ch. D. 182; *Ratcliffe* v. *Barnard*, 19 W. R. 340, 764, L. R. 6 Ch. App. 652; *Jones* v. *Smith*, 1 Hare 43; *English and Scottish Investment Co. v. Brunton*, 41 W. R. 133, [1892] 2 Q. B. 700; *Garnham* v. *Skipper*, 34 W. R. 135; *Brown* v. *Steadman*, 44 W. R. 458; *Maxfield* v. *Burton*, 22 W. R. 148, L. R. 17 Eq. 15; *Hiern* v. *Mill*, 13 Ves. 114; *Tourle* v. *Rand*, 2 Br. Ch. Cas. 649; *Ex parte Hardy*, 2 Deac. & Chitty 393; *Carter* v. *Carter*, 3 K. & J. 617, 6 W. R. Ch. Dig. 48; *Jones* v. *Williams*, 5 W. R. 540, 775, 24 Beav. 47; *Peto* v. *Hammond*, 30 Beav. 495, 11 W. R. Ch. Dig. 119; *Worthington* v. *Morgan*, 16 Sim. 547; *Colyer* v. *Finch*, 5 H. L. Cas. 905, 5 W. R. Ch. Dig. 56; *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 32 W. R. 626, 26 Ch. D. 482.

*Rowden, Q.C.*, and *J. B. Mathews*, for the plaintiff, were not called upon.

LINDLEY, M.R.—I do not think that this case presents any serious difficulties when once the facts are understood. The defendant has been cheated by Hill, but she has not been cheated in any way by the plaintiff. In 1888 Hill mortgaged five cottages to the plaintiff, three of which are the subject of this action. This was not a legal mortgage, but an equitable mortgage by deposit of title deeds accompanied by a memorandum of deposit by which Hill agreed to execute a legal mortgage when requested by the plaintiff to do so. The plaintiff has therefore a good equitable mortgage, and cannot be charged with any neglect or breach of duty in not obtaining a legal mortgage. She ran the risk, however, of losing her priority in case the legal estate was conveyed to a subsequent purchaser for value without notice of her charge. Who is it now claims to override her charge? The only person who is entitled to do so, if he has acquired his title subsequently to hers, is a *bonâ fide* purchaser for value without notice of the charge. But that does not include a purchaser for value who is so grossly careless that he does not take the ordinary precautions which ought to be taken in such a matter. He may be a *bonâ fide* purchaser for value without notice of a prior charge, but he is not entitled to the protection of the court. I do not base my judgment upon constructive notice, nor do I mean to suggest that there was any fraud or any complicity in fraud on the part of either the defendant or his agent. Price's evidence was given with perfect candour. He was a friend of the defendant, and she left the whole management of the purchase to him. He inquired for the deeds and he was told by Hill that they were in his possession but would not be delivered to the purchaser because they also related to other property. No abstract of title was either asked for or delivered, and there was no further inquiry as to the title. Price in the witness-box admitted that he made a mistake in not asking to see the deeds, but said he relied upon Hill.

Can a purchaser of property be regarded as a *bonâ fide* purchaser without notice and entitled to the protection of the legal estate when he acts in this way and takes none of the ordinary precautions? To allow a purchaser who acts with such gross carelessness as the defendant did to deprive a prior innocent mortgagee of her priority would be a great injustice. None of the cases cited really assist the defendant with the exception of *Ratcliffe* v. *Barnard*. The actual decision in that case was right, but I think that James, L.J., went too far in his judgment when he said that in order to deprive a man of his legal security "he must have been guilty of fraud or of that wilful negligence which leads the court to conclude that he was an accomplice in the fraud." I am not prepared to go that length, and I do not think what was said by James, L.J., is justified by the case of *Hunt* v. *Elmes*, 9 W. R. 362, 2 De G. F. & J. 578, to which he referred. In that case and also in *Hewitt* v. *Loosemore* it was said that to deprive a man of the protection of the legal estate he must have been guilty of either fraud or gross and wilful negligence. In order to deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate I do not think it essential that he should have been guilty of fraud. It is sufficient that he should have been guilty of such gross negligence as to render it unjust to deprive the prior incumbrances of his priority. The appeal must be dismissed.

JEUNE, P.—I am of the same opinion. I have endeavoured to discover the principle underlying the cases referred to. This class of case depends on mixed questions of fact and law, but so far as I understand them, I think the principle is that there must be gross negligence on the part of the subsequent purchaser for value without notice to disentitle him to the protection of the legal estate. The observations of James, L.J., in *Ratcliffe* v. *Barnard* would appear to show that he thought there must have been either fraud on the part of the purchaser or such gross negligence as to lead the court to infer fraud on his part. In this case there is

no fraud on the part of the purchaser, only gross negligence in the ordinary sense of the word. But we must look at the judgment of James, L.J., in the light of the other authorities. I think they show that what he meant was, not such conduct as would entitle a jury or a judge at common law to find that there had been actual fraud, but negligence so gross as would justify the Court of Chancery in concluding that there had been fraud in an artificial sense of the word—such gross negligence as consisted in not making an inquiry as to the title to the property. In that sense I think in this case there has been such gross negligence on the part of the defendant as would almost have led the Court of Chancery to impute fraud, although I do not mean to suggest that there has been any fraud in fact. But there has been such gross negligence on the part of the defendant as to disentitle her to be protected as a *bonâ fide* purchaser for value without notice of the plaintiff's charge.

RIGBY, L.J.—I am of the same opinion, and so entirely concur in what has been said by Lindley, M.R., and Jeune, P., that I will not repeat it. I will only say that I consider that most of the authorities cited as being in favour of the appellant are, when considered, hostile to her. In many of them it is said that if a purchaser makes inquiries and gets an answer with which he might reasonably be satisfied he is excused from making further inquiries. Most of the cases relate to the delivering up of title deeds, but the answer with which the purchaser may rest satisfied must be an answer to the question which, under the circumstances, he ought to ask. In the present case production of the title deeds ought to have been demanded by the purchaser—not delivery. When he was told that the vendor had the deeds he did not (as he ought to have done) say "Let me see them." I do not mean to say that if he had done so the vendor might not have given him an answer which he could reasonably have accepted. But he got no reasonable answer because the question never was put. The vendor was never asked to produce the deeds. With reference to the language of James, L.J., in *Ratcliffe* v. *Barnard*, which has been referred to, a court is not bound to treat the language of a judge adopted in a particular case he was dealing with, as laying down a principle of law applicable to other cases. In the present case no proper inquiry was made by the defendant's agent, and it is, in my opinion, just the same thing as if he had made no inquiry at all about the deeds.

*Appeal dismissed.*

Solicitors, *Timbrell & Deighton*, for *Dobbs & Hill*, Worcester; *A. Hunt*, for *R. A. Essex*, Worcester.

---

From Q. B. Div. (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) June 5, 1899.

*Ex parte* TWEED. (*a*.)

*Solicitor — Costs—Charging order—Property recovered or preserved—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

*A testator devised his estate to his wife for life, and after her death to his two daughters, of whom one was legitimate and the other illegitimate. The daughters having opposed probate of the will, an action was commenced by the executor, in which the will was upheld.*

*Held, that the solicitor of the executor was entitled to a charging order for his costs on the property devised, as being property preserved through his instrumentality.*

Appeal from the refusal of Grantham, J., to make a charging order under section 28 of the Solicitors Act, 1860.

A testator by his will devised and bequeathed his real and personal estate to his wife for life, and after her death to his two daughters in equal shares. One of the daughters was a legitimate daughter by a former wife, the other was illegitimate. The greater part of the estate was real property. On the death of the testator the daughters opposed probate of the will. The executor commenced an action in the Probate Division to establish the will, and the case was tried before Grantham, J., at Lincoln Assizes. The learned judge upheld the will, and ordered the daughters to pay the executor's costs. The solicitor of the executor, being unable to obtain payment of the costs from the daughters, applied to Grantham, J., at chambers for an order under section 28 of the Solicitors Act, 1860, declaring that he was entitled to a charge upon the property devised and bequeathed by the will as being property recovered or preserved through his instrumentality.

Grantham, J., refused to make an order, being of opinion that the case did not come within the section. The solicitor appealed.

*W. H. Stevenson*, for the appellant.

*Lampard*, for the respondents.

The following cases were cited: *Catlow* v. *Catlow*, 25 W. R. 866, 2 C. P. D. 362; *Bulley* v. *Bulley*, 26 W. R. 638, 8 Ch. D. 479; *Greer* v. *Young*, 31 W. R. 930, 24 Ch. D. 545.

A. L. SMITH, L.J.—The appellant asks for a charging order on the ground that property has been recovered or preserved in the probate action through his instrumentality. He says that, at any rate, the interests which the wife and illegitimate daughter take under the will were preserved; and he further says that the interest which the legitimate daughter takes under the will was preserved, though she would have taken as heiress-at-law in case of intestacy. Grantham, J., thought that no property had been recovered or preserved within the meaning of the section, and he held that he had no jurisdiction to make a charging order. I am of opinion that the cases which have been cited show that he had jurisdiction to make an order, for they establish that this property was preserved through the instrumentality of the appellant within the meaning of the section. I think that a charging order ought to be made on the whole property, both the life interest of the wife and the reversionary interests of the daughters. The appeal must be allowed.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

*Appeal allowed.*

Solicitors for the appellant, *Clinton & Co.*, for *F. G. Tweed*, Gainsborough.

Solicitors for the respondent, *F. D. W. Hatton*, for *C. T. Rhodes*, Halifax.

---

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

## High Court of Justice.

Chan. Div. } Kekewich, J. } July 4, 5, 1899.

STOCK v. MEAKIN. (a.)

*Vendor and purchaser—Private street works—Charge—Completion of works—Final apportionment—Date when charge comes into existence—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 257—*Private Street Works Act,* 1892 (55 & 56 *Vict. c.* 57), *s.* 13.

*The apportioned expenses of private street works executed by an urban authority are, under section* 13 *of the Private Street Works Act,* 1892, *charged upon the premises affected from the date of the completion of the works.*

Action.

By an agreement dated the 10th of October, 1898, F. Meakin, the vendor, agreed to sell to the agent of the purchaser, W. Stock, in fee simple in possession, a piece of freehold land in the parish of West Ham, in Essex.

Clause 2 provided that up to completion "all rent (if any) and outgoings were, if necessary, to be apportioned," and clause 4 that the premises were sold subject "to any subsisting liability to repair party walls, fences, roads, or streets."

The piece of land abutted on a private road called Queen's-road. The purchaser asked if this road had been taken over by the parish and all charges in connection with it paid, to which the vendor replied that he did not know, but that he had never paid any charges for the road.

The purchase was completed on the 22nd of November, 1898, by a conveyance of that date, in which the vendor, after reciting that he had agreed to sell "free from incumbrances," as "beneficial owner," conveyed and confirmed the land to the purchaser.

On the 29th of November, 1898, the purchaser received from the urban authority a notice of the final apportionment of a sum of £130 14s., for private street works executed by the authority in Queen's-road under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57). The works had been completed on the 26th of July, 1898.

It appeared that the vendor, having himself recently acquired the property, had not received the notices of the provisional apportionment of the cost of the works. The purchaser paid the sum demanded and then brought this action to recover it, with interest, from the vendor. Whether the vendor or the purchaser ought to bear the cost of the works depended on whether it was a charge on the premises from the date of the completion of the works, the 26th of July, before the contract for sale, or the date of the final apportionment, the 29th of November, after the contract for sale.

The Private Street Works Act, 1892, s. 1, provides: "This Act may be cited as the Private Street Works Act, 1892, and shall be construed as one with the Public Health Acts . . . , and this Act and the Public Health Acts may be cited together as the Public Health Acts"; and section 13 (1) provides: "Any premises included in the final apportionment and all estates and interests from time to time therein shall stand and remain charged (to the like extent and effect as under section 257 of the Public Health Act, 1875) with the sum finally apportioned on them, or if objection has been made against the final apportionment, with the sum determined to be due as from the date of the final apportionment with interest. . . ."

*P. O. Lawrence, Q.C.*, and *P. F. Wheeler*, for the purchaser.—The Act of 1892 is to be construed as one with the Act of 1875, section 257 of which latter Act is expressly incorporated in section 13 of the Act, 1892. Under the Act of 1875 and previous Public Health Acts it has been held that a charge of this nature comes into existence at the date of the completion of the works: *In re Bettesworth and Richer*, 36 W. R. 544, 37 Ch. D. 535; *Tottenham Local Board* v. *Rowell*, 29 W. R. 36, 15 Ch. D. 378; *Hornsey Local Board* v. *The Monarch Investment Building Society*, 38 W. R. 85, 24 Q. B. D. 1; *In re Boor, Boor* v. *Hopkins*, 37 W. R. 349, 40 Ch. D. 572; *Corporation of Birmingham* v. *Baker*, 17 Ch. D. 782, 30 W. R. Dig. 121. This charge therefore came into existence at the date of the completion of the works, and the cost ought to be borne by the vendor as an "outgoing," and as an incumbrance within his covenants as "beneficial owner" for freedom from incumbrances, and further assurance.

*Warrington, Q.C.*, and *Vaughan Hawkins*, for the vendor.—The authorities cited do not apply, for this Act of 1892 is distinct from the Act of 1875. Under section 150 of the latter Act the owner is to do the work, and the urban authority only do it if the owner is in default, whereas under this Act of 1892 the urban authority are to do the work themselves directly. The Act of 1892, sections 6 and 7, in dealing with provisional apportionment, speaks of the premises as "liable to be charged." Not until dealing with the final apportionment in section 12 are they spoken of as "charged." Section 13 of the Act of 1892 says the premises are to remain charged "with the sum finally apportioned on them," which must mean there is to be no charge until the final apportionment is made. This charge did not, therefore, come into existence until the date of the final apportionment; it is not an "outgoing," nor is it an incumbrance, and it ought to be borne by the purchaser.

KEKEWICH, J.—Here the decision of a short point has occupied a long time, but it was quite inevitable, and Mr. Lawrence could not have argued his client's case without calling my attention to the Acts of Parliament which he mentioned and to the several authorities in which those Acts of Parliament have been construed, and of course it has been necessary to refer to them in some detail. But now we have had a full discussion the point is an extremely short one, not by any means without difficulty, but not the less a short one because of difficulty. The difficulty arises from the habit of the Legislature, which has increased of late years, of making enactments by reference and incorporating previous Acts.

That is the mainspring of the difficulties in this case.

Section 13 of the Act of 1892, which is the critical section, though not by any means the one section of that Act which requires attention, refers to the Act of 1875, and obviously depends on the Act of 1875 in great measure, and particularly on section 257 of that Act, and yet some modifications are introduced which are introduced not by repeating language with alteration, but by incorporation.

Mr. Warrington boldly met that difficulty by saying that the Act of 1892 is an independent Act. Of course he did not mean that it was out of place to refer to the Act of 1875, or to the decisions on that Act, but he said the Act of 1892 was an independent Act, and you must construe it, I think he went so far as to say, independently of the Act of 1875. Now that seems to me impossible because it is wholly incon-

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

sistent with the language of the Act of 1892. The first section of the Act of 1892 introduces the great difficulty to which I have referred, "This Act may be cited as the Private Street Works Act, 1892, and shall be construed as one with the Public Health Act," which includes, of course, the Act of 1875 and so on, "and this Act and the Public Health Act may be cited together as the Public Health Acts"; that is to say, it is like another chapter in the book or another section in the Act or a *fasciculus* of sections—to use a term which is familiar to us—added to the Act of 1875. The two Acts, and a great many others with which fortunately we are not now here concerned, are to be read as one. Therefore I cannot possibly say that I may construe the Act of 1892 independently, and not as depending upon the Act of 1875.

The real question which I have to decide is whether this sum which is clearly now charged on the premises in question though sold by the defendant to the plaintiff was so charged before the date of the contract. It matters not whether we take the date of the contract or conveyance, because it is now admitted that the works were completed on the 26th of July, 1898, and as the contract is dated the 10th of October in that year, the conveyance of course being later, we may take the contract on the one hand and the completion of the works upon the other as the crucial dates. That is the question. Expenses of this character were charged under the Act of 1875, and the question when that charge took effect has been discussed in several cases. It arose in the case of *Hornsey Local Board* v. *The Monarch Investment Building Society*. I agree that the real question with which the Court of Appeal had to deal there was how far the Statute of Limitations became applicable—that is to say, from what date it became applicable, and their judgments are directed mainly to that point, but in order to ascertain from what date the Statute of Limitations began to run, they were obliged to consider and express a judicial opinion on the question when the charge took effect. It is true they considered it tolerably plain, but they had to consider it, and they had, if not to decide it, to express a judicial opinion upon it, and it is expressed in a very few words as plainly as can be by the Master of the Rolls, who says: "The conclusion of the whole matter appears to me to be this. It has been settled by this court in the case of *Tottenham Local Board* v. *Rowell*, which has been followed by North, J., in *In re Bettesworth and Richer*, that the charge is a present existing charge as from the time of the completion of the works. The actual amount, no doubt, has to be ascertained, but the charge exists." After that, of course, it is quite impossible to say under the Act of 1875 the charge came into existence at any other time than the completion of the works. Then is that rule to be applied to the Act of 1892, or does the later Act introduce exceptions? We have no decision on the Act of 1892, and having regard to the passage I have just read, it seems to me quite unnecessary to refer to any other decisions on the Act of 1875, or on the preceding Acts, for some of them went back to the Act of 1848. I may say in passing that I do not consider the case of *In re Boor, Boor* v. *Hopkins*, before Kay, J., to be of any value in the present instance to either side, because it is quite obvious from a perusal of the case that Kay, J., was discussing an entirely different question, and the case has been so accepted. Passing that case by, and taking these decisions as establishing, as they do, the position which I have mentioned from the present Master of the Rolls' judgment, let us look at the Act of 1892 to see in what respect it differs from the Act of 1875—that is to say, what difference the Act itself constitutes. There are no doubt other differences, but in what respect has the Legislature said that the procedure, and the incidence of the charge are to differ in the Act of 1892 from those under the Act of 1875, bearing in mind that this Act of 1892 is to be read as one with the Act of 1875. No doubt a very important difference has been introduced, about which there is no question. Under the Act of 1875, and as far as I am aware under all the previous Public Health Acts, wherever improvements were required which the urban or district authority had power to construct, the owner was given opportunity of doing the works at his own expense.

It has seemed right to the Legislature as regards this Act of 1892 to reverse that, and to say that the owner shall not have that opportunity, the works must be done for him by the local authority, and all he has to do and all he has an option of doing is to pay the expense. That, no doubt, is an alteration, and much has been made of it in this way; it is said that the default of the owner to comply with the requirements of the local authority to execute the works is what governs the decisions. I do not follow that criticism throughout, nor do I think it is of much avail on the present occasion; but it is a distinction no doubt. Then the language unfortunately is rather different, and Mr. Warrington called my attention to one verbal difference which must be treated by itself. In section 6, sub-section 2 (c), a provisional apportionment is spoken of as having to be prepared by the local authority, and it is "a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act." In section 7, again, you have that exact phrase with reference to the provisional apportionment, because the owner has a month during which he may object to the proposed works, and he is described as the owner of any premises shown in a provisional apportionment as "liable to be charged" with any part of the expense. But when you come on later to section 12 the phrase is changed, and you come then to the final apportionment, and then the premises are spoken of as "charged," and not as "liable to be charged"; and on that hangs the argument that the Legislature intended, while incorporating the Act of 1875, or rather making this Act a part of the Act of 1875 and one with it, by those words to indicate that until the final apportionment there was no charge, notwithstanding that in 1892 it had been settled by a series of decisions that under the Act of 1875 the charge existed when the works were completed. That is a strong thing to hold, but with an Act of Parliament of this kind when one has to construe language you must make the best of it. It seems to me these words in section 6, "liable to be charged therewith under this Act," are a mere description of the premises thus spoken of. There is to be a provisional apportionment of the estimated expense, and it is to be distributed—that is to say, apportioned according to the proper values among the premises. What premises? Why, the premises which under this Act of Parliament are those properly chargeable therewith—not others, but only those. If any others were included they would be wrongly included. The distribution of the expense is to be made on a proper scale among the premises properly chargeable according to the Act. I think that is what it means, and nothing more. It is a mere description of the premises. If so, the words in section 7, "the owner of any premises shown in the provisional apportionment as liable to be charged," are merely referential to the preceding section. One of the first things the owner may object to is that he is not liable to be charged. He may object to the

proposals of the urban authority on any of the following grounds—that is to say, section 7 (*a*), that an alleged street or part of a street is not or does not form part of the street within the meaning of this Act. He may make that objection under that clause, or under 7 (*e*), "that any premises ought to be excluded from or inserted in the provisional apportionment." He may say that house No. 1 ought to be excluded because it is not chargeable—that is to say, not liable to be charged; or that house No. 6, which is not in the provisional apportionment, ought to be there because it is properly chargeable—that is to say, liable to be charged. That seems to me to give the words to which I have referred in the section a thoroughly plain meaning, and one ought not to be surprised to find that different language is used in section 12, nor is it in the slightest degree out of place that the premises are there spoken of as "charged" when the final apportionment has been completed. Such objections as the owners had to raise to it have been raised and decided and now you know, subject to the possible power to object even to the final appointment, what premises are charged, and they are treated then as "charged," and not as "liable to be charged." The description of the premises there is not required. I think with that I may pass to section 13, on which, of course, a good deal depends: "any premises included in the final appointment and all estates and interests from time to time therein shall stand and remain charged." Mr. Wheeler has conjured up a vision of some charge before created and there referred to as standing and remaining, but I think that is a little hypercritical and I cannot construe even an Act of Parliament on that argument. But I am bound to say every word requires consideration and possibly it is open to more than one construction. Then there are introduced into this section in a parenthesis these words: "to the like extent and effect as under section 257 of the Public Health Act, 1875." I apprehend that the reference to the Act of 1875 and section 257 was really unnecessary. This Act is part of the Act of 1875, and it might very well be that the charge would have been by reference to the Act of 1875 without this. But I consider it quite unnecessary to go as far as that on the present occasion, and it is only a passing remark. Nor am I disposed to say what is the real meaning of "the like extent and effect." It may mean a great many things, but I think we have a clear induction here that section 257 of the Public Health Act, 1875, is to be taken as the guide in considering the charge, except so far as this Act now in question, the Act of 1892, has expressly modified it. Now, the premises are to be charged with what? With the sums finally apportioned on them. There is not a word there to indicate that the charge is to take effect from the final apportionment, and I apprehend perhaps it is going too far—but I think that if the framer of this section had intended to say, contrary to all the decisions on the Act of 1875, that the charge should only take effect as from the date of the final apportionment, nothing could have been easier than for him to have written "shall as from the date of the final apportionment stand and remain charged," and I cannot help thinking that any intelligent draftsman would have seen the necessity for stating in plain language, and in the earliest possible part of the section, the date from which the charge is to be created. That is not done. It is treated as a charge under section 257, which, as I have already mentioned, means from the date of the completion of the works.

But there are these other words, "or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest . . ." Those are words which create a certain difficulty, and I do not profess to thoroughly understand them, but what I do say is they are introduced simply in order to indicate what sum is to be charged and what sum is to carry interest. The charge is said to be the sum finally apportioned on the premises, or if objection is made against the final apportionment, the sum determined to be due as from the date of the final apportionment. The final apportionment may have been wrong. It may have been objected to, or it may have been altered, and if so, of course it would be absolutely wrong to say that, notwithstanding that the final apportionment has been altered, the sum charged is to be that which was originally in the final apportionment. That seems to me to be the key to the alternative there given, and having regard to what I have already said, which I venture to repeat, because it is the ground of my decision, that inasmuch as the Legislature intended to make the Act of 1892 part, and has said it is to be part, of the Act of 1875, it would be giving those words far too wide a meaning to hold that here the Legislature intended to alter the date from which the charge was to run. What the alternative is introduced here for, seems to me clearly to be in order to show for what sum the charge is to stand. I do not think it will do to say that that reference to the final apportionment is in connection with the interest only, but the real object is to show what sum is to be charged, and that sum you are to find either in the final apportionment itself, the original one, or, when objection is made to the final apportionment, in the final apportionment as altered, if it has been altered in consequence of the objection. Of course it is obvious that that is not giving full grammatical meaning to the words "as from the date of the final apportionment," but I do not myself see what the real meaning of those words is. That may fairly be a point for consideration in some other case, and some other point may arise thereon. What I decide is that those words do not alter the law as it then stood on the construction of the Public Health Act, 1875, which, I take it, was not intended to be altered, and cannot be taken as having been altered by this Act except so far as the Legislature has so expressed it.

That is the short point on the construction of the Act, and that being so, I need go no further, because if my view is correct it follows from decided cases, and having regard to the covenants entered into by the vendor in this case, that this is a charge which was existing at the date of the contract, a charge which the vendor was bound to discharge, and that he is liable now to do so notwithstanding completion. Perhaps the circumstances explain why, but it seems that neither vendor or purchaser were aware of this charge, but that makes no difference. The purchaser, in my view, is entitled now to have the property released from this charge—that is to say, he would have been if he had paid it. I understand he has paid it. He must be taken to have paid it on behalf of his vendor, and is now entitled to receive it from him.

Solicitors, *George Brown, Son, & Vardy; Farrer & Co.*

Chan. Div. }
Byrne, J. } June 8, 16, 28, 1899.

FREEMAN v. LAING. (a.)

*Mortgage—Further advance—Second mortgage—Tacking—Trustees—Joint tenants.*

*In October, 1864, certain property was mortgaged to A., B., and C. (who were trustees), as joint tenants, to secure £3,000 and interest. In February, 1866, the same property was mortgaged to L. to secure £3,500 and interest. In October, 1876, a further charge was executed in favour of the first mortgagees to secure £1,000 and interest. A. died in May, 1883.*

*The plaintiffs in the action were the present trustees of the settlement of which the first mortgagees had been trustees, and the defendants were the present owners of the second mortgage.*

*B., who was a solicitor, had acted for all parties in carrying out the first and second mortgages and the further advance by the first mortgagees, and had actual notice of the second mortgage at the date of its creation, but he failed to communicate the fact of the second mortgage to his co-mortgagees at the time of the further advance and they had no personal knowledge of its existence.*

*Held, that the plaintiffs were not entitled to tack the amount due in respect of the further advance to the amount due on the first mortgage and so postpone the second mortgagees.*

*In the case of a mortgage of real estate to joint tenants to secure a debt due to them jointly, it cannot be said as against strangers that any one portion of the security or of the debt belongs to any one of the mortgagees: each is entitled to the whole, and if notice of a second incumbrance is given to any one of them, such notice creates an equity against one in respect of the whole sufficient to prevent any tacking.*

By an indenture of mortgage dated the 12th of October, 1864, and made between Thomas Cowan and James Cowan of the one part, and Joseph Oldham, Thomas Walker and Fredk. Barker of the other part, certain premises therein described were demised to Oldham, Walker and Barker to secure £3,000 and interest.

The mortgagees were in fact trustees of a settlement, and the mortgage was to them as joint tenants.

By an indenture dated the 12th of February, 1866, the same premises were, subject to the mortgage of the 12th of October, 1864, assigned by way of mortgage to Samuel Laing to secure £3,500 and interest.

By an indenture dated the 9th of October, 1876, the same premises were charged in favour of the said first-mentioned mortgagees with the further sum of £1,500 and interest.

Joseph Oldham died in May, 1883, and thereupon the first mortgage and the further charge of the 9th of October, 1876, and the debts thereby secured, became vested in Thomas Walker and Frederick Barker as joint tenants.

Thomas Walker died in January, 1889, leaving Frederick Barker the sole surviving trustee.

The plaintiffs were the present joint mortgagees, claiming as new trustees only, appointed of the settlement of which Oldham, Walker, and Barker were the trustees, and by virtue of assignment from Barker to them as such trustees. The defendants were the present owners of the second mortgage of the 12th of February, 1866, claiming as trustees of a settlement created by Samuel Laing, and dated the 23rd of February, 1856, to whom the mortgage of the 12th of February, 1866, had been assigned. The said Thomas Walker being one of such trustees. Thomas Walker was a solicitor, and acted for all parties on the occasions of the creation of the first and second mortgages, and of the further advance by the first mortgagees.

Thomas Walker had actual notice of the second mortgage at the date of its creation and at the date of the further advance, but he failed to communicate the fact of the second mortgage to his co-mortgagees, and they had no general knowledge of its existence at the date of the further advance.

The plaintiffs claimed a declaration that they were entitled to tack the further charge to their mortgage dated the 12th of October, 1864, and to rank in priority to the charge dated the 12th of February, 1866.

The defendants under the indenture of the 12th of February, 1866, claimed priority over the indenture of further charge dated the 9th of October, 1876.

*Neville, Q.C.*, and *H. J. Turrell*, for the plaintiffs.—The doctrine of *Ward* v. *Duncombe*, 42 W. R. 59, [1893] App. Cas. 369, that notice to one trustee is notice to all, only applies to successive assignees of trust funds held by trustees. The personal disqualification of one mortgagee who is dead is no answer to an action by his co-mortgagees: *Luke* v. *South Kensington Hotel Co.*, 27 W. R. 514, 11 Ch. D. 121; *In re South Durham Iron Co., Smith's case*, 27 W. R. 845, 11 Ch. D. 579.

*Levett, Q.C.*, and *Medd*, for the defendant.—The estate and interest of each joint tenant is in the whole subject-matter. Here one of the mortgagees, who were joint tenants, as a solicitor acted for all parties in all three transactions and had actual notice of the second mortgage at the time when he and his co-mortgagees made the further advance, and the equity arising against him owing to this must prevent tacking.

They referred to *Bolland* v. *Hart*, 19 W. R. 962, L. R. 6 Ch. App. 678, and *Bradley* v. *Riches*, 26 W. R. 910, 9 Ch. D. 189.

*Neville* in reply.

*Cur. adv. vult.*

June 28.—BYRNE, J., after stating the facts, proceeded: All the foregoing facts are admitted, and the question for consideration is whether or not the plaintiffs are entitled to tack the amount due in respect of the further advance to the amount due on the first mortgage, and so to postpone the second mortgagees.

I am of opinion that they are not. No question arises in this case as to the effect of purchase for value without notice, and the matter has to be determined as though it were a claim on the part of Barker, the survivor of the original joint tenant mortgagees.

Had Walker been the survivor it would have been impossible for him to have asserted the right to tack, but it is said that the equity arising against a first mortgagee who seeks to tack by reason of his having notice of a second mortgage at the time when he makes a further advance is a purely personal equity against the individual and cannot affect others, though interested jointly with him in the mortgage debt and the security.

The question is, of course, different from that arising when there is a contest between assignees of a fund of personal estate vested in trustees, as to priority. In that case it is established that if one only of the trustees in existence at the date of the second assignment had notice of the prior assignment, the earlier assignee does not lose his priority. It has also been held that an assignee who has given notice to one only of several trustees is not entitled to priority over a subsequent assignee who takes his assignment after the death of the trustee to whom notice was given;

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

and it has also recently been determined by Stirling, J., in *In re Wasdale*, 47 W. R. 169, [1899] 1 Ch. 163, where the authorities for the former propositions are referred to, that an assignee who has given notice to all the trustees in existence at the time of his assignment is entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all those trustees, and who gives notice of such assignment to the new trustees.

So far as there can be considered to be any analogy between the effect of notice as applied to the class of cases to which I have referred and to cases like that with which I have to deal, it is against the plaintiffs, but I do not think that the analogy is very close. In the case of a mortgage of real estate to joint tenants to secure a debt due to them jointly, it cannot be said, as against strangers, that any one portion of the security or of the debt belongs to any one of the mortgagees; each is entitled to the whole, and if notice of a second incumbrance be given to any one of them, that appears to me, by creating an equity against one in respect of the whole, to prevent any tacking, which in such a case must be of the further advance to the whole subsisting original debt.

If the joint tenant to whom notice is given dies, the security and debt become vested in the survivors by operation of law, but I cannot see how that confers upon them any better equity than they had before or renders the pre-existing equity of the second mortgagee any worse. If it be correct to say that the right of the three joint tenants to tack, which is a right to retain the legal estate until the first debt and all that is due in respect of further advances is satisfied, was lost by reason of the notice given to one of them, it is difficult to see how that right can revive.

I think there is a certain analogy between this state of things and the case of a devise to two as joint tenants, one being privy to an illegal intent on the part of a testator, and the other not, in which case neither can claim under the devise, the result being different in the case of a devise to two as tenants in common, in which case he who is not privy to the intent will take, the other will not: see *Jones* v. *Badley*, 16 W. R. 713, L. R. 3 Ch. App. 362; and *Rowbotham* v. *Dunnett*, 26 W. R. 529, 8 Ch. D. 430. The case of *In re South Durham Iron Co., Smith's case*, relied upon by the plaintiffs, is distinguishable on the ground, amongst others, that there was no question there as to the effect of the neglect of one of several joint tenants, but of the neglect of one of several persons having separate interests to do something which he ought to have done in a different capacity.

It is unnecessary to express my opinion upon the other point argued—namely, whether or not notice ought to be imputed to Walker's co-mortgagees by reason of his having acted as solicitor for them on the occasion of the further advance. There are some observations by the Master of the Rolls in *Bailey* v. *Barnes*, 42 W.R. 66, [1894] 1 Ch. 25, at p. 35, which would have to be borne in mind before determining this question hostilely to the defendants. They have a bearing on the argument put forward by Mr. Levett as to the duty of a party to inquire.

Solicitors, *Walter O. Freeman; Maples, Teesdale, & Co.*

---

Chan. Div.
Cozens-Hardy, J. } Aug. 5, 9, 11, 1899.

*In re* WHEELER'S SETTLEMENT.
BRIGGS *v.* RYAN. (*a.*)

*Married woman—Separate use—Restraint on anticipation—Bankruptcy—Subsequent discoverture—Residue of life interest—Married Women's Property Act*, 1882 (45 & 46 *Vict.* c. 75), *s.* 1, *sub-section* 5; *s.* 19.

*Where a married woman entitled to property for life for her separate use without power of anticipation becomes bankrupt, her entire life interest vests in her trustee in bankruptcy, under section* 1, *sub-section* 5, *of the Married Women's Property Act*, 1882, *subject, however to the restraint upon anticipation under section* 19; *but the restraint upon anticipation saved by section* 19 *only attaches to her life interest during the joint lives of herself and her husband, and not to the residue of her life interest after her husband's death. Consequently the trustee in bankruptcy of a married woman, who at the date of her bankruptcy is entitled to real property for her life for her separate use without power of anticipation, becomes entitled upon the death of the husband of the bankrupt to the future rents and profits during the remainder of her lifetime.*

Originating summons.

This summons was taken out for the purpose of determining whether the defendant, Mrs. Ryan, a widow lady, or her trustee in bankruptcy, was entitled to certain rents and profits accruing since the death of her husband.

By an indenture of settlement of March, 1859, certain shares of certain lands were vested in trustees for Mrs. Ryan for her sole and separate use independently of any husband with whom she might intermarry, but without power for her whilst covert or sole in any way to charge or anticipate the same, and after her death upon the trusts therein mentioned. She married in 1868. In 1891 Mrs. Ryan, who had been carrying on the business of a schoolmistress apart from her husband, was adjudicated a bankrupt. The defendant, Gittins, was the official receiver and the trustee in the bankruptcy. In February, 1899, Mr. Ryan, the husband, died. The bankruptcy had not been closed and Mrs. Ryan was still undischarged. The trustee in bankruptcy now claimed to have the rents and profits of the settled land which had accrued since the death of Mr. Ryan, and those which would accrue in the future during the life of the widow, paid over to him. This claim was opposed by Mrs. Ryan.

The trustee of the settlement thereupon took out this summons to obtain the direction of the court.

*Brabant*, for the trustee.

*Astbury, Q.C.*, and *W. A. G. Woods*, for Mrs. Ryan.—The trustee in bankruptcy can claim this property only either (1) as vesting in him immediately upon the bankruptcy, or (2) as after-acquired property. But it clearly is not after-acquired property, for Mrs. Ryan acquired no fresh interest upon the death of her husband. She still had the same life estate: *Pelton Brothers* v. *Harrison*, 39 W. R. 689, [1891] 2 Q. B. 422; *Beckett* v. *Tasker*, 36 W. R. 158. 19 Q. B. D. 7. Did, then, the property vest in the trustee immediately upon bankruptcy? It could not do this, because of section 19 of the Married Women's Property Act, 1882. Moreover, section 1 of that Act only applies to property which the woman can alienate. The involuntary alienation of bankruptcy only reaches property capable of voluntary alienation: *Ex parte Gilchrist, in re Armstrong*, 34 W. R. 709, 17 Q. B. D. 521. Upon the death of the husband the separate use ceased as well as the restraint upon anticipation, and therefore section 1, sub-section 5, of the Act of 1882 would not apply: see Kay, J., in *Pelton Brothers* v. *Harrison*, p. 425.

*H. Greenwood*, for the trustee in bankruptcy.—Separate use and restraint upon anticipation are different things. Restraint continues during coverture only, while separate use lasts during lifetime:

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

*Barton* v. *Briscoe*, Jac. 603. The whole life interest of Mrs. Ryan vested at once in the trustee in bankruptcy (*In re Armstrong, Ex parte Boyd*, 36 W. R. 772, 21 Q. B. D. 264), although he could not touch it until the death of the husband removed the restraint upon it. The cases cited by the other side are all cases depending on contract, and not upon bankruptcy. The words "as if she were a *feme sole*" in section 1, sub-section 5, distinguish the case of bankruptcy from the other cases. *Pelton Brothers* v. *Harrison* was, moreover, decided merely upon the form of the judgment obtained by the creditor.

The cases of *Softlaw* v. *Welch*, 46 W. R. 626, [1899] 2 Ch. 419; *Cooper* v. *Macdonald*, 28 W. R. 377, 7 Ch. D. 288; *Tullett* v. *Armstrong*, 1 Beav. 1, 4 My. & Cr. 390; *Holtby* v. *Hodgson*, 38 W. R. 68, 24 Q. B. D. 103; and *In re Frances Handford & Co.*, 47 W. R. 391, [1899] 1 Q. B. 566, were also referred to.

*Cur. adv. vult.*

Aug. 11.—COZENS-HARDY, J.—The question in this case depends upon the true construction and effect of section 1, sub-section 5, of the Married Women's Property Act, 1882, coupled with section 19. Now, it is clear that the entire life interest of Mrs. Ryan, notwithstanding the restraint upon anticipation, passed to the official receiver: *Axford* v. *Reid*, 37 W. R. 291, 22 Q. B. D. 548. That she could not by voluntary alienation affect her life interest would be of no moment. This is her separate estate, and the language of the statute is general. Then comes section 19, which is not easy to interpret. It has been decided by the Court of Appeal that the life estate of a married woman limited to her separate use, but without a restraint upon anticipation, will vest in her trustee in bankruptcy notwithstanding this section: *In re Armstrong, ex parte Boyd*, 36 W. R. 772, 21 Q. B. D. 264. It is plain that the bankruptcy could not render inoperative the restraint upon anticipation. But is the title of the trustee effective now that that restraint is no longer operative? It is important to observe that Mrs. Ryan takes nothing under the Act of 1882. She takes under an instrument of 1859, which purports to give her an interest for her separate use during the whole of her life, and subject to a restraint upon anticipation. It is common knowledge that it is usual to give the income of property during the whole life of a woman for her separate use, though the separate use is sometimes limited to a particular coverture: *Stogdon* v. *Lee*, 39 W. R. 467, [1891] 1 Q. B, 661. There is no difficulty in attaching a separate use either to the complete life interest or even to an estate in fee: *Bagget* v. *Meux*, 1 Coll. 138; or to an absolute interest in personal estate: *In re Grey's Settlements*, 35 W. R. 560, 34 Ch. D. 712. In the well-known case of *Tullett* v. *Armstrong*, Lord Langdale treated the separate use as suspended, and having no operation while the woman is discovert. Lord Cottenham expressly negatived the idea that a new separate estate arises on second marriage, and asserts that the old estate continues through the second coverture: 4 My. & Cr., p. 405. There are authorities which speak of that which was separate estate being so still after the husband's death: *Pike* v. *Fitzgibbon*, 28 W. R. 667, 29 *ib.* 551, 14 Ch. D. 837; Seton on Decrees (5th ed.), p. 757. And so also after the wife's death: *Heatley* v. *Thomas*, 15 Ves. 596, and *London Chartered Bank of Australia* v. *Lempriere*, 21 W. R. 513, L. R. 4 P. C. 572. Section 23 of the Act of 1882 treats a married woman's separate estate as something that may vest in her executors: *Surman* v. *Wharton*, 39 W. R. 416, [1891] 1 Q. B. 491. It seems to follow that separate estate may be said to exist notwithstanding discoverture. It is "suspended" in this sense—that the widow's power of disposition over it is the same as if it had been given her simply, and without words creating a separate use. It is not extinct because it becomes operative upon second marriage. If the coverture ends by her death it is still regarded as her separate estate, and is applied in satisfaction of her debts and liabilities. If the coverture ends by her husband's death, the same principle ought to apply. Unless, therefore, I am constrained by authority, I should hold that the combined effect of sections 1 and 19 of the Act of 1882 was to vest in the trustee the whole of the life interest of Mrs. Ryan, subject only and except so far as it was protected by the restraint upon anticipation, and that, directly the restraint upon anticipation ceased by the death of her husband, the title became free from impediment. But it said that I am not at liberty to take that view in consequence of the decision of the Court of Appeal in *Pelton Brothers* v. *Harrison*. In that case judgment had been obtained against a married woman in the form settled in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120. In delivering the judgment of the court Kay, L.J., said: "The question is whether, under this judgment, the property which the married woman was restrained from anticipation was affected. The shortest answer is that the judgment expressly directs that there shall be no execution against such property, and, in my opinion, it is as completely excepted from the consequences of the judgment as if it had been specifically mentioned in it and stated to be excepted, because the married woman was restrained from anticipating it" (p. 423). This, of course, was a sufficient ground for the decision. But the Lord Justice proceeds to discuss the Act of 1882, section 1, sub-sections 2 and 4, and says, p. 425: "But it is argued that when the husband died the property was still separate property, and that by the death of the husband the restraint upon anticipation was gone, and it may therefore be treated as separate property acquired upon the death of the husband. The answer to this argument is that there is no such thing as separate property of an unmarried woman. Separate property means property held separately from the husband." The case turned upon sub-section 2, which may be called the contract section, and not sub-section 5, which is the bankruptcy section. But I have felt great difficulty in consequence of these observations. They were not, however, necessary to the decision of the case, and they seem to me not to be consistent with the view of the Court of Appeal in *Pike* v. *Fitzgibbon*, and of other judges in many cases, to some of which I have referred. I therefore feel myself at liberty to follow my own view, and hold that the entire life interest of Mrs. Ryan was her separate property at the date of the bankruptcy within the meaning of sub-section 5, and that the restraint upon anticipation which is saved by section 19 attached only to a portion of that life interest—namely, during the joint lives of herself and her husband—and that the residue of the life interest from the death of the husband belongs to the trustee in bankruptcy, and must be applied in satisfaction of Mrs. Ryan's debts. I make a declaration accordingly. I think it is a case in which the costs of all parties, including Mrs. Ryan, should be paid by the plaintiff, the trustee of the settlement, out of the life interest to which the declaration extends.

Solicitors, *C. J. E. Crosse*, Manchester; *Jaques & Co.*, for *Layton, Melly, & Layton*, Liverpool.

Q. B. Div.
(Darling and Phillimore, JJ.) July 26, 1899.

ATTORNEY-GENERAL v. SMITH-MARRIOTT. (a.)

*Inland revenue—Estate duty—Annuity—"Full consideration in money or money's worth"—Finance Act,* 1894 (57 & 58 *Vict.* c. 30), *s.* 3, *sub-section* 1.

*In* 1862 *the defendant inherited under a settlement a life interest in estates in Lincolnshire, subject to a jointure rent-charge of* £400; *he also inherited a life interest in estates in Dorsetshire. In* 1870 *he sold the Lincolnshire estates subject to the jointure rent-charge, investing part of the purchase-money in the name of trustees on trusts to indemnify the purchasers against the rent-charge. In* 1883 *an arrangement was made by which the rent-charge owner released the Lincolnshire estates from the payment of the rent-charge, in consideration of which and in consideration of the money invested in the name of trustees being released from the trusts for indemnity, the defendant charged his life interest in the Dorsetshire estate and certain policies on his life with the payment of an annuity of* £400.

*Upon the death of the annuitant the Commissioners of Inland Revenue claimed estate duty from the defendant in respect of the benefit which accrued or arose to him as the tenant for life of the Dorsetshire estates upon the cesser of the annuity.*

*Held, that the annuity was not granted by the defendant for "full consideration in money or money's worth" paid to him "for his own use or benefit" so as to be exempt from the payment of duty by virtue of section* 3, *sub-section* 1 *of the Finance Act,* 1894.

Information.

By an indenture dated the 25th of May 1853, Sir John James Smith, in exercise of a power of jointuring given to him by an indenture of settlement dated the 3rd of July, 1813, granted to Dame Frances Smith, his wife, an annual sum or yearly rent-charge of £400 to be issuing and payable out of estates in the county of Lincoln subject to the uses of the indenture of the 3rd of July, 1813, and he demised the estates to trustees for a term of ninety-nine years to commence after his death upon trust for further securing the payment of the jointure rent-charge.

Sir John James Smith died on the 3rd of September, 1862, and the defendant succeeded to a life interest both in the Lincolnshire estates subject to the above-mentioned jointure rent-charge and, also, in estates in the county of Dorset which were subject to another jointure rent-change of £1,000 per annum secured thereon in favour of Dame Frances Smith.

In 1870 the defendant sold the Lincolnshire estates to two separate purchasers subject to the jointure rent-charge of £400. He invested part of the purchase-money in the purchase of a sum of £13,333 6s. 8d. reduced 3 per cent. bank annuities in the names of trustees upon trusts for indemnifying the purchasers against the jointure rent-charge and subject thereto upon trust for the defendant absolutely.

In 1883 an arrangement was made between the defendant, Dame Frances Smith, and the purchasers of the Lincolnshire estates for the extinction of the jointure rent-charge of £400 and the surrender and merger of the term; and for the release of the bank annuities from the trusts for indemnity, the defendant agreed to grant to Dame Frances Smith an annuity of £400 secured upon his life interest in the Dorsetshire estates and upon life policies upon his life.

Three indentures were executed in furtherance of this arrangement. By two of the indentures, both dated the 31st of December, 1883, Dame Frances Smith in consideration of the defendant having secured the annual sum or rent-charge of £400 to her satisfaction released the Lincolnshire estates from the rent-charge of £400 created by the indenture of the 25th of May, 1853, and by the same two indentures the term of years vested in trustees for securing the rent-charge was released.

By the other indenture, which was of the same date, the defendant, in consideration of Dame Frances Smith having agreed to release the Lincolnshire estates from the jointure rent-charge of £400 and in consideration of the sum of £13,333 6s. 8d. reduced 3 per cent. bank annuities being released from the trusts for indemnity, charged his life interest in the Dorsetshire estates and, in the event of his death in the lifetime of Dame Frances Smith, certain policies of assurance on his life with the payment of the annual sum of £400, in addition to the annual sum or rent-charge of £1,000 to which she was then entitled.

On the 7th of January, 1884, the defendant paid to the commissioners, by way of commutation of succession duty due upon the succession on the death of Dame Frances Smith, the sum of £116 7s. 9d.

Dame Frances Smith died on the 18th of June, 1895, and the information claimed that estate duty under the provisions of the Finance Act, 1894, became payable in respect of the benefit accruing or arising to the defendant as tenant for life of the Dorsetshire estates by the cesser of the annuity of £400.

*Sir R. Finlay, S.G.* (*Vaughan Hawkins* with him), for the Crown.—The answer of the defendant to the claim for estate duty is based on section 3, sub-section 1, of the Finance Act, 1894, which provides that "estate duty shall not be payable . . . in respect of the determination of any annuity for lives where . . . such . . . annuity" was "granted for full consideration in money or money's worth paid to . . . the grantor for his own use or benefit . . . ," and it is said, here, that the release of the Lincolnshire estates from the burden of the rent-charge was full consideration for the creation of the annuity secured on the defendant's life interest in the Dorsetshire estates. It cannot be denied that subject to section 3, sub-section 1, on the cesser of an annuity such as this there is an increase of benefit on which estate duty is payable. The true effect of the transaction in 1883 was, however, merely to change the security of a subsisting annuity.

*A. T. Lawrence, Q.C.,* and *Danckwerts,* for the defendant.—From 1870 to 1883 the rent-charge upon the Lincolnshire estates was relieved in the hands of the purchasers from all liability to pay estate duty by virtue of section 21, sub-section 3, which provides as follows: "Where an interest in expectancy in any property has before the commencement of this part of this Act been *bonâ fide* sold or mortgaged for full consideration in money or money's worth then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the Act had not passed." Then in 1883 the Lincolnshire estates were released from the rent-charge and succession duty was paid, and a new annuity was granted by the defendant to Lady Smith which was secured on estates coming to the defendant by a different title. This annuity was granted for full consideration within section 3, sub-section 1, the price paid being the release of the rent-charge issuing out of the Lincolnshire estates and the release of the £13,333 6s. 8d. from the trusts for indemnity. The transaction was a perfectly *bonâ fide* one, and, having taken place ten years before the Finance Act was passed, it could not have been effected with a view to evading the duty. The statute does not happen to

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

hit the present case, and unless the property comes within the very words of the Act the Crown ought not to succeed: see *Phillips* v. *Morrison*, 12 M. & W. 740; *Tennant* v. *Smith*, [1892] A. C. 150, 40 W. R. Dig. 216; *Commissioners of Taxation* v. *Teece*, [1899] A. C. 254.

*Sir R. Finlay, S.G.*, in reply.—Section 21, sub-section 3, does not apply. It affords relief to the purchasers, and has no reference to the defendant at all.

DARLING, J.—I think that in this case our judgment must be for the Crown. The effect of the settlements was this: that Sir William Smith-Marriott became possessed of property in Lincolnshire and Dorsetshire, and that one of the consequences of his having that property was that he had to pay £400 a year to Lady Smith. He was from the time he came into possession of the property until Lady Smith's death liable in one way or another to pay her an annuity of £400. It is true that he was not liable in the same way, nor did the annuity issue out of the same property or funds during the whole of that time; because in 1883 an arrangement was made, the effect of which was this, that whereas formerly the annuity was secured upon the Lincolnshire property it now became secured upon the Dorsetshire property; but though the security was changed the burden upon Sir William Smith-Marriott remained precisely the same as before.

In these circumstances Sir William Smith-Marriott says that upon the death of Lady Smith he is not liable to pay estate duty because he comes within the exemption in section 3, sub-section 1, of the Finance Act, 1894. The question is, was anything paid to Sir William Smith-Marriott "for his own use or benefit," and if there was, was it "full consideration in money or money's worth." I am unable to see anything which fairly comes within those words. The arrangement by which the annuity was charged upon the Dorsetshire property is said by Mr. Lawrence and Mr. Danckwerts to amount to the creation of a new annuity—a new burden. I do not think it was. I think it was a mere transfer of the burden, which was always upon Sir William Smith-Marriott, from one portion of his property to another. It does not seem to me that the annuity created on the Dorsetshire property by the deed of December, 1883, was an annuity created for full consideration in money or money's worth. That annuity may have been less burdensome to Sir William Smith-Marriott, but I cannot see that for that reason it can be held to come within the words that it was created "for full consideration in money or money's worth" paid to him.

PHILLIMORE, J.—I agree that our judgment should be for the Crown. The case is brought clearly under section 2 of the Act, and the burden is on the defendant to bring the case within the excepting words of section 3, sub-section 1.

The whole matter turns upon the question, Is this a new annuity, or is it an old one with a varied security? The strength of the argument for the defendant (and I am not at all saying that there is not some force in it) lies in this, that in law a freehold annuity upon the estate of A. is a different thing from a freehold annuity upon the estate of B. To put the matter plainly, if there had been a bond by Sir William Smith-Marriott to secure £400 a year as a security charged upon his Lincolnshire estates, and the whole effect of the arrangement had been to leave that bond untouched, but to substitute as the security a charge upon the Dorsetshire estates, I should have said that the defendant would not have had a word to say for himself. What the defendant says is that the effect of the arrangement was that a freehold interest in one estate was substituted for a freehold interest in another. Lady Smith ceased to be a freeholder in the county of Lincoln and became a freeholder in the county of Dorset. The annuities were different to that extent. But at the same time the true substance of the matter is the substitution of one security for another. The annuity, though it does not in reality exist apart from the estate, out of which it is carved, is nevertheless treated by the parties as an entity of itself, and that, after all, is the business view of the matter. Therefore, in my opinion, Sir William Smith-Marriott, who would certainly have had to pay duty in respect of the annuity if he had not sold the Lincolnshire estates, does not escape from paying such duty because, by arrangement with Lady Smith, he has substituted his Dorsetshire estates for the Lincolnshire estates as security for the payment of the annuity.

*Judgment for the Crown.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendant, *Lee & Everington*, for *Hinds & Son*, Goudhurst.

---

Q. B. Div.
(Grantham and Kennedy, JJ.) } March 7, 20, 1899.

BURROWS v. RHODES AND ANOTHER. (*a*.)

*False representation—Raid on friendly State—Illegality of common venture—Criminal offence — Claim for damages — Joint delinquents — Demurrer — Foreign Enlistment Act*, 1870 (33 & 34 *Vict. c.* 90), *s.* 11 (i.).

*Where the plaintiff was induced by the fraudulent misrepresentations of the defendant to join with him and others in doing an act which in consequence of such misrepresentation he believed to be legal, but which in fact was criminal, and the plaintiff thereby suffered injury and loss,*

*Held that the defendant could not set up the plea that there was no right of indemnity between joint delinquents as an answer to an action for damages by the plaintiff.*

Special case for the opinion of the court on points of law raised by the defendants' contention that the plaintiff's statement of claim disclosed no cause of action.

The proceedings in this case arose out of the Jameson raid upon the Transvaal Republic, and the plaintiff, a trooper, claimed damages in respect of injuries he had suffered in the course of that expedition, which he alleged he had been induced to take part in by the fraudulent misrepresentations made to him by the defendants Rhodes and Jameson.

The statement of claim was as follows:

(1) The British South Africa Co. is a British company incorporated by Royal Charter dated the 29th of October, 1889, and having for the principal field of its operations a region of South Africa. (2) The defendant Rhodes was at all times material to this action a director of the said company, and was entrusted with the management of all its property and affairs in South Africa. The defendant Jameson was at all such times as aforesaid an officer and agent of the said company, and was entrusted with the control of the forces of the company which were employed in the invasion hereinafter mentioned. (3) In or about the month of September, 1894, the plaintiff was employed by the company to serve for a

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

year in the armed forces of the company within the territorial limits prescribed for the company by the said charter, and he entered upon and remained continuously in such employment from the time of his engagement as aforesaid until the happening of the matters hereinafter complained of. (4) In the month of September, 1895 (when the plaintiff was at Bulawayo, and his period of service was about to expire), the defendants, having secretly determined to invade the territory of the South African Republic with a hostile armed force, in order to induce the plaintiff to renew his engagement and take part in such invasion as a member of the said force, fraudulently represented to the plaintiff that the detachment in which he was serving was about to be employed in active service, and that it would be to his benefit, and they requested him to continue in the service of the said company. The defendants intended the plaintiff to believe, and he did believe, that the service on which the said detachment was about to be employed was of a lawful nature, and, relying upon the aforesaid representations, the plaintiff agreed to and did continue in the said company's service for a further period. The said representations were to the knowledge of the defendants untrue. (5) Shortly after the plaintiff had entered into the agreement in paragraph 4 hereof mentioned, the defendants caused a considerable number of the troops in the employment of the said company (including the detachment in which the plaintiff was serving) to be concentrated at or near Pitsani under the control of the defendant Jameson for the purpose of the said invasion. (6) On the 29th of December, 1895, the defendants, for the purpose of the said invasion and in order to induce the plaintiff to take part therein and to enter the territory of the said republic as a member of the said company's armed forces, fraudulently represented to the plaintiff that fighting was about to commence in or near Johannesburg; that protection was needed for the women and children there; that a body of Rhodesian Horse would meet and co-operate within the territory of the said republic with the troops with which the plaintiff was serving; that a body of Cape Mounted Rifles (forces of her Majesty) was also waiting near the frontier of the said republic to join and co-operate with the said troops; and that the proposed invasion had the sanction and support of her Majesty's Government. The representations in this paragraph mentioned were to the knowledge of the defendants untrue. (7) The plaintiff, believing the aforesaid representations to be true and relying thereupon, was induced thereby to enter the territory of the South African Republic as a member of the said company's armed forces and to engage in hostilities with the troops of the said republic. (8) By reason of the matters aforesaid the plaintiff suffered great injury, and was subjected to severe hardship and imminent dangers. The troops of the said company with which the plaintiff was serving as aforesaid were defeated by the forces of the said republic at Doornkop, and in the battle which was fought there the plaintiff was severely wounded, and lost a leg, and subsequently had to undergo seven surgical operations. He was taken and kept prisoner by the authorities of the said republic, and was liable to summary execution at their hands. Hospital accommodation was refused him, and he was left lying exposed in the street at Pretoria. He was also rendered liable to severe punishment in England for offences against the laws of England, and was brought to England as a prisoner. He was caused much pain and suffering, and his health and capacity for earning his livelihood were, and still are, and always will be, greatly impaired. The particulars of the special damages were: (1) Loss of kit, £25; loss of pay for first eight months of 1896 at £15 a month (rations were provided), £120; (3) loss of earnings from the 1st of September, 1896, to November, 1898, at £200 a year, £433 6s. 8d.; (4) loss of leg. Damages 3 and 4 are still continuing, and must be so throughout plaintiff's life.

In the defence the above statements were denied.

Paragraph 11 of the defence was as follows: "The defendants will submit that the statement of claim discloses no cause of action."

By a consent order it was directed (1) that the British South Africa Co., who were originally defendants, should be dismissed from the action without costs; (2) that the question of law raised by paragraph 11 of the statement of defence be set down for hearing.

*Arthur Cohen, Q.C.* (with him *Lord Robert Cecil*), for the defendants, said the question was whether a person who had committed a criminal offence could recover compensation from anybody who had induced him to commit the offence, for the consequences which he had suffered by reason of committing that offence. He submitted that he could not. The plaintiff's claim was founded on the assumption that the expedition in which he was induced to take part was an illegal venture. If the plaintiff established that proposition his claim for the loss and damage he sustained from having done so could not be enforced against the defendants, for they were, on his own showing, joint delinquents with himself. On the ground of public policy the courts would not assist him in such circumstances.

The learned counsel then referred to all the cases considered in the judgments, and also to *Scott* v. *Brown*, 41 W. R. 116 [1892] 2 Q. B. 724.

*Lawson Walton, Q.C.* (with him *Barnard Lailey*), for the plaintiff, submitted that this demurrer ought not to succeed, and said it might be necessary that he should ask for some amendment to the statement of claim, which stated in effect that the plaintiff had been brought to England as a prisoner and had become liable to prosecution, because by that statement he did not intend to admit and did not admit that he had intentionally violated the provisions of the Foreign Enlistment Act, 1870. His submission was that that Act could not be violated by anyone who had not *mens rea*. [GRANTHAM, J.—It does not seem necessary to prove *mens rea* to establish the committing of an offence under that Act.] If the plaintiff in what he did had innocently acted illegally, then he never became a criminal, and therefore the defence set up was not sufficient, because there had been no violation of the Foreign Enlistment Act so far as the plaintiff was concerned. The general rule of English law was that no crime could be committed without there being a *mens rea*. [GRANTHAM, J.—By some statutes—for example, Acts relating to licensed victuallers and to trade-marks—an employer is made liable for the acts of his servants. They render the employer an insurer for the observance of the law, and under those statutes persons might be rendered liable to punishment without there being any *mens rea*.] The cause of action was that the expedition was clearly of an illegal nature, and that the plaintiff was induced to take part in it by representations made to him by the defendants or their agents which, if true, would have legalized it. The plaintiff believed the truth of what he was told. It was said that he might have been prosecuted as a wrong-doer, but he was not in fact brought to trial. A man was not a criminal in the eyes of the law because someone to suit his own purpose chose to go about saying he was. There was no question of public policy involved in

the case. The basis of the rule that a person who was engaged in an illegal expedition could not sue another person engaged in that expedition was founded upon the assumption that there was a community of wrong-doing between the parties, but nothing of that kind could be successfully alleged by these defendants.

*Arthur Cohen, Q.C.*, in reply.—A person who engages in an attack on a friendly State does so at his peril. If it turns out that the expedition was illegal, it is no defence to say he was under the belief that the expedition was made with the sanction of her Majesty's Government. The courts, on the ground of public policy, will not assist such a person to recover damages for loss he so incurred. The offence is perfectly distinct from a tort, which is a wrong committed against an individual.

*Cur. adv. vult.*

GRANTHAM, J.—In this case we are asked to determine whether, on the statement of claim as presented to us (or with such amendments, if any, as may be necessary to raise the question of law to be determined), any cause of action has been shown for which an action is maintainable according to English law. For the purposes of our judgment, this being a demurrer by the defendants, all the facts alleged in the claim must be taken to be true and admitted by the defendants. What, therefore, are these facts? Shortly, these. That the defendants, having secretly determined to invade the territory of a friendly Power with a hostile armed force, they, for the purpose of inducing the plaintiff to enter their service as an armed servant, deceived the plaintiff as to their intentions, told him that the service on which they wished to employ him was lawful, that, as fighting would shortly take place in the said South African Republic between other forces, his services were required for the protection of women and children, that the force of which he was a member would have the support of other lawfully appointed forces, and that such invasion of the territory of the South African Republic had the sanction and support of her Majesty's Government; whereas, in fact, all the aforesaid representations were untrue to the knowledge of the defendants. Acting on and believing in these statements, the plaintiff entered the services of the defendants, and in obeying their orders received the injuries, and suffered the losses complained of, and for which he seeks to recover damages in this action. It is difficult to realize any period of our history in which a defendant making such fraudulent statements and inflicting such serious injury would not be liable for the consequences of his fraud, and yet it has been solemnly argued that such is the law at the present time. Let us see, therefore, on what grounds the learned counsel (Mr. Cohen) attempts to support his contention that this statement of claim discloses no good cause of action. He does not rely on a possible assumption that the damages resulted from the voluntary enlistment of the plaintiff on a warlike expedition for the pay and the prospective advantages likely to accrue to him, and were not in any way caused or aggravated by the fraud; but he admits that his contention rests solely on the assumption that the plaintiff, innocent of all knowledge of wrong on his part, did by obeying the order of the defendants in fact become a criminal himself, and could not therefore complain of any wrong done him by the defendants, who were *particeps criminis* with him. But how does he show that he is a criminal? He relies on the Foreign Enlistment Act, 1870, s. 11 (*i.*). That section deals with the penalty of fitting out naval or military expeditions without the license of her Majesty, and exacts that: Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment or either of such punishments, at the discretion of the court before which the offender is convicted, and imprisonment, if awarded, may be either with or without hard labour. The defendants contend, therefore, that, it being immaterial whether the person employed in such expedition had a *mens rea* or guilty knowledge of the nature of his act or not, and although believing as he did that his action had the sanction of the Queen's Government, yet he was just as much a criminal as the defendants who had knowingly broken the law and that, once that the plaintiff was proved to be a criminal, he could not, according to the defendants, be heard to complain of the original and deeper dyed fraud of the defendants, which had placed the plaintiff unwittingly on his part in a position which made him liable to be called a criminal. A grosser perversion of English justice it is impossible to imagine, and I should indeed be sorry if under any circumstances it could be proved to be English law. It must not be forgotten that the plaintiff has not been proved to be a criminal in any court of law. He has not been tried, much less convicted, and never will be tried, and therefore cannot be convicted, and under the circumstances a jury would, I doubt not, acquit him if he was now tried; but, till he has been convicted, how can the defendants be heard to say that, as in their opinion the plaintiff's conduct was an infringement of the Act, he must be treated as if he had been convicted of being a criminal by Act of Parliament? Let us look, therefore, at the authorities relied upon by Mr. Cohen on behalf of the defendants to see what aid, if any, they give him in his contention. First, he relies on the dictum of Lord Mansfield in *Holman* v. *Johnson*, Cowp. 341 at p. 343 (of the date 1775), wherein he says, "the objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. But it is not for his sake that the objection is allowed. . . . No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*, there the court says he has no right to be assisted. . . . So if the plaintiff and defendant were to change sides the latter would have the advantage, for *potior est conditio defendentis*," and so on. It seems to me that no stronger authority could be quoted against the defendants. The plaintiff's cause of action is not founded, as far as he is concerned, on any immoral or illegal consideration, but, as the defendants rely on their own immorality and illegality, it does sound very ill in their mouths to endeavour to rob the plaintiff of his rights by their (the defendants') illegality; and as in these proceedings the defendants have changed places with the plaintiff and are practically plaintiffs, as they are claiming a judgment on their demurrer, I am only echoing Lord Mansfield in saying I will not allow the plaintiffs to rely on their illegality to obtain a judgment against defendant for *potior est conditio defendentis*, and the demurrer being dismissed the present plaintiff's right of action is admitted. The next case Mr. Cohen relied on was *Colburn* v. *Patmore*, 1 C. M. & R. 73. This case, when it is carefully examined, seems to me to help the defendants less even than the last. The only matter under discussion in that case was whether the plaintiff, the printer and owner of a paper, having been convicted of a criminal libel and fined £100, could recover that sum from the defendant, the editor of the paper, whom he alleged

to have first inserted the libel contrary to his duty to the plaintiff and so induced the plaintiff to publish it. It was held he could not recover, because he had not shown that he had not himself approved of the libel before printing and publishing it himself. But even taking the *obiter dicta* of the learned judge as law in the passage where (quoting from Lord Lyndhurst's judgment) Lord Lyndhurst says, "I know of no case in which a person who has committed an act declared by the law to be criminal has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime." Quite true. But what compensation can he not recover? Why, compensaion for the damages he has incurred by proceedings having been taken against him for the commission by him of the wrongful act complained of. As Mr. Maule (afterwards Maule, J.) said during the argument, "the question is whether a person convicted of a criminal offence can claim indemnity from another who has participated with him in the commission of that offence"—*i.e.*, indemnity for the damages recovered against him for the commission of the offence. In this case the plaintiff, in the first place, has been convicted of no offence and, in the second place, is not seeking to recover an indemnity for damages recovered against him, but is seeking to recover damages for a wrong done to him, in which he did not participate except as a sufferer, and in which it cannot be said he was a criminal. When the false and fraudulent representation was made which was the *causa causans* of this action, no crime had been committed by the defendants much less by the plaintiff, and as far as plaintiff knew no crime had been committed by the defendants at any time up to the happening of the events which caused the damage to the plaintiff, for if the invasion had the sanction and authority of her Majesty or her Government, as the defendants alleged, there were no breach of any statute for which the plaintiff or the defendants could be made liable. Mr. Cohen relies next on the case of *Merryweather* v. *Nixan*, 8 T. R. 186, in which it was held that one wrongdoer cannot have redress or contribution against another. True, it was so held; but what does Best, C.J., say about it in delivering the judgment of the court in the case of *Adamson* v. *Jarvis*, 4 Bing. 66? He says: "From the concluding part of the judgment in *Merryweather* v. *Nixan*, and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Again, in the case of *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* [1894] A. C., 318, the noble lords, though not overruling *Merryweather* v. *Nixan*, damn the case with faint praise, decline in terms to apply it to Scotland, and refuse to extend its operation one iota. As the action of the plaintiff is only made a criminal act by statute, and is not inherently a criminal act, the plaintiff cannot be presumed to have known of his guilt until he has been proved to have been guilty. As the expedition in question is alleged to have been something in the nature of a highway robbery, I am surprised that the defendants did not refer to the case of *Everet* v. *Williams*, mentioned in Lindley on Partnership (5th ed.), p. 101, which it was said was a suit of one highwayman against another for an account of their plunder, the bill alleging that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, purses, &c., and that the defendant applied to him to become a partner, and that, after dealing together at several places, such as Bagshot, Hampstead, Salisbury, &c., they differed as to their respective shares, and so the suit in Chancery was instituted for an account. The bill was dismissed with costs because it was held that they were both *particeps criminis*, and so plaintiff could not recover. Perhaps it may be that the learned counsel were afraid to refer us to this case lest the same results should happen—namely, that the counsel who signed the bill was made to pay the costs of the bill, and the solicitors were fined £50, and the plaintiff and defendant were both hanged. As the defendants have failed to establish their case, it is hardly necessary to refer to any authorities on the other side, and I will only mention *Campbell* v. *Campbell*, 7 Cl. & Fin. 166, where one partner in a distillery had been convicted of illegal transactions and made liable to penalties, and he was held entitled to recover against his co-partner contribution for those penalties, notwithstanding the authority of *Colburn* v. *Patmore* before referred to, because (as Lord Cottenham said) he was not *particeps criminis* in the sense which would disentitle him to sue for contribution. If, in such case, he could recover, how much more so when the cause of action is not one for indemnity for damages given against him for the commission of the alleged illegal act, but is for damage for the alleged fraud on the part of the defendants in putting the plaintiff into such a position as caused him personal injury and loss quite irrespective of any illegal complicity in a crime. It is true the plaintiff also refers in his statement of claim to the liability the defendants had made him incur to severe punishment in England for offences against the English law, but he never was made liable to punishment, he never was made a criminal, and he suffered no damage from that liability; and I therefore treat that part of the statement of claim as struck out, since no damages are really claimed under that head. As the defendants have entirely failed to refer us to any authority that, in my judgment, justifies their contention that the plaintiff's declaration discloses no good cause of action for which he can sue, I am glad to be able to say that our law has been purged from the suggestion that fraud and false representation injurious to an innocent person can be committed with impunity if the injured person has by such fraud and false representation been unwittingly and innocently made to commit what the law has said shall be called a crime. For these reasons, in my judgment, the demurrer must be dismissed with costs.

KENNEDY, J.—The plaintiff in this action seeks to recover damages from the defendants on the ground that they induced him by false and fraudulent representations to renew an engagement of service with the British South Africa Co., and to take part in the well-known expedition which was led by the defendant Jameson into the Transvaal in December, 1895, in consequence whereof he was demnified in various ways which are set forth in the statement of claim.

In paragraph 8 of the statement of claim the plaintiff alleges, among other things, that by reason of the premises he was rendered liable to severe punishment in England for offences against the laws of England. The defendants in paragraph 11 of the statement of defence have pleaded that the statement of claim discloses no cause of action, their point being that that allegation of paragraph 8 which I have just quoted puts the plaintiff out of court. It is an admission that the plaintiff's participation in the expedition constituted a criminal offence under section 11 of the Foreign Enlistment Act, 1870, and the defendants' argument is that no action can be maintained to recover damages for having been induced to commit a crime.

It is upon the correctness of this contention that

the court is called upon to adjudicate, as if the point had been raised by a demurrer under the old common law practice.

It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void. In *Shackell* v. *Rosier*, 2 Bing. N. C. 634, where, in consideration that the plaintiff had published a libel at the defendant's request, and had at the like request consented to defend an action brought against the plaintiff for such publication, the defendant promised to indemnify the plaintiff from the costs of the action, the Court of Common Pleas held that the promise could not be enforced. In the preceding year 1835, in the American case of *Arnold* v. *Clifford*, 2 Sumner, 238, at p. 239, Judge Story held that a promise to indemnify another for doing a private wrong or for committing a public crime is against public policy, and is void at law. [See also *Martin* v. *Blithman*, Yelv. 197, which is cited in the note to *Farebrother* v. *Ansley*, 1 Camp., at p. 348.] Where the circumstances constituting the unlawfulness of the act are known to the doer of it, his inability to claim contribution or indemnity appears to me to be clear.

In the next place it is, I think, also clear that an action for indemnity grounded either on deceit or warranty may be maintained where the party who seeks the indemnity has incurred damage by reason of his having been authorized or (as is alleged in this instance) fraudulently induced by another to do an act, indifferent in itself, which has turned out to be unlawful, because it constitutes a private wrong, but which was not at the time apparently unlawful, and was done in honest ignorance of the particular circumstances which constituted its unlawfulness. [See the judgment of Best, C.J., in *Adamson* v. *Jarvis*, 4 Bing. 66; *Betts* v. *Gibbins*, 2 A. & E. 57; *Dixon* v. *Fawcus*, 9 W. R. 414, 30 L. J. Q. B. 137; Pollock on Torts (1887 ed.), p. 171.] In such a case an express promise to indemnify is valid in law: *Fletcher* v. *Harcot*, Hutton 55.

I come now to the question which was very fully argued before us in the present case—namely, Does this right of indemnity which exists in the case of a wrongdoer by misadventure when the wrong is a private wrong, exist also in any case in which the wrong is a criminal offence? The defendants contend that it does not. They say that in no case whatever where the act done constitutes a criminal offence can the doer of it have a right of indemnity against any of the consequences of the act. It appears to me that this proposition of the defendants is wider and more general than the law warrants. Certainly there is no right of indemnity where the doer of the act, which another has authorized or induced, knows it at the time to be an offence. If, upon the face of his claim for an indemnity in a case in which knowledge is an essential ingredient of the offence, the plaintiff admitted that he was guilty of the offence, his claim would be, on the face of it, bad. If, in a like case, he was at the trial found to have been convicted of the offence, judgment must be given against him. Nor, in my judgment, can there be any valid claim to indemnity when the doer of the act which constitutes the offence has done it with knowledge of all the circumstances necessary to constitute the act an offence, but in ignorance that the act done under those circumstances constituted an offence. A man is presumed to know the law. Again, although it is not necessary to decide the point, I am inclined to think that there could be no claim to indemnity for being authorized or induced to do an act, when the act, which is in fact criminal, is done in ignorance, indeed, of some circumstances which is necessary to constitute a crime, or even is done in a belief that such circumstance does not exist, but the doer knows that the act is honestly a wrong act. In such a case the doer of the act has the *mens rea* in the sense attributed to that expression by Bramwell, B., in the well-known case of *Reg.* v. *Prince*, L. R. 2 C. C. R. 154, 23 W. R. Dig. 65, and referred to by Willes, J., in *Queen* v. *Tolson*, 37 W. R. 716, 23 Q. B. D., 168, at p. 180. Such cases I think might occur, although it is not likely to come often. But I am unable to accept the defendants' proposition where the act, though a criminal offence—*malum prohibitum*—is upon the state of facts which the doer by the fraudulent misrepresentation of the person against whom he claims indemnity, has been induced to believe to be the true state of facts neither criminal nor immoral. Take the present case as an example, and for the purposes of the argument the facts must be assumed to be as the plaintiff alleges them to be. [His lordship then referred again to the facts.] It appears to me that a representation that the expedition had the "sanction" of her Majesty's Government, necessarily involves a representation that the "sanction" had been given in the way in which by section 11 of the Foreign Enlistment Act, 1870, it would be properly given—namely, with the license of her Majesty.

The learned counsel far the defendants contended that any claim for damages arising out of this matter which constitutes an offence on the ground of public policy was legally inadmissable. Speaking for myself I can see no ground of public policy upon which redress for consequent damages should be refused to the person so led to commit an offence by the false and fraudulent misrepresentations of fact which in this case, if true, as he believed them to be, justified the doer in believing that he was acting in accordance with the law.

It appears to me that if the defendants' reasoning on this point were adopted a real injustice might result. For instance, the Licensing Act, 1872, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. It was held in *Cundy* v. *Le Cocq*, 32 W. R. 769, 13 Q. B. D. 207, that the prohibition was absolute, and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. Suppose a person by a fraudulent misrepresentation of the sobriety of another person, who gives no indication of intoxication, but whom he knows to be drunk, authorizes and induces a licensed victualler, who has no reason to disbelieve and does himself believe the truth of the representation, to sell drink to the drunken person, and the licensed victualler is convicted and fined, upon what consideration of public policy should a man who, if the representation as to sobriety had been true, would have committed no offence, either against law or morals, be debarred from redress against the man who had by fraud inflicted upon him what might be a very serious injury? Or take a case under the 8 & 9 Vict. c. 100, s. 44. A person who receives two or more lunatics into his house not being a registered asylum or hospital or a house duly licensed under the Act or any previous Act commits an indictable offence, and in *Reg.* v. *Bishop*, 28 W. R. 475, 5 Q. B. D. 259, it was held by the Court for Crown Cases Reserved that it afforded no defence to prove, as was proved in that case, that the defendant honestly and on reasonable grounds believed that the persons who he received were not lunatic. Suppose in such a case that the belief had been induced by a false and fraudulent misrepresentation on the part of the person who requested and

authorized the proprietor of the house to receive the persons into his care. I am unable to see upon what ground of public policy or of justice the proprietor who has been led into the committing of the offence by the fraud of another should be denied a right of suing for damages. There is an express provision in the Sale of Food and Drugs Act, 1895, s. 328, for the right of a person convicted under the Act recovering the amount of any penalty in which he may have been convicted under the Act together with all costs from the person who sold him the adulterated article.

Mr. Cohen has, for the defendants, relied principally upon the opinion which was expressed by Lord Lyndhurst, C.B., in *Colburn* v. *Patmore*, It is quoted and criticized in the notes to *Lampleigh* v. *Brathwait* in Smith's Leading Cases (7th ed.), p. 159. It does not appear to me to help the defendants in the present case. The facts shortly were that the plaintiff, the proprietor of a journal, had been prosecuted, convicted, and fined for falsely and maliciously printing and publishing a libel in his newspaper. He thereupon sued the editor for damages, which included the amount of the fine and the expenses he had been put to in defending himself. The decision of the court was given upon a point of pleading, but there was a very full discussion in the course of the argument as to the right of the plaintiff, having been himself convicted and fined for the libel, to sue the editor for indemnity. The members of the court in the course of the argument expressed a strong opinion that he had no such right, and Lord Lyndhurst said, "I entertain little or no doubt that such an action could not be maintained." The plaintiff in *Colburn* v. *Patmore* could not after his conviction be heard to say that he did not falsely and maliciously publish the libel. As it was put by Alderton, B., in the course of the argument, the plaintiff though actually ignorant was legally cognizant of the publication of the libel. Here the gist of the plaintiff's case is that he did not know the facts which made his conduct criminal, but, on the contrary, was led by the defendants to believe and did believe in the existence of a fact—the sanction of the British Government, which if it was given, as he had a right upon the defendants' representation to assume it had been in the proper way—namely, by license of her Majesty—would have been an answer to any imputation of illegality. Further, while I have felt it my duty to deal with the case as if the plaintiff had been convicted and was claiming an indemnity from the final consequences of a criminal offence, it should, I think, be borne in mind that in fact the plaintiff here has not been convicted and is claiming under various heads damages which are connected with the possibility of conviction and punishment. The nearest claim to an indemnity to damages consequent upon the conduct of the defendants inducing the commission of action is contained in the allegation that he was brought to England as a prisoner. Whether any of these other heads of damage are so proximately connected with the alleged tortious conduct of the defendants as to be legally recoverable we have not to consider. It is a matter which, like the proof of the act itself, the plaintiff will have to prove at the trial. It may be that in any case some of these claims of damages might be legally sustained even if a claim for indemnity strictly so-called against the penal consequences of the commission of an offence could not. I prefer, however, to base my judgment for the plaintiff in regard to the question before the court upon the broader grounds which I have stated above.

Solicitor for the plaintiff, *G. B. Crock.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

## Court of Appeal.

From Chan. Div. (Lindley, M.R., Jeune, P., and Rigby, L.J.) — June 29, 30; July 14, 1899.

DAY v. SINGLETON. (*a.*)

*Vendor and purchaser—Leaseholds—Sale subject to consent of lessor—Duty of vendor to obtain consent—Vendor inducing lessor to refuse—Measure of damages.*

*When a lessee whose lease prohibits assignment without the written consent of the lessor enters into an agreement, expressed to be subject to the lessor's consent, to sell the property, he is bound to do his best to obtain such consent. If the vendor does not perform that duty, and still more if he actually induces the lessor to refuse, he is liable to an action for damages in which the purchaser may recover not only his deposit with interest and costs, but also damages for the loss which he has sustained owing to the vendor's omission to obtain the required consent.*

Bain v. Fothergill, 23 *W. R.* 261, *L. R.* 7 *H. L.* 158, *distinguished.*

*In such a case, if it appears that the vendor has made no effort to obtain the lessor's consent, it will be presumed against him that he could have procured it; and it is then for him to prove that he could not have induced the lessor to accept the purchaser as a tenant.*

Appeal from Romer, J.

Dunn was lessee from the Governors of the Charterhouse of a private hotel known as Cocker's Hotel. The lease, which expired in 1900, contained several restrictive covenants preventing him (*inter alia*) from making structural alterations and from assigning the premises without the written consent of the lessors. Dunn obtained from the lessors a promise of a renewal of his lease until 1940, and also permission to put up a public bar on the premises, and to make other alterations. But the lessors insisted upon reserving power to remove the bar at any time, should they think fit. Dunn commenced the alterations, but before he had completed them he entered into an agreement to sell the hotel and his business to the plaintiff. The contract was contained in a memorandum dated the 1st of April, 1897, which was as follows: "Received of Mr. Frank Day the sum of £325 as a deposit and in part payment of the purchase-money for the lease and goodwill of 'Cocker's Hotel,' 18, 19, 20, and 21, Charterhouse-square. Also the whole of the stabling and warehouse at the back. The lease has about forty years to run on the whole property. Rent £560, less a portion let off for stabling and warehouse in rear £220, the net rental being £340. The whole of the furniture and household effects on the premises to be included. The takings were about £2,800 to £3,000 per annum. I, Mr. Dunn, undertaking to finish my contract I now have with my builders for completion of the alterations and additions now being carried out, which include all gas fittings, the fitting up of bar and beer engine or otherwise, the same to be allowed for. The hotel is fully licensed for wine, spirits, and beer, on and off the premises. The present alterations to be completed within one month from the date hereof. All painting and graining to be done by me and allowed for. The title of the above premises to be satisfactory, and, subject to landlord's consent to transference of lease; price £6,500 all at.—Dated this 1st day of April, 1897. (Signed) A. D. DUNN, FRANK DAY."

On the 2nd of April, 1897, H. W. Lee, the

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

agent of the governors, was informed of the agreement by Dunn's solicitors, who suggested that the new lease should be granted direct to the plaintiff. Lee gave no definite answer about accepting the plaintiff as a tenant, but he informed Dunn that the plaintiff would not be allowed to retain the bar.

On the 26th of April, 1897, Dunn died. Litigation ensued respecting his will. On the 24th of May, 1897, the defendant Singleton was appointed administrator *pendente lite*; on the 13th of April, 1898, the other defendants, as executors, duly proved the will. An action for the administration of the estate in the Chancery Division was then commenced, an order for administration was obtained, and the administration was being proceeded with.

On the 11th of June, 1897, Day was informed that he could not have the bar. After some correspondence, in which Day insisted on specific performance with compensation for the loss of the bar, the defendant Singleton, by his solicitors, on the 2nd of November, 1897, required Day to elect whether he would complete the contract or rescind it, and on the 7th of December, 1897, Singleton's solicitor sent Day a notice rescinding the contract, and offering to return his deposit with interest, and to pay any costs he had been put to. On the 14th of December, 1897, Lee, the lessor's agent, wrote to Singleton's solicitors pressing for the rent, which was in arrear. On the 15th of December, 1897, the solicitors, in a letter to Lee, after fully describing the nature of the difficulties in which Singleton found himself owing to the bargain with the plaintiff being neither on nor off, wrote as follows: "The heavy arrears of rent," due to the Charterhouse from Singleton as administrator, "ought to be paid, and the administrator is not in funds at the present time to meet them. There are persons quite ready, and who have offered, to purchase the hotel at a price slightly beyond that proposed to be given by Mr. Day, and who would, we believe, be considered eligible tenants by the governors, which would at once relieve the administrator of difficulty. The contract with Mr. Day was stated to be (and of course was) subject to approval by the Charterhouse. We have taken the necessary steps to rescind it, but in the view of possible further litigation with him we think we may ask the governors whether, taking into consideration all the circumstances, they would or would not be satisfied with him as a tenant if the contract were still in existence." Lee replied that he did not think it was likely that the plaintiff would be accepted as a tenant. In another letter to Lee, dated the 8th of March, 1898, Singleton's solicitors said: "We beg to inform you that on the 14th of January last Mr. Day commenced an action in the Chancery Division against Mr. Singleton, the administrator *pendente lite*, claiming specific performance and compensation in respect of the contract for the sale to him of the hotel. . . . It will in all probability be some time before the action is reached. . . . May we therefore now again ask the governors whether, taking into consideration all the circumstances, they would or would not accept Mr. Day as a tenant if the contract were still in existence, which we deny?" Day, knowing nothing of this correspondence, had, in December, 1897, commenced an action against Singleton for specific performance with compensation, and delivered a statement of claim. Singleton, in his reply, delivered on the 27th of January, 1898, pleaded that the lessors would not consent to the transfer to the plaintiff of the existing lease or of the proposed new lease. The plaintiff's reply was filed on the 2nd of February, 1898.

On the 9th of July, 1898, the plaintiff amended his claim, adding Dunn's executors as defendants, abandoning his claim for specific performance, and claiming damages occasioned by Singleton's breach of duty in inducing the lessors to refuse their consent to an assignment to the plaintiff. He also claimed a return of his deposit with interest. In the meantime Dunn's executors had sold the hotel and business to other purchasers for £6,825—£325 more than the plaintiff had agreed to give; and it was on hearing of this sale that the plaintiff amended his claim.

At the trial before Romer, J., Lee was not called, and no evidence was given to show what the lessors would have done if they had been asked to accept Day as their tenant, and had been told that Dunn's representatives were desirous of completing the sale.

Romer, J., gave judgment for the plaintiff for the amount of his deposit, with interest, and the costs of the investigation of the title, but held, on the authority of *Bain* v. *Fothergill*, 23 W. R. 261, L. R. 7 H. L. 158, that he was not entitled to recover any damages for the loss of the bargain.

The plaintiff appealed.

*Neville, Q.C.*, *R. M. Bray, Q.C.*, and *Ward Coldridge*, for the appeal, cited *Lehmann* v. *McArthur*, 16 W. R. 877, L. R. 3 Ch. App. 496; *Williams* v. *Glenton* 14 W. R. 294, L. R. 1 Ch. App. 200; *Godwin* v. *Francis*, L. R. 5 C. P. 295, at p. 306, 18 W. R. C. L. Dig. 89; *Bain* v. *Fothergill*; *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Engel* v. *Fitch*, 16 W. R. 785, 17 W. R. 894, L. R. 3 Q. B. 314, L. R. 4 Q. B. 659.

*A. R. Rowden, Q.C.*, and *Jason Smith*, for the defendants, cited *Gas Light Co.* v. *Towse*, 35 Ch. D. 519, at pp. 542, 543, 35 W. R. Dig. 110.

*Neville, Q.C.*, replied.

*Cur. adv. vult.*

July 14.—LINDLEY, M.R., read the judgment of himself and RIGBY, L.J., as follows: The question raised by this appeal is whether a purchaser of leasehold property, which the vendor could not assign without a licence from his lessor, is entitled to damages (beyond the deposit, interest, and expenses) by reason of the vendor's omission to do his best to procure such licence. [His lordship stated the facts down to the delivery of the reply, and proceeded:] Pausing here, let us consider the rights of the parties at this time. Day was willing to complete if he could obtain the new lease and compensation for the loss of the bar. But it is obvious that he was not willing to complete if he could not get the new lease, and that he did not take the risk of obtaining or not obtaining the lessors' consent to its transfer to him. He was not, therefore, in a position to succeed in his action if such consent could not be obtained. If, however, the lessors' consent could be obtained, Singleton had no defence to Day's action. Singleton's notice to rescind did not deprive Day of his right to specific performance with compensation for loss of the bar, if the lessors' consent could be obtained. It was Singleton's business, as Dunn's representative, to obtain that consent if he could (*Lehmann* v. *McArthur*); although it was not necessary to obtain it until the time for completing the assignment to Day had arrived: see *Ellis* v. *Rogers*, 29 Ch. D. 661, 33 W. R. Dig. 237. If Singleton could not obtain the consent, then, as already stated, specific performance would be impossible, and Day's action as it stood must have failed, and in such case Day could only have recovered back his deposit and interest and the costs of investigating the title. This is shown by *Bain* v. *Fothergill*. But if Singleton could have got the lessors' consent and would not, still more if the refusal of that consent was procured by Singleton, Day would have had a right of action for damages

against Singleton for a breach of his duty to obtain the lessors' consent, it being in his power to obtain it. In such an action (unless *Bain* v. *Fothergill* extends to it, which I will consider presently) the measure of damages would not be confined to the deposit and interest and costs rendered useless, but the measure of damages would be the loss occasioned by not obtaining the lease with compensation for the absence of the bar. Singleton never asked the lessors to accept Day as their tenant without a bar, and consequently it would be for him (Singleton) to show that if he had asked them they would have refused. [His lordship then stated the rest of the facts, and proceeded:]

Romer, J., did not think that the plaintiff had proved that Singleton, by his solicitors, had induced he lessors to decline to accept Day as their tenant, and the learned judge considered that the case fell within *Bain* v. *Fothergill*. He took a very charitable view of the letter of the 15th of December, 1897; but, even taking this view of it, Singleton certainly made no effort to obtain the lessors' consent to the required assignment without a bar, as it was his duty to do. But for that letter there is no reason to suppose that Day would not have been accepted as a tenant without a bar, and it ought to be inferred as against Singleton that the lessors would have accepted Day, if Singleton had asked them to do so. Having regard to this circumstance, we do not think that *Bain* v. *Fothergill* covers this case. There the vendors did all they could to obtain the lessors' consent to the assignment, and they failed to obtain it: see L. R. 7 H. L., p. 175. The first question submitted to the judges (see p. 170) shows that what was being considered was the rule as to damages on the sale of real estate where a vendor, without his default, is unable to make a good title. Lord Chelmsford's judgment is addressed to that question, and his observations on fraud (on pp. 206-7) are part of his comment on *Hopkins* v. *Grazebrook*, 6 B. & C. 31, which had decided that the exceptional rule laid down in *Flureau* v. *Thornhill* did not apply where the vendor knew that he had not a good title, although he believed he could get one, and had in fact an equitable title. Neither Lord Chelmsford's judgment nor Lord Hatherley's is an authority for the application of that exceptional rule to the case of a vendor who can make a good title but will not, or will not do what he can do and ought to do in order to obtain one. Such a case is, however, covered by *Engel* v. *Fitch*, which was to a certain extent based on *Hopkins* v. *Grazebrook*, and was much commented on in, but not overruled by, *Bain* v. *Fothergill*.

These observations do not, however, dispose of this case. They render it necessary to consider another difficulty, which is this: If Dunn's representatives had tried to obtain the lessor's consent, and had failed, Day could have obtained no more damages than those he has recovered. The damage to him is occasioned by his not obtaining what he was entitled to by his contract, and, so far as damages are concerned, the reason why he fails to obtain what he bargained for is immaterial. The damage is the same whatever that reason may be. Why, then, should he obtain more damages if no attempt is made to obtain the lessors' consent than he would be entitled to if a proper effort to obtain such consent had been made and had failed? The only reason which can be assigned for deciding that he is entitled to more is that the rule which limits his damages in the first case is itself an anomalous rule based upon and justified by difficulties in showing a good title to real property in this country, but one which ought not to be extended to cases in which the reasons on which it is based do not apply. This answer to the question with which we are dealing appears to us sufficient and satisfactory. The answer may possibly be difficult to reconcile with some of Lord Chelmsford's observations in *Bain* v. *Fothergill*, but the answer is, in our opinion, quite consistent with the decision in that case, and it has the merit of preventing the rule there upheld from leading to grievous injustice.

We come, therefore, to the conclusion that the judgment appealed from ought to be reversed, except so far as it relates to the deposit, and that it ought to be declared that the plaintiff is entitled to the damages which he has sustained by the omission of the defendant Singleton to obtain the consent of the Governors of the Charterhouse to the assignment to the plaintiff of the lease referred to in the memorandum of the 1st of April, 1897, without the bar, which the said governors would not allow the plaintiff to have. Then there must be an inquiry to ascertain the amount of these damages, and the defendant Singleton must be ordered to pay them. He must look for his indemnity to Dunn's estate.

As regards the costs, the plaintiff is entitled to the costs of the appeal, and to the costs of the action, and the defendants must look to Dunn's estate for their indemnity.

JEUNE, P., read the following judgment: I think that in this case the real question is one of fact rather than of law, and I am compelled to differ from the conclusion of the learned judge in the court below mainly because I cannot accept his view of the facts, which is founded hardly at all on the evidence of witnesses, but turns on the inference to be drawn from certain correspondence. [His lordship stated the facts, and proceeded:] The action, therefore, as it now stands, is a claim for damages, based on the refusal by the administrator to carry out Mr. Dunn's contract, and on his not only failing to do his best to obtain the consent of the lessors to the assignment to Day, but inducing the lessors to refuse such consent.

I am compelled to differ from the learned judge in the court below as to the proper inference to be drawn from the facts and correspondence to which I have referred. To me it appears abundantly clear that the administrator's solicitors, acting on his behalf, did not use their best endeavours to obtain the lessors' consent, but, on the contrary, endeavoured, and I think successfully endeavoured, to induce the lessors through their solicitor to refuse that consent. It should be mentioned that on the 2nd of April, 1897, Messrs. Roscoe & Hincks wrote to Mr. Lee recommending Mr. Day as an assignee, and stating that they were informed that he was a man of respectability and good means. It was then their interest to get Mr. Day accepted as a tenant. But by December it was greatly to the interest of the estate which they represented to induce the governors to refuse their consent. They could so, but only so, get rid of the impending action for specific performance and compensation, to which as far as I can see they had no answer; and they would also be made free to sell their property on more advantageous terms. I do not think it possible that an experienced solicitor, such as Mr. Lee doubtless is, could fail to understand the drift of the letter of the 15th of December, or to see that the administrator was asking the governors to refuse to their consent on account of the great advantage which such refusal would be to him; and also the advantage which he suggests it would be to the governors. And I cannot, as a matter of common sense, refuse to connect the refusal which promptly followed with the letter of the 15th of December.

Romer, J., was struck with the fact that Mr.

Lee was not called by the plaintiff. It appears to me that it was for the defendants to call him to refute, if they could, the strong presumption arising from their letter, and to show, if they could, that something other than Messrs. Roscoe & Hincks' representations induced the governors to refuse their assent. It was argued before us that the letter of the 15th of December was written *bonâ fide* in the interests of Mr. Dunn's estate. I have no doubt that it was. But, as Mr. Neville pointed out in his forcible reply, Mr. Singleton had a duty to Mr. Day superior to that to Mr. Dunn's estate, and it was just because he was zealous in regard to his duty to that estate that he failed in his duty to the person with whom Mr. Dunn had contracted.

But now comes the question whether, on the facts as I have found them, an action lies at the suit of the plaintiff, and an action in which full damages can be recovered. It is contended that the case of *Bain* v. *Fothergill* is a conclusive authority against such a proposition.

The effect of the decision in *Bain* v. *Fothergill* is, I think, summed up in saying that it overruled the exception which the court in the case of *Hopkins* v. *Grazebrook* had sought to engraft on the rule laid down in the case of *Flureau* v. *Thornhill*. What that exception was may be stated in the words of Lord Chelmsford in his judgment in *Bain* v. *Fothergill* (at p. 206): "The exception which the court in *Hopkins* v. *Grazebrook* engrafted upon the rule in *Flureau* v. *Thornhill* has always been taken to be this: that in an action for breach of contract for the sale of real estate, if the vendor at the time of entering into the contract knew that he had no title the purchaser has a right to recover damages for the loss of his bargain." As the law, therefore, now stands, limited damages only can be recovered in an action for breach of contract for the sale of real estate, whether or no the vendor knows that he had no title to the thing contracted to be sold. Lord Chelmsford, indeed, in his judgment (p. 207) was led to regard the rule laid down in *Flureau* v. *Thornhill* as without exception. "I think," he said, "the rule as to the limits within which damages may be recovered upon breach of contract for the sale of real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate, knowing that he has no title to it nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by action for the breach of the contract; he can only obtain other damages by an action for deceit."

But the present action is not, I think, to be regarded as an action for breach of contract to sell the lease of the hotel in question. It is really an action against Mr. Singleton for failing in his duty to obtain, if he could, the consent of the Charterhouse to a transfer.

I do not think it can be doubted that it is the duty of a vendor to make a good title for his purchaser if he can, and certainly not to do anything to impair or spoil such title. The emphatic words of Turner, L.J., in *Williams* v. *Glenton* have been often referred to: "The vendor is bound to complete the contract, and if he does not take the steps which are necessary to enable him to do so, he is liable for damages upon the contract; and heavy damages would be given if, having the means of completing the sale, he should decline to take the proceedings necessary for the purpose." It may perhaps be doubted if the expression of opinion that the vendor is liable for damages upon the contract does not conflict with the *dicta* of Lord Chelmsford, but the expression of the duty of the vendor leads to no such conflict. In *Lehmann* v. *McArthur* Page Wood, L.J., said "it was the duty of McArthur" (the vendor in that case) "to do his best to obtain the landlord's consent." *Engel* v. *Fitch*, decided by the Court of Queen's Bench and the Exchequer Chamber, appears to me to be an authority on this point. In that case the mortgagee of a house sold it to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The title was satisfactory, but the mortgagor, who was in possession, refused to go out, and the vendors refused to oust him by ejectment or to complete the sale. It was held that the rule in *Flureau* v. *Thornhill* did not prevent the purchaser from recovering damages for the loss of his bargain. It is quite true that in the judgment of Kelly, C.B., may be found words which approve the decision in *Hopkins* v. *Grazebrook*. But the case of *Engel* v. *Fitch* appears to me to rest on ground quite different from that taken in *Hopkins* v. *Grazebrook*. It turned, not on the knowledge of the vendor of his want of title, but on his failure to do his best to carry out his contract.

Nor does the case of *Bain* v. *Fothergill* at all conflict with this view of the duty of a vendor. The decision in that case clearly does not. The words of Lord Chelmsford are, no doubt, very general, but they may be understood to refer to the exception which the case of *Hopkins* v. *Grazebrook* sought to engraft on the rule of *Flureau* v. *Thornhill*. Lord Hatherley, on the other hand, repeating, as I think, his former opinion expressed in *Lehmann* v. *McArthur*, said, referring to the case of *Engel* v. *Fitch*: "The vendor in that case was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others that he can compel to concur in the conveyance." But it should be added that his lordship proceeded to express a doubt whether in *Engel* v. *Fitch* damages were properly given in respect of the loss of the contract. It cannot, I think, be said that the House of Lords in *Bain* v. *Fothergill* overruled the case of *Engel* v. *Fitch*.

I am of opinion that in the present case the vendor's representative distinctly failed in his duty to do his best to obtain the lessors' consent. Indeed he went further, and, as I think, prevented that consent from being given. I can see no reason why he is not liable to an action for this, and why in such an action damages should not be awarded to compensate the plaintiff. Now, what are the damages in the present case? They are not, I think, exactly the damages for the plaintiff's loss of bargain in respect of this hotel. It is true that the defendant did not, and could not, complete Dunn's contract to sell the hotel with the bar, but this did not arise from the refusal of the Charterhouse to accept the plaintiff as a tenant, but from the terms of the lease to the vendor. What happened was that the plaintiff accepted the position that he could not have the hotel with the bar, and in consequence brought an action for specific performance with compensation for the loss of the bar. It was in consequence of and in order to defeat this action that Singleton, as I think, resorted to the plan of getting the Charterhouse to refuse to take the plaintiff as tenant, and the result of the refusal necessarily was that the action was rendered abortive. I think that the defendant is liable for the consequences of his conduct, such consequences being that the plaintiff lost, not the hotel with the bar, but a successful result to his action—that is to say, a decree of specific performance with compensation. It seems that the hotel without the bar has been sold far a larger sum than the plaintiff agreed to give for it with the bar,

and this fact will be material in estimating the amount of the damages.

I think, therefore, that the judgment of the court below must be reversed, and judgment entered for the plaintiff, with an inquiry as to damages estimated on the principle which I have indicated.

*Appeal allowed.*

Solicitors, *W. B. Glasier; Roscoe & Hincks.*

---

From Q. B. Div. (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) July 3, 1899.

RIVER RIBBLE JOINT COMMITTEE *v.* HALLIWELL. SAME *v.* SHORROCK. (*a.*)

*River—Pollution—Putrid solid matter—Right of impounding or diverting water—Rivers Pollution Act,* 1876 (39 & 40 *Vict. c.* 75), *ss.* 2, 17, 20.

*The defendant had been for many years the owner of weaving sheds on the bank of a river, and, before the passing of the Rivers Pollution Act,* 1876, *had acquired a right of diverting and impounding water for the purpose of his business. The water higher up the stream contained vegetable refuse, which, if it had been allowed to flow along the natural course of the river, would not have become putrid. But when it settled in the defendant's impounding reservoir it became putrid, and, when the reservoir was periodically cleared out by opening sluices, the effluent contained the vegetable refuse which had so become putrid. The effluent consisted of* 97·6 *per cent. of water and* 2·4 *of solid matter. Proceedings having been taken against the defendant, in which it was alleged that he put putrid solid matter into the river contrary to the provisions of section* 2 *of the Rivers Pollution Act,* 1876,

*Held, that the defendant was protected from liability under the Act by section* 17.

*Held, also (by* A. L. Smith *and* Rigby, L.JJ.), *that the matter put into the river by the defendant was not solid matter.*

Per Vaughan Williams, L.J.—Quære, *whether the proper time for considering whether the matter was solid was not the moment of commencing the operation of flushing rather than the moment when the matter came into contact with the stream.*

Appeal from the judgment of a Divisional Court (Lord Russell of Killowen, C.J., and Wills, J.) on the hearing of an appeal in two actions brought in the Blackburn County Court by the Joint Committee of the River Ribble under the Rivers Pollution Act, 1876.

The plaintiffs alleged that the defendant in each action put or caused to be put or to fall, or knowingly permitted to be put or to fall or to be carried into the River Darwen certain putrid solid matter, so as to interfere with its due flow and to pollute its waters, contrary to the provisions of section 2 of the Rivers Pollution Act, 1876, and they claimed against the defendant in each action an order under section 10 requiring him to abstain from the commission of any further offence against the Act, and an order requiring him to perform his duty in the premises in manner to be specified in such last-mentioned order, and with such conditions and directions for carrying it into effect as to the court should seem meet.

The defendant Halliwell was and had been for many years the owner of weaving sheds worked by steam power on the banks of the River Darwen. Higher up the stream there were a considerable number of manufactories of paper, which discharged vegetable refuse into the river. Before the passing of the Rivers Pollution Act, 1876, Halliwell had acquired a right to divert water from the river for the purposes of his business by means of a goit. The water passed through the goit into a large impounding reservoir, where it was allowed to settle, and it was then let into a smaller reservoir for the purpose of condensation. It was necessary to clear out the larger reservoir from time to time in order to prevent it silting up, and the practice was on Saturdays to open three sluices and let the water flow through the reservoir and out into the stream. If the vegetable refuse from the paper manufactories had been allowed to flow along the natural course of the river it would not have become putrid. But when it settled at the bottom of the reservoir it did become putrid, and, when the sluices were opened, the effluent contained the vegetable refuse which had so become putrid. The defendant did not add any solid matter to the water in the reservoir, but only let the contents of the reservoir flow out. Spades and shovels were used to stir up the deposit at the bottom of the reservoir, but the only effect of this was to clear out the reservoir more quickly. The effluent consisted of 97·6 per cent. of water and 2.4 per cent. of solid matter.

The facts in the other action were substantially the same.

The county court judge gave judgment for the defendant in each case, being of opinion, first, that the effluent was not "solid matter" within the meaning of section 2 of the Rivers Pollution Act, having regard to the definition in section 20; and secondly, that the defendants were protected by section 17.

Section 2 of the Rivers Pollution Act, 1876, enacts that "Every person who puts or causes to be put or to fall or knowingly permits to be put or to fall or to be carried into any stream, so as . . . to interfere with its due flow or to pollute its waters, the solid refuse of any manufactory, manufacturing process or quarry, or any rubbish or cinders, or any other waste or any putrid solid matter, shall be deemed to have committed an offence against this Act."

By section 17, "This Act shall not apply to or affect the lawful exercise of any rights of impounding or diverting water."

By section 20, "In this Act, if not inconsistant with the context . . . 'solid matter' shall not include particles of matter in suspension in water."

The Divisional Court affirmed the judgment of the county court judge.

The Joint Committee of the River Ribble appealed.

*C. A. Cripps, Q.C.,* and *F. H. Mellor,* for the appellants.

*Joseph Walton, Q.C.,* and *Danckwerts,* for the respondents.

A. L. SMITH, L.J.—I am of opinion that this case may be decided in favour of the respondents either under section 2 coupled with section 20, or under section 17. The charge against them is that they have put putrid solid matter into the River Darwen. No doubt the matter which they put into the river was putrid and polluted the river. But was it, at the time when they put it into the river, solid matter? Having putrid solid matter at the bottom of the reservoir was not an offence against the Act. What constitutes an offence against the Act is putting putrid solid matter into a river. I am not sure that this was ever solid matter at all, but the evidence clearly shows that at the time when it was put

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

into the river it was not solid. I should come to this conclusion independently of section 20. I think the judgment of the Divisional Court on this point was right. I also think the judgment was right as to section 17. The respondents have for years been carrying on their business and exercising their right of impounding for the purpose of getting clear water, and in my opinion they are within the protection of section 17. The appeal must therefore be dismissed.

RIGBY, L J., concurred.

VAUGHAN WILLIAMS, L.J.—I agree that the appeal should be dismissed. But I prefer to rest my decision on section 17. As to section 2, I am inclined to think, for my part, that the time with regard to which we ought to consider whether the matter was solid, is the moment of commencing the operation of flushing, and that a case might well be within the Act though the matter had ceased to be solid when it was brought into contact with the stream.

*Appeal dismissed.*

Solicitors for the appellants, *Ridsdale & Son*, for *F. C. Hulton*, Preston.

Solicitors for the respondent Halliwell, *Halliwell & Halliwell*, Darwen.

Solicitors for the respondent Shorrock, *Pritchard & Englefield*, for *C. Costeker*, Darwen.

## High Court of Justice.

Chan. Div. Stirling, J. } July 21; Aug. 3, 9, 1899.

WALTERS AND OTHERS *v.* GREEN AND OTHERS. (*a.*)

*Trade union — Strike and lock-out — "Watching or besetting" — Interlocutory injunction — Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *ss.* 3, 7—*Practice—Joinder of parties—R. S. C., ord.* 16, *rr.* 1, 4, 11.

*The eight defendants, who were officials of various trades unions, met men who had been brought over by the plaintiffs under contracts from Ireland to replace workmen on strike, at the railway station of their destination, and persuaded many of them to leave the place or to refuse to work for the plaintiffs. The seven plaintiffs were several master builders and members of a master-builders' association.*

*Held,* (1) *that the action was properly constituted, since the seven plaintiffs were suing the eight defendants on one and the same series of transactions and to determine a question of combination;* (2) *that the acts complained of in two out of the eight cases were a "watching or besetting" within the meaning of section 7 of the Conspiracy Act,* 1875; *and an injunction was granted in those two cases accordingly.*

Charnock *v.* Court, 47 *W. R.* 633, [1899] 2 *Ch.* 35, *followed.*

This was a motion to restrain the defendants from watching or besetting any railway station in Hull or elsewhere or the works of the plaintiffs or any of them or the approaches to any such station or works or any place where any persons employed or about to be employed by or working or intending to work for the plaintiffs or any of them resided or worked or happened to be, for the purpose of persuading such persons not to work or abstain from working for the plaintiffs or any of them or for any other purpose than to obtain or communicate information. A preliminary question was raised on the hearing of the motion as to whether the action was properly constituted, and that led to his lordship directing a statement of claim to be delivered; this now came before him and was said by his lordship to state very clearly the cause of action which the plaintiffs claimed and to enable him to deal with great facility with that objection.

The plaintiffs were master builders carrying on their businesses at Hull and were members of the master builders' association there.

The defendants were officials of the various trades unions at Hull and also of a federation called the Hull Building Trades' Federation, which was a union of unions connected with Hull. It appeared that in the early part of the present year there arose a labour dispute in the building trade, and as a result a large number of men employed either struck or were locked out. In order to replace the services of the workmen so lost the plaintiffs, the masters, imported workmen from Belfast in Ireland. These men entered into contracts with an agent of the masters that they would go to Hull and work as non-union men for twelve months for such firms belonging to the masters' union as the masters' association should specify, and in other cases as a particular member of that body should specify. In this connection paragraphs 9 and 10 of the statement of claim were important. Paragraph 9 said: "The defendants having ascertained that the masters' association were bringing workmen from other places to Hull to fill the positions vacated by the men on strike or locked out as aforesaid, thereupon with the intention of injuring the plaintiffs and other members of the masters' association in their trade and business, and thereby compelling the plaintiffs and the other members of the association to accept the terms of the unions, and to conduct their respective businesses in accordance with the requirements of the unions, wrongfully and without lawful excuse combined and conspired together to watch and beset, or cause or procure to be watched and beset railway stations and other places where workmen brought to Hull by the masters' association as aforesaid, or other non-union men employed or about to be employed by the plaintiffs or some or one of them might happen to be, and the approaches thereto respectively, for the purpose of persuading or otherwise inducing such workmen not to work or to cease working for the plaintiffs or any of them or any other member of the masters' association." Paragraph 10 continued: "In furtherance and execution of the said combination and conspiracy, the defendants wrongfully and without legal authority did, or caused to be done, the several overt acts, of which particulars are stated in the next succeeding paragraph hereof, for the purpose of persuading or otherwise inducing workmen brought to Hull by the masters' association as aforesaid, or other non-union workmen working or intending to work for the plaintiffs or any of them, or any other members of the masters' association, and did in fact persuade or induce many of such workmen to leave Hull or refuse or cease to work for the plaintiffs or any of them or any other member of the masters' association, by reason whereof the plaintiffs have been much hindered and interfered with in the lawful conduct of their respective businesses, and have respectively suffered serious loss and damage." Paragraph 11 gave particulars of the overt acts complained of.

*Upjohn, Q.C.*, and *R. J. Parker*, for the plaintiffs, said that the torts in respect of which the defendants

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

were sued were not separate, but were acts of conspiring together within the meaning of section 7 of the Conspiracy and Protection of Property Act, 1875: *Lyons* v. *Wilkins*, 47 W. R. 291, [1899] 1 Ch. 255; also see Clerk & Lindsell, Law of Torts (2nd ed.), p. 53: "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design." The effect of ord. 16, rr. 1, 4, and 11, is that where A., B., and C. are, for example, joint trustees in X. trust, and A. and B. also joint trustees in Y. trust, if A., B., and C. are sued jointly, the case to succeed must be proved against all three. Here, the real *injuria* is the common design to put pressure on the plaintiffs which is unlawful: *Flood* v. *Jackson*, 43 W. R. 453, [1895] 2 Q. B. 21. There is a combination in overt acts: *Gregory* v. *Duke of Brunswick*, 1 Car. & Kir. 24; *Mogul Steamship Co.* v. *McGregor*, 40 W. R. 337, [1892] A. C. 25; *Skinner* v. *Gunton*, 1 Williams's Saunders, 269; *Drincqbier* v. *Wood*, 47 W. R. 252, [1899] 1 Ch. 393; *Gower* v. *Couldridge*, 46 W. R. 214, [1898] 1 Q. B. 348. It is not necessary to prove everything against everybody; the court is competent to direct a separate assessment of damages in the different cases.

*J. D. Crawford*, for six of the defendants, said that the acts complained of were distinct acts committed against distinct plaintiffs on distinct occasions, and that therefore seven plaintiffs could not be joined in the one action in accordance with order 16: *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494. That this order was not passed for the purpose of dealing with distinct cases of tort has been shown in *Sadler* v. *Great Western Railway Co.*, 45 W. R. 51, [1896] A. C. 450; *Thompson* v. *London County Council*, 47 W. R. 433, [1899] 1 Q. B. 840; *Gower* v. *Couldridge*. The terms of sections 3 and 7 of the Conspiracy Act, 1875, make clear the importance of keeping the actions separate. An action in which seven plaintiffs and eight defendants are joined makes fifty-six issues. Where the defendants are joint tortfeasors, that does not give a cause of action to joint plaintiffs: *Allen* v. *Flood*, 46 W. R. 258, [1898] A. C. 1; *Mogul Steamship Co.* v. *McGregor*; *Hutchins* v. *Hutchins*, Ir. R. 10 Eq. 453, 25 W. R. Dig. 10.

*Stewart Smith*, for defendants Hall and Cuttill, officials of the Carpenters' and Joiners' Association, said that there was no evidence that they were agents of the other defendants, or that they authorized the acts of the other defendants.

Aug. 9.—STIRLING, J., stated the facts and continued: In order to ascertain whether the action is properly constituted, let me consider what would be the case if a single plaintiff were suing all these defendants. It appears to me that the allegations contained in paragraphs 9 and 10 of the statement of claim (set out above) amount to this, that the defendants jointly committed a series of illegal acts causing damage to the plaintiffs. Therefore what is alleged is a joint cause of action. In my judgment, therefore, the case is distinguishable entirely from the case of *Sadler* v. *The Great Western Railway*, which on this point was relied on. The decision there was on claims for damages, and it was held that such claims against two or more defendants in respect of their several liability for separate torts cannot be combined in one action. The present case is not one of suing several defendants on account of several liability for several torts, but jointly in respect of their acts. Lord Davey in his judgment in *Sadler* v. *Great Western Railway Co.*, at p. 456 of [1896] A. C., puts it thus: "I believe there is not a scintilla of allegation, nor was it intended, as the appellants' counsel fairly said, to state in the statement of claim that there was anything else than a separate cause of action—that there was anything like a joint cause of action, or a joint action of any kind on behalf of the defendants." In this case the allegations are of a totally different kind. Then, if I may make a few remarks as to what the result would be supposing that it were not established that all the defendants have committed the acts complained of, I think the authorities to which I was referred—viz., *Skinner* v. *Gunton*; *Savile* v. *Roberts*, 1 Ld. Ray. 374, at p. 379; *Muriel* v. *Tracy*, 6 Mod. 169—show that even if the result of the trial be that some only of the defendants are shown to have committed such acts, judgment may be recovered against them, and even against one of them. I do not at all speculate on the result of the evidence at the trial; it is obvious that difficulties may arise in proving joint acts. It is enough to state now that the action is brought in respect of joint acts.

Then the next question is whether the plaintiffs can properly combine in bringing this action. That depends on the effect of the recent modification of ord. 16, r. 4. As it now stands it runs thus: "All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or, in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise." The meaning of that rule was considered by the Court of Appeal in *Stroud* v. *Lawson*, 46 W. R. 626, [1898] 2 Q. B. 44, where Chitty, L.J., says: "It is necessary that both these conditions should be fulfilled—that is to say, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law in order that the case may be within the rule." I then ask, Are these two conditions fulfilled? It seems to me that they are, because, firstly, the right to relief as alleged here to exist arises out of the same series of transactions; secondly, there has been a question of fact as well as law—viz., whether all those acts were done in pursuance of a combination so as to make the defendants jointly responsible in respect of them.

Now, passing by the objection to the constitution of the action, we come to the question of the plaintiff's legal rights. On that I propose to say very little. The law is settled to a great extent in the case of *Lyons* v. *Wilkins*. That action was based on section 7, sub-section 4, of the Conspiracy and Protection of Property Act, 1875, which runs as follows: "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority" (*inter alia*) "(4) watches or besets the house or other place where such other person resides or works, or carries on business, or happens to be, or the approach to such house or place . . ." shall, on conviction, be liable to certain penalties. Then follows a proviso: "Attending at or near the house or place where a person resides or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." I will read a few words from the judgment of Chitty, L.J., in that case, where he says: "To bring a case of watching and besetting within the section it must be shown that the watching or

besetting was done with a view to compel the person to abstain from doing or to do any act which such person has a legal right to do or abstain from doing." As to that, the allegations tend to show that the acts here were done with a view to compel the masters to act in accordance with the views of the trades unions and not in accordance with those they think fit to adopt, these views being perfectly legal and not otherwise objectionable. Then the lord justice says: "It was urged that the watching or besetting mentioned in the fourth sub-section was not rendered unlawful by that section where it was done for the purpose of persuading workmen to abstain from taking work from the person sought to be compelled. I cannot accept that proposition. I think that when that view is established the only case in which watching or besetting is allowed, or, in other words, is not unlawful, is that mentioned in the proviso at the end of the section—namely, where the attending at or near the house or place where a person resides or works, or carries on business, or happens to be, or the approach to such house or place, is in order merely to obtain or communicate information. Attending in order to persuade is not within the proviso." So that although there may be attendance for the purpose of communicating information, there may not be attendance in order to persuade. As regards the general nature of the acts complained of, that is very similar to the recent case of *Charnock* v. *Court*. There is, however, one point in which the frame of this action differs from that. In that case all the members of the masters' association were plaintiffs in the first instance, though ultimately some were made defendants. They were all present. The contracts which were made here with the workmen were made on behalf of the masters' association, and the workmen were to work for such members of that body as should be specified by some member thereof. They were intercepted before they went to work, or before any member had been specified, and it is contended that that does not give rise to damage to a plaintiff who had not been specified. It seems to me that that is not so. I think that the men being intercepted so that a particular master lost the chance of employing those particular men who were intercepted, is a sufficient damage to enable the master to sue. I pass then to the question whether there is evidence that these defendants have been guilty of the acts complained of. Now, looking at the particulars given in the statement of claim, there are two defendants whose names are very prominent—namely, Tighe and Emerson. The case against them is most strongly urged. I begin first with Tighe, and it seems to me clear that he has been guilty of going beyond that which has been allowed by the clause of the section I have referred to. There are several such acts to which I might refer, but it will be sufficient to refer to one—viz., that which occurred on the 31st of May, and which is spoken to by the witness J. Hayes in paragraph 10 of his affidavit, where he says: "On arriving we put our boxes in the parcels office. A number of the men on strike were there and followed us out of the station. The man I know as Tighe came up and got between McKenna and me. He asked me where we were going. I said we were going to see Mr. Walters. He said he would advise us to come first and see the officials of the club. He said 'I assure you we will treat you decently and give you a good dinner, and either find you employment or send you back again.' We said it was not fair for Mr. Walters to import men from Belfast and rob them of their just claims." That is not denied specifically. What Tighe says is this: "I have never watched or beset or picketed any of the works or buildings of the plaintiffs or any of them, neither have I caused anyone else to do so on my behalf; furthermore. I have never been the cause of a crowd assembling at the railway stations or elsewhere or the cause of any disturbances that may have arisen, neither have I been at the railway stations or elsewhere during the dispute save and except to obtain or communicate information." That may be in accordance with what took place as stated by Hayes. But it seems to me that that is not attending merely for the purpose of communicating information, but attending for the purpose of persuading or inducing men to abstain from working for the plaintiffs and other members of the masters' association. The next case is that of Emerson. It is clear again here that there are several such acts. According to the affidavit of G. B. Thain in paragraphs 11 and 12 he says this: "On the 30th of May I, with Clubley and Johnston, met a batch of nine men coming from Belfast by the 11.30 train. There were then in the station over a hundred strike men, including Tighe and Emerson and a man called Noble, another of the labourers' union, who were leading them. When the Belfast men got out of the train they were surrounded by the strikers. I have read the affidavit by W. R. Johnston sworn herein on the 27th of June, 1899, and I corroborate his recollection of the circumstances attending the arrival of these men. During the confusion I got my hand injured by trying to retain a tool-bag belonging to one of the joiners who had come after the other nine men had been got into a waggonette by the strike men. On the following day I met the defendant Tighe, and in conversation he apologized for the rough and disorderly behaviour of his men in the station the previous day. None of the Belfast men were retained by us on this occasion." Johnston, in paragraph 3 of his affidavit says, "Ten men arrived, including joiners and plasterers. I took hold of one of the joiner's arms and went with him along the platform in company with Thain and Clubley who went along with the other men. There was a large collection of men who had come into the station in company with Emerson and Tighe, and considerable excitement and bustle took place along the station; we trying to get the men away and they trying to take the men away from us." Then Walters, in an affidavit filed on behalf of the plaintiffs, says in paragraph 10: "On Wednesday morning, the 14th of June last, about 11 o'clock, I was at the Paragon Railway Station in Hull to meet seven men who were coming from Belfast sent by Mr. Forster. When in the station I saw several of the strike men watching, including the defendant Devine, to whom I said 'Good morning.' I then saw a lot of other men were coming on to the platform and I at once went to the station master and got him to send a railway policeman, who cleared these men off the platform and ordered them out of the station. As soon as Devine got out of the station he ran off as hard as he could in the direction of the men's club room, and in about a quarter of an hour some fifty or sixty men more arrived. I left the railway station and drove on to the Monument Bridge, where I found a police sergeant, who went for me to the central Police Station and took several policemen to the railway station, as I fully expected there would be a disturbance. I then went into the town. I returned to the station later on in order to catch a train for Leeds, and then found that the seven men had arrived and had been got away by my manager, Mr. Thain, and my clerk, Mr. Clubley. When at the platform barrier I met defendants Tighe and Emerson. They shook hands, and we walked on to the platform together. I said, 'This is like the meeting of Wellington and Blucher.' Emerson said, 'We got three of the men

just landed, and we intend to have the lot. We've been talking them in the cab; we shall get from you all the men you've got before we've finished.' I said, 'I don't think you will,' to which Emerson replied, 'I am sure we shall.' Emerson also said, 'It is costing you some hundreds of pounds getting these men here, and you cannot stand that very long,' to which I replied, 'It is not costing me anything. I am acting as agent for the Yorkshire Federation in this business.' The seven men were eventually got away by these men."

I cannot act on any such view, for trades unions are legal bodies, and *primâ facie* their officers cannot be presumed to have authority to do or sanction anything other than what trades unions may lawfully do. There was one piece of evidence which was sought to be pressed against them, particularly the acts of the defendant Tighe. He is what is called "a walking delegate" of the Hull Builders' Association. He says in his affidavit, "What I do on behalf of my society is upon instructions received." Another defendant, Flannagan, the secretary, appears by the same solicitor. He has made no affidavit denying the truth of Tighe's statement. Tighe's affidavit was filed on behalf of the defendants generally. It is stated that Flannagan ought to be bound by Tighe's statement, and that he is a party to Tighe's illegal acts and sanctioned them. That seems too far to go from the fact that they appear by the same solicitor in this particular action. Another point relied on was that large numbers assembled at the railway station whenever the imported workmen arrived. It is put very forcibly in the affidavit of Bray, who says in paragraph 4: "I say that the importation of the non-union men to the city by the master builders' association has been matter of common notoriety ever since the arrival of the first batch of men in the early part of May last, and I say that the proceedings which have been taken on the part of the men on strike to meet these non-union men coming into the city and to induce and intimidate them from carrying out the engagements into which they have entered with the master builders in Hull prior to their arrival have been organized, and could only have been carried out by and through official action on the part of the several men's unions, of which the defendants are respectively officials." That would have been denied by all the defendants. Tighe, in his affidavit in reply, says: "The union men get to know about all these matters long before the officials do, and if the men, as alleged, did try to persuade the non-union men from working for their respective masters, I say that it was without the knowledge or consent of the officials of the union of which I am a member." It is said that that ought not to be believed. I confess I cannot come to that conclusion. It seems to me perfectly possible that it may have been as stated by Bray, and that it will so turn out when the cross-examination gives more investigation. Now I do not see my way to do that. The only defendants, therefore, against whom there is a case are Tighe and Emerson. I propose to grant an injunction against them similar to that which was granted in *Charnock* v. *Court*, 47 W. R. 634, [1899] 2 Ch. 35.* The costs to be costs in the action. I think I am entitled to grant an injunction because if at the trial it is found that Tighe and Emerson are the only persons who combined together, I can say that according to the authorities I am entitled to give judgment against them. As to the other defendants, that must depend on what takes place at the trial.

Solicitors, *Fred Jones*, for *J. W. Chilman*, Hull; *Rollit & Sons*; *Pattinson & Brewer*.

* Reported in 47 W. R. 634; the terms of the injunction there granted were "to restrain the defendants or their agents or person authorized by them from watching or besetting the landing-stage at Fleetwood, or any other place to which any person or persons employed or about to be employed by the plaintiffs or any of them may be brought."

---

Chan. Div.
Cozens-Hardy, J. } June 22, 23, 26; July 6, 1899.

BARRON v. WILLIS. (a.)

*Solicitor—Married woman—Gift to solicitor's son—Voluntary deed by wife in favour of husband—Undue influence*—Onus probandi.

*Although a voluntary gift by a client to his solicitor or to a member of the solicitor's family while the confidential relation exists cannot be supported unless the client had competent and independent advice, the rule ought not to be applied in favour of a plaintiff who denies the relationship, and against a defendant who, except as a friend of the family, has only seen the plaintiff on a few occasions in company with persons who admittedly were his clients.*

Liles v. Terry, 44 *W. R.* 116, [1895] 2 *Q. B.* 679, *distinguished.*

*The relation of husband and wife is not one of those to which the doctrine of* Huguenin v. Baseley, 14 *Ves.* 273, *applies, and there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid.*

Nedby v. Nedby, 5 *De G. & Sm.* 377, *followed.*

Action.

The plaintiff, Mrs. Annie Butler Barron, wife of William Barron, and formerly wife of Joseph Willis, sought to rectify or set aside a deed executed in 1891, to which she was a party, and also to obtain a declaration that the defendant Frederick Herbert Skinner could not take any benefit under the said deed, inasmuch as his father, the defendant William Moore Skinner, had acted as her solicitor in the preparation of the deed.

In October, 1889, the plaintiff was married to Joseph Willis. He was the only son of Thomas Willis, who died in April, 1890, and of Ann Willis, who was appointed by Thomas Willis his sole executrix and sole residuary legatee.

On the 29th of December, 1890, a deed was executed which was made between Ann Willis of the first part, Joseph Willis of the second part, the plaintiff (then his wife) of the third part, and the defendants Nicholas Willis, Isaac Dunn, and William Moore Skinner of the fourth part. It recited that the property of Thomas Willis consisted of the particulars mentioned in the first three schedules, and that the property mentioned in the fourth schedule belonged to Joseph Willis. It further recited that Ann Willis believed that it was her late husband's intention to revoke or partially revoke his will, and to dispose of his property in favour of his widow and son, and, with a view to carrying out in some measure the wishes of the testator, and also with the object of making provision for Joseph Willis and his wife and any future wife and the lawful issue of Joseph Willis, it had been agreed between Ann Willis and Joseph Willis by way of family arrangement that the properties mentioned in the schedules should be settled in manner thereinafter expressed. The trusts were during the joint lives of Ann Willis and Joseph Willis to pay him £100 a year, subject thereto to pay

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

the income to Ann Willis during her life, and subject thereto there was a protected life interest given to Joseph Willis, and after his death the trust was for the widow of Joseph Willis during her life, with subsequent trusts in favour of the children or issue of Joseph Willis, and in default of issue a general power of appointment by deed was given to Joseph Willis and the plaintiff jointly, and subject thereto a general power of appointment by deed was given to the survivor, and subject thereto the property was settled in trust as to one half for Nicholas Willis and as to the other half for Frederick Herbert Skinner, son of the defendant William Moore Skinner, absolutely. Nicholas Willis was a cousin of Joseph Willis, and Frederick Herbert Skinner was a great friend of Joseph Willis, and was then under twenty-one years of age.

In the year 1891 differences arose between Joseph Willis and his wife mainly, if not entirely, by reason of the intemperate habits into which he had fallen. On the 3rd of October, 1891, a deed was executed by Joseph Willis, the plaintiff (his wife), and Ann Willis, which recited that the deed of 1890 did not in all respects carry out the wishes of the parties to the family arrangement, and that it had been agreed that for the purpose of varying the trusts of the same deed and of fully carrying out the intention of the parties, these presents should be executed, the said Ann Willis concurring therein to show her assent to the same; and the deed provided, first, that the provision for the widow of the said Joseph Willis during her life should be read and construed as a provision for the benefit of such widow so long only as she should remain the widow of the said Joseph Willis, and that the words "after the decease of the survivor" should be read and construed as "after the decease of the survivor or the marriage of the widow"; and by the same deed Joseph Willis and the plaintiff, in exercise of the joint power of appointment vested in them in case of failure of issue, appointed that the trust funds should be held in trust for such person and in such manner as Joseph Willis alone should by deed appoint, and in default of appointment, and so far as no such appointment should extend, then (excluding the power of appointment by a widow of the said Joseph Willis) upon the trusts declared by the principal deed of 1890. Joseph Willis died intestate and without issue in September, 1893.

By a deed dated the 2nd of August, 1894, between the plaintiff of the first part, Ann Willis of the second part, Frederick Herbert Skinner of the third part, and Nicholas Willis, Isaac Dunn, and William Moore Skinner of the fourth part, after reciting accurately the effect of the deeds of 1890 and 1891, and that it had been agreed by way of family arrangement that such further modification of the trusts as was thereinafter contained should be executed, it was witnessed, and it was thereby agreed and declared, and particularly the said Ann Willis, Nicholas Willis, and Frederick Herbert Skinner thereby agreed, declared, and directed that the direction contained in the settlement for payment or application of the income of the trust funds to or for the benefit of the widow of the said Joseph Willis during her life should have full force and effect, and that such income should be paid to the plaintiff during her life in the same manner as if clause 1 of the modification deed of 1891 had not been inserted therein, and in all other respects the deeds of 1890 and 1891 should be and were thereby confirmed.

All the three deeds of 1890, 1891, and 1894 were prepared by William Moore Skinner as solicitor, with the assistance of counsel.

Mrs. Ann Willis died in April, 1897. In November, 1897, the plaintiff married again, and on the 22nd of February, 1898, the above action was commenced. William Moore Skinner purchased the reversionary interest of his son in one moiety, but with full notice of all circumstances which were said to render the deed of 1891 invalid, and his lordship pointed out that he could not be in any better position than his son.

*Hughes, Q.C.*, and *Ashton Cross*, for the plaintiff.

*Eve, Q.C.*, and *Austen-Cartmell*, for the defendants W. M. Skinner and F. Skinner.—The plaintiff has failed to show that W. M. Skinner stood in a fiduciary relation to her in regard to the deed of 1891, but on the assumption that there was a fiduciary relation he has fully discharged himself of the burden so cast upon him. As to the benefit that came to F. Skinner by the extinction of the plaintiff's power of appointment, she did not execute the deed of 1891 *animo donandi* as regarded F. Skinner, and cannot rely on this accidental result of an act done *alio animo*. Cases where the object of the transaction was to benefit the solicitor or a member of his family are not analagous, and do not govern this case.

*Astbury, Q.C.*, and *Stokes*, for the defendant Willis.—The only gift under the deed of 1891, regard being had to the state of circumstances at the time it was executed, was to the plaintiff's husband, Joseph Willis. The property was thereby appointed in trust for such persons as Joseph should by deed appoint, and that is in substance a gift to Joseph. The time to be regarded is the time when the deed was entered into, and the non-exercise by Joseph of the power thereby given to him is immaterial. He did not as husband stand in a fiduciary relation to the plaintiff, and the *onus probanbi* is on her (*Nedby* v. *Nedby*, 5 De G. & Sm. 377), and she cannot sustain it. In the events which happened the ultimate trusts under the deed of 1890 took effect, and that deed is not challenged by the plaintiff.

*F. A. Milne*, for the defendant Dunn.

*Hughes*, in reply.—The plaintiff had no independent advice in the transactions resulting in the deed of 1891, and such advice was essential to its validity as against her. The court will not allow persons standing in a fiduciary relation to another to keep benefits from that other acting without independent advice: see *Huguenin* v. *Baseley*, 14 Ves. 273, 1 W. & T. Lead. Cas. (7th ed.), p. 247, and notes; *Bridgeman* v. *Green*, 2 Ves. sen. 627, Wilm. 58. [*Astbury* referred to the observations of Lord Brougham in *Hunter* v. *Atkins*, 3 My. & K. 113, at p. 135.] In particular a solicitor cannot take a gift for himself or a member of his family from a client without independent advice: *Goddard* v. *Carlisle*, 9 Price 169; *Liles* v. *Terry*, 44 W. R. 116, [1895] 2 Q. B. 679. [He also cited *Rhodes* v. *Bate*, 14 W. R. 292, L. R. 1 Ch. App. 252; *Morgan* v. *Minett*, 25 W. R. 744, 6 Ch. D. 638; *Moxon* v. *Payne*, L. R. 8 Ch. App. 881, 22 W. R. Dig. 110; *Ellis* v. *Barker*, 20 W. R. 160, L. R. 7 Ch. App. 104, at p. 108; *Allcard* v. *Skinner*, 36 W. R. 251, 36 Ch. D. 145; *Morley* v. *Loughnan*, [1893] 1 Ch. 736, 41 W. R. Dig. 260; *De Witte* v. *Addison*, 80 L. T. Rep. 207, 47 W. R. Dig. 138; and *Kempson* v. *Ashbee*, 23 W. R. 38, L. R. 10 Ch. App. 15.] As to the relation of husband and wife, *Milnes* v. *Busk*, 2 Ves. jun. 488, p. 498, points to a fiduciary relation, notwithstanding the expressions of Lord Hardwicke in *Grigsby* v. *Cox*, 1 Ves. sen. 517. [COZENS-HARDY, J., referred to *Pybus* v. *Smith*, 3 Bro. Ch. Cas. 340.]

*Cur. adv. vult.*

COZENS-HARDY, J., after stating the above facts, proceeded: The plaintiff, by her counsel, alleges that Mr. W. M. Skinner was her solicitor in reference to the deeds of 1891 and 1894, or at least that he was acting as her solicitor and confidential adviser at the time when those deeds were executed; that he did not in fact explain to her that by the deed of 1891 she was voluntarily parting with a portion of her life interest and the general power of appointment which, in the events which have happened, she, as the survivor, would have been entitled to exercise under the deed of 1890, and that it was Mr. Skinner's bounden duty to send her to another solicitor by whom she might be advised as to the propriety of the transaction; and that under the circumstances the deed of 1891, except so far as rectified by the deed of 1894, cannot stand, for Mr. Skinner's son benefited by the release of the general power of appointment inasmuch as his reversionary interest was thereby rendered less liable to failure. The plaintiff was examined and cross-examined before me, and I am bound to say that I do not feel able to rely upon her testimony where she is directly contradicted by other witnesses. I do not propose to go in detail through the evidence, but the conclusions at which I have arrived upon the disputed facts are as follows: In the first place, I think that Joseph Willis and his mother, Ann Willis, were both desirous that the property which came from them should not go to "a strange man," by which, of course, was meant a second husband of the plaintiff, or to any member of her family, and this desire was made known to the plaintiff. She did not deem this desire unreasonable or improper, and she consented to give effect to it. Joseph Willis and his mother thought that the deed of 1890 did not, in respect to those matters, give effect to their real intentions, though such intentions had not been communicated to Mr. Skinner. He was angry at the suggestion that there was any mistake on his part, and unwilling that the deed should be modified. In the second place, I think the deed of 1891 was in substance a transaction between the plaintiff and her husband. In the third place, I think the nature and effect of the deed of 1891 were explained to the plaintiff on the 30th of September, 1891, and again on the 3rd of October, when it was executed by her and her husband, and that on that occasion Mr. Skinner suggested that both of them should go to some other solicitor. In the fourth place, I think the deed of 1894 was most carefully explained to the plaintiff prior to its execution, and I believe that she understood its effect, although she has now brought herself to believe that it was never explained to her and that she never understood it. In the fifth place, I think that Mr. Skinner did act as the plaintiff's solicitor in the matter of the 1894 deed, which is not complained of, but that he did not act for her in the matter of the 1891 deed. Whether at that time the relation of solicitor and client existed between the plaintiff and Mr. Skinner is a matter of more doubt, which I propose hereafter to deal with. In the sixth place, I think that no case has been made for setting aside or rectifying the deed of 1891, unless it can be impeached on the ground of some fiduciary relation.

It remains to consider the consequences which follow from these facts. Now, it has been long settled that a voluntary gift by a client to his solicitor or to a member of the solicitor's family, while the confidential relation exists, cannot be supported unless the client had competent and independent advice, and that it is not enough to show that the client understood what he was doing: see *Goddard* v. *Carlisle* and *Liles* v. *Terry*. If, therefore, the deed of 1890 had been challenged, I think the settlors might have set it aside, so far as the interest of Mr. Skinner's son is concerned, if not entirely. But no such case is made by the plaintiff. She claims under and relies upon the deed of 1890. It is also settled by authority, which binds me, although text writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Baseley* applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid. The *onus probandi* lies on the party who impugns the instrument and not on the party who supports it. This was clearly decided by Sir James Parker in 1852 in *Nedby* v. *Nedby*, and it accords with what Lord Hardwicke said in *Grigsby* v. *Cox*. It is, moreover, consistent with the authorities which have recognized the validity of mortgages by a wife to secure her husband's debts, although a similar mortgage by a son just after attaining majority to secure his father's debts would not be upheld: see *Hudson* v. *Carmichael*, 2 W. R. 503, Kay 613; *Paget* v. *Paget*, 46 W. R. 472, [1898] 1 Ch. 470; *Baker* v. *Bradley*, 4 W. R. 78, 7 De G. M. & G. 597; and *Bainbrigge* v. *Browne*, 29 W. R. 782, 18 Ch. D. 188. I think, therefore, that the deed of 1891, in so far as it is a transaction between the plaintiff and her husband, Joseph Willis, is a good deed. It was strongly urged by Mr. Hughes in his very able argument that, even assuming the law to be so, it does not operate further than to validate that part of the deed of 1891 which gave to Joseph Willis an overriding general power of appointment for his own benefit. But upon consideration, I do not think this distinction ought to prevail. The release of the general power of appointment which the plaintiff, if she survived her husband, would have had under the deed of 1890 was essential to give effect to his known desire. To reduce her life interest to an interest during widowhood and to leave her a power which she might exercise so as to enlarge this interest would have been absurd. The continuance of her general power of appointment was inconsistent with the idea that no strange man and none of her family should take the property. It was not intended that these people should be cut out if, and only if, the husband chose to exercise his new overriding power of appointment. I think the true arrangement made between the plaintiff and her husband in 1891 was carried into effect by means of an exercise of the joint power of appointment. A new general power of appointment was given to the husband alone, and the other general powers contained in the deed of 1890 were destroyed. This deed was prepared by Mr. Skinner as the husband's solicitor. It cannot be impeached except on the ground of Mr. Skinner's relation towards the plaintiff. In the view which I take this is not material, the transaction being one between the plaintiff and her husband, and not between the plaintiff and Mr. Skinner or Mr. Skinner's son. But I think it right to add this—I am not satisfied that, until long after the execution of the deed of 1891, Mr. Skinner ever was or acted as the plaintiff's solicitor. It is not unimportant to observe that he never made any charge against her, and, although solicitors may act gratuitously, it is not usual for them to do so. The plaintiff herself more than once said in the box that she did not employ Mr. Skinner as her solicitor, but I prefer not to rely solely upon her testimony on this or on any other point. I have seen Mr. Skinner, who gave his evidence very fairly. There are five occasions on which it is said that he acted as the plaintiff's solicitor: (1) On the 12th of September, 1890, she came with her husband, and there is an entry in

his diary, "Attending Mr. and Mrs. Joseph Willis, discussing and advising." Considering that the plaintiff had nothing to settle, and that Joseph Willis was his client, I attach no importance to this. (2) On the 16th of October, 1890, the plaintiff and her husband had a long conversation at Mr. Skinner's house, but to this also I attach no importance. (3) In the spring of 1891 the plaintiff called upon Mr. Skinner and complained of her husband's conduct, and said she thought she should be compelled to separate, and asked what would be her position under the 1890 deed in that event. He told her it would be for the trustees to apply the income as they might think fit. I do not regard this as a business interview. It was a question asked by the plaintiff of one who was an intimate friend and also a trustee under the deed. (4) On the 9th of September, 1891, the plaintiff came with her mother-in-law, Mrs. Ann Willis, and the entry in Mr. Skinner's diary is, "Mrs. Ann Willis and Mrs. Joseph Willis. Conference as to the unhappy differences between Mr. Joseph Willis and his wife." This was a matter in which Mrs. Ann Willis took a deep interest. She was Mr. Skinner's client. (5) On the 12th of September, 1891, the plaintiff went with her husband to Mr. Skinner's office. I am not prepared to say that any or all of these attendances created or evidenced that fiduciary relation of solicitor and client between Mr. Skinner and the plaintiff to which such special disabilities are attached. The rule of law expressed in *Liles* v. *Terry* ought not to be applied in favour of a plaintiff who denies the relationship, and against a defendant who, except as a friend of the family, has only seen the plaintiff on a few occasions in company with persons who admittedly were his clients. If Mr. Skinner was not the plaintiff's solicitor, I think no relief can be claimed on the ground of his being a trustee of the deed of 1890. The result is that, in my judgment, the action fails, whether Mr. Skinner was or was not the plaintiff's solicitor. The plaintiff must pay the costs of the defendants.

*Judgment for the defendants.*

Solicitors for the plaintiff, *Wynne-Baxter & Keeble*, for *Beldon & Ackroyd*, Bradford.

Solicitors for the defendants, *Sismey & Sismey*, for *Skinner, Son, & Church*, Sunderland; *Patersons, Snow, Bloxam, & Kinder*, for *Ranson, Nelson, & Maling*, Sunderland.

---

Q. B. Div.
(Darling and Phillimore, JJ.) } Aug. 8, 1899.

*Ex parte* FLINN & SONS (*Appellants*). (*a.*)

*Licensing law—Beerhouse—Forfeiture of licence by conviction of licensee—Application by owner for temporary authority—Discretion of justices—Grounds of refusal—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 15.

*Where the holder of a beerhouse licence which has existed before and continuously since* 1869 *has forfeited his licence by conviction for offences under section* 15 *of the Licensing Act.* 1874, *and the owner of the premises makes an application under that section to a court of summary jurisdiction for a temporary authority to carry on the business until the next special licensing sessions, the justices in such court have not a general discretion to refuse such application, and cannot go beyond the four grounds of refusal specified in section* 8 *of the Wine and Beerhouse Act*, 1869.

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Case stated by justices of the peace for the borough of Saffron Walden.

Prior and up to the date of the conviction hereinafter mentioned one Walter Peachey, then of the Royal Oak beerhouse, was the holder of a licence to sell beer to be consumed on and off the said premises, with respect to which premises such a licence had been in force continuously from a date anterior to 1869, until the forfeiture hereinafter mentioned.

On the 18th of February, 1899, Peachey was for the second time convicted of selling spirits without a licence, and thereupon by the operation of section 3 of the Licensing Act, 1872, he forfeited his right to sell beer.

At a petty sessions (being a court of summary jurisdiction) held for the borough on the 25th of February, 1899, application was made on behalf of Messrs. Flinn & Sons, the owners of the Royal Oak beerhouse, for authority under section 15 of the Licensing Act, 1874, to carry on until the next special sessions for licensing purposes the business of beersellers, being the same business as had previously to his convictions been carried on by Peachey at the Royal Oak beerhouse, but the justices finding as a fact that prior to such application being made Peachey had been convicted for the second time of the offence of selling spirits without a spirit licence, held that they had no jurisdiction to hear and determine the application under the section, inasmuch as the opening words of that section limit the right to make such applications to cases where a person is convicted for the first time, and that any application for a licence for the premises could only be entertained at the general annual licensing meeting for the borough.

However, upon a case stated for the opinion of the High Court, the court (Day and Lawrance, JJ.) decided on the 8th of June, 1899, that the justices had jurisdiction and remitted the matter to them to hear and determine the application (see *Ex parte Flinn & Sons*, 47 W. R. 697, [1899] 2 Q. B. 154). Accordingly on the 17th of June, 1899, the same was heard by the justices upon the merits. The applicants appeared by counsel who contended that as the retail beer licence was in force on the 1st of May, 1869, the discretion of the justices was restricted to the four grounds specified in section 8 of the Wine and Beerhouse Act, 1869, notwithstanding the forfeiture, and further that for the purposes of section 15 of the Licensing Act, 1874, the licence was not dead.

The justices held, on the authority of *Reg.* v. *Justices of Hertfordshire*, 7 Q. B. D. 542, 50 L. J. M. C. 121, 29 W. R. Dig. 119; and *Freer* v. *Murray*, [1894] A. C. 576, that in order to bring the case within section 8 of the Wine and Beerhouse Act, 1869, the licence must not only have been in force on the 1st of May, 1869, but also continuously in force down to and at the date of the application, and that as the licence had by the forfeiture ceased to exist prior to the application their discretion was not limited to the four grounds, and after hearing evidence tendered as well on behalf of the applicants as of the police, who strongly opposed the application, they refused the application.

Flynn & Sons appealed from this decision.

The question of law for the opinion of the court was whether or not on the facts as stated, the justices were entitled to exercise their discretion at large as to granting the application or not, or whether they had power to refuse it only on one of the four grounds mentioned in section 8 of the Wine and Beerhouse Act, 1869.

Section 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), provides: "Where any licensed person is convicted for the first time of any one of the following offences . . . and in consequence either becomes

personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises, and for this purpose the provisions contained in the Intoxicating Liquor Licensing Act, 1828, with respect to the grant of a temporary authority and to the grant of licences at special sessions shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee."

Section 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27) provides: "All the provisions of the said Act"—that is, of the Alehouse Act, 1828 (9 Geo. 4, c. 61)—"as to the terms upon which, and the manner in which, and the persons by whom, grants of licences are to be made by the justices at the said general annual licensing meeting . . . shall, so far as may be, have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises shall be refused, except upon one or more of the following grounds . . ."

Section 19 provides: "Where on the 1st of May, 1869, a licence under any of the said recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premisss in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine not to be consumed on the premises may be refused in accordance with this Act."

*Foote, Q.C.* (*H. O. S. Ellis* with him), for the appellants.—The justices were wrong in holding that they had a general discretion to refuse the application. At the very most they were entitled to refuse it on the four grounds set out in section 8 of the Wine and Beerhouse Act of 1869. The court was merely a court of summary jurisdiction, and yet, although they were only a petty sessions court, they claimed to have as great or greater discretion than a court constituted for licensing purposes. They were under the opinion that the licence was dead, and that therefore the application was one for a new licence, and that they consequently had an absolute discretion in the matter. That was an erroneous view of section 15, because it says that if the licence is forfeited by conviction of the licensee the owner may apply. The licence in this case is a beerhouse licence, which has existed prior to and continuously since 1869, and, therefore, by section 19 of the Act of 1869, the renewal of the licence could only be refused on the four grounds of refusal specified in section 8. That is the first step, that the renewal could only have been refused on one of the four grounds. The next step is that the same principle applies to transfers of the licence: *Simonds* v. *Justices of Blackheath*, 35 W. R. 167, 17 Q. B. D. 765). It was there held that the transfers of these old beerhouse licences could only be refused on the four grounds, as in the case of renewals. And further, the same principle applies to these applications under section 15, though the rules as to transfers are not expressly made applicable. The section contemplates that though the licence is forfeited it is kept alive for the purpose of this application by the owner. The cases relied on by the justices are distinguishable, as in *Reg.* v. *Justices of Hertfordshire* the application was to a licensing court, and in *Freer* v. *Murray* the licence was dead at the time of the application, which was an application by a new tenant, and not, as here, an application by the owner under section 15. Here the licence was not dead, but was only forfeited. The justices here were not entitled to exercise any discretion at all, but were bound to grant this application as a matter of right. That may not be clear upon the wording of the section, and it is not necessary to argue it here, as our contention is that at the very utmost the justices could not go outside the four grounds of refusal; but they did so, and refused the application upon a ground which was not one of the four grounds. They had no evidence before them on which they could properly refuse, and the application ought to have been granted.

No respondents appeared.

DARLING, J.—In this case an application has been made by the owners of this beerhouse to a court of summary jurisdiction for authority to carry on the business, the right to carry on which has been forfeited by the holder of the licence immediately before that time. The justices were of opinion that, upon that application being made, their jurisdiction was not limited to the four grounds set out in section 8 of the Wine and Beerhouse Act, 1869; and they heard evidence, and upon that evidence, and not upon any of the four grounds, they refused the application of the owners of the house for an authority to carry on the business. I think they were wrong in so holding. With regard to the point which Mr. Foote raised, but did not expressly argue, as to whether this transfer to the owners is a matter of right or not, however the case may be as to that, I do not think it is necessary to express any opinion upon it; but I think in doing what the justices did, they were wrong, and that their business was at the most to ascertain whether this licence was forfeited or ought not to be granted upon one of those four grounds in section 8 of the Act of 1869. They did not affect to do that, or to find out whether the licence was in any way forfeited or ought to be forfeited upon one of those four grounds. They assumed that they had an absolute discretion to hear evidence as if they were at special licensing sessions. In that it seems to me they were wrong, and I think that, therefore, their decision must be reversed.

PHILLIMORE, J.—I am of the same opinion. It is unfortunate that this case must be argued on one side only, but the justices have stated clearly the grounds on which they acted, and I think they have enabled us to see both their reasons for so acting and the authorities by which they thought they were bound. The licensee had forfeited his licence by reason of two convictions for selling spirits, whereas he was only the licensee of a beerhouse. Thereupon the justices were applied to, to substitute the owners of the beerhouse in his stead until the next special licensing sessions. The justices thought in the first instance that by reason of the very difficult language of the statute they were precluded from admitting the owners on the ground that they had come too late. That error was corrected by my brothers Day and Lawrance in the case of *Ex parte Flinn & Sons*, 47 W. R. 697, [1899] 2 Q. B. 154. Thereupon the matter went back to the justices to see whether it was a case in which they ought to grant the authority to the owners under section 15 of the Licensing Act, 1874, which would be a temporary authority to carry on the business. The justices were then of opinion

that the licence was gone, and that this application was a new application, and that consequently their discretion was unfettered. They thought that they had a right to receive evidence as to the desirability or otherwise of the house, and that they were not limited to the four grounds which are generally applied in applications to keep alive a beerhouse licence. No doubt it is said the licence is forfeited. The licence would be forfeited but for the act of the owner in making the application. It is forfeited as regards the original licensee, but it remains capable of being kept alive if in due and very speedy course the owner makes an application to have it kept alive for the purpose of its being transferred to him. That, I think, is a reasonable construction of the section. Therefore the justices are bound to treat the application in substance as if it were an application for a transfer. Then if it is an application for a transfer, *Simonds* v. *Justices of Blackheath* decides that the justices are limited to the four grounds, the object being to protect the vested rights in the beerhouse. Then *Reg.* v. *Justices of Hertfordshire* decides that they may use the four grounds, at any rate on an application at special sessions. Therefore the matter is reduced to a very small compass. They are limited to the four grounds on a transfer; they may use the four grounds on a transfer; therefore they are, at any rate at special sessions, limited to, and may use, the four grounds. Mr. Foote stated that on an application for a temporary authority they cannot use the four grounds. I do not want in these licensing cases to decide anything outside the strict matter we have to decide; but my own strong opinion at the present time is that they can use the four grounds as an objection at this stage. That the four grounds can be used on an application at a special licensing sessions seems not to be disputed. I think they can also be used on the application for the temporary authority. In this case application was made for a temporary authority, and the four grounds, or any of them, if they exist, must be raised by objection and proved. Nobody has objected on any of these four grounds, and, at any rate, nobody has proved any one of the four grounds. Therefore the justices had nothing before them on which they could enforce the four grounds, and they should have granted the application.

*Appeal allowed without costs; case remitted to the justices.*

Solicitors for the appellants, *Thorneycroft & Willis*, for *Baker & Thorneycroft*, Bishop's Stortford.

---

Q. B. Div.
(Darling and Channell, JJ.) May 1, 1899.

GREEN (*Appellant*) *v.* THOMPSON (*Respondent*). (*a.*)

*Master and servant—Apprentice—Infant—Stipulation in apprenticeship deed not for benefit of infant—Validity—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 6.

*An apprenticeship deed contained a stipulation that the master should not be liable to instruct the apprentice or to pay her wages at times when the business of the master should be at a standstill through accident beyond the control of the master.*

*Held, that this stipulation did not render the contract as a whole unfair as against the infant, and that the apprenticeship deed was not invalid.*

Case stated by justices of Derbyshire.

The appellant was a manufacturer of earthenware, carrying on business at Gresley; the respondent was an infant, who had been apprenticed to the appellant to learn a branch of a potter's business called decorating. The appellant summoned the respondent to answer a complaint under the Employers and Workmen Act, 1875, claiming an order for the respondent to perform her duties under the deed of apprenticeship.

By the deed of apprenticeship, to which the respondent, her mother, and the appellant were parties, the respondent bound herself apprentice to the appellant to learn the above-mentioned business "from the 6th of April, 1896, for the term of five years (excepting the usual holidays and days on which the said branch of the business of the master shall be at a standstill through accident beyond control of the master)." The appellant covenanted that he would during the term, except as aforesaid, cause the respondent to be instructed in the business and pay her wages as provided by the deed. The respondent and her mother covenanted that during the term, except as aforesaid, the respondent would honestly and faithfully serve the appellant.

It was proved that the respondent worked as an apprentice under the deed from its date until the 8th of October, 1898. On that day she absented herself from work, and remained absent thereafter. It was admitted by the appellant that, having regard to the words of the exception in the deed, if the works were stopped, not only by accident, but by strike, the respondent would not be paid wages or be taught during the time of such stoppage.

An objection was taken on behalf of the respondent that the apprentice deed was invalid for want of mutuality, and for containing a provision disadvantageous to the respondent, she being an infant, on the ground that it was unfair and inequitable to her that the appellant should not be liable or called upon to pay any wages to the respondent, or to teach her or to find her work so long as his business should be interrupted or be at a standstill through accident under peculiar circumstances which were wholly independent of any act of the respondent. It was contended that such circumstances might be of uncertain duration, and might extend over a lengthy period, and that the respondent was precluded during any such period from undertaking any employment and could earn nothing towards her maintenance, and was prevented from continuing to learn her own or any other trade. *Meakin* v. *Morris*, 32 W. R. 661, 12 Q. B. D. 352, and *Corn* v. *Matthews*, 41 W. R. 262, [1893] 1 Q. B. 310, were cited in support of the objection.

The justices upheld the objection, being of opinion that the deed was invalid for want of mutuality, and that the case came within the above-mentioned decisions, and they dismissed the complaint.

*Hextall*, for the appellant.

*Dwyer*, for the respondent.

In addition to the above-mentioned cases the following were referred to in the course of the arguments: *Reg.* v. *Lord*, 12 Q. B. 757; *Leslie* v. *Fitzpatrick*, 3 Q. B. D. 229, 26 W. R. Dig. 139; *De Francesco* v. *Barnum*, 39 W. R. 5, 45 Ch. D. 430; *Fellowes* v. *Wood*, 59 L. T. Rep. 513; *Flower* v. *London and North-Western Railway Co.*, 42 W. R. 519, [1894] 2 Q. B. 65.

DARLING, J.—In this case the appeal must be allowed. Under this deed of apprenticeship the apprentice obtained the advantage of learning a trade, and during the time when she was so learning she was to be paid wages, but the payment of wages was not to be made when the business of the master was at a

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

standstill through accident beyond his control. It is said that that provision makes the indenture void, because it contains terms disadvantageous to the infant. The magistrates have held that the deed is void on the ground of want of mutuality, but I think they meant by that that it was disadvantageous to the infant.

If Lord Coleridge, C.J., by his judgment in *Meakin* v. *Morris* really meant to hold that a contract with an infant is bad unless every single term contained in it is to the manifest advantage of the infant, I think that that is a wrong decision, and one not in accordance with the other cases. A deed of apprenticeship must necessarily contain some clauses which, standing by themselves, would be disadvantageous to the infant. The rule was laid down by A. L. Smith, L.J., in *Corn* v. *Matthews* as follows: "It seems to me that the law as regards these contracts by infants has been laid down to this effect, that if there be a stipulation in the contract entered into by an infant so to the detriment of the infant as to render it unfair that the infant should be bound by it, then the deed cannot be enforced at all. It seems to me that the authorities are all in conformity with that view, with possibly the exception of *Leslie* v. *Fitzpatrick*."

Now, is there any stipulation in this deed which can be said to be so so much to the detriment of the infant as to make it unfair that the infant should be bound by the deed? I cannot see how it can be said that the proviso that the infant was not to be taught or paid wages on days when the business was at a standstill through accident beyond the master's control makes the whole indenture one of detriment to the infant. Obviously, the whole of the contract must be looked at, and that is what Lindley, L.J., did in construing the deed in *Corn* v. *Matthews* where he said: "I attach great importance myself to the fact that a turn-out includes a lock-out. If the proviso were addressed to a state of things over which the master might have no control, such as a strike, I think the case would not be quite so clear, but in this case the master has it in his own power to call in aid that proviso to the detriment of the apprentice, and if for any reason the master locks out his men the apprentice can no longer earn wages. That strikes me, I confess, as a very serious matter in considering or construing the effect of a deed of this description."

I do not think that it can be said that this deed is solely in favour of the master, or that it is so disadvantageous to the infant as to make it unfair that she should be bound by it, and in my opinion, therefore, the decision of the magistrates was wrong and the appeal must be allowed.

CHANNELL, J.—I am entirely of the same opinion. The cases make it quite clear that the question to be considered is whether the entire contract is to the disadvantage of the infant. One clause may make the contract less advantageous, but that does not necessarily make the whole contract disadvantageous. The present case is the case contemplated by Lindley, L.J., in *Corn* v. *Matthews*, and which he thought was not quite so clear as the case then before him. It seems to me that it is a reasonable thing to provide in the deed of apprenticeship that the apprentice is not to be taught when the works are at a standstill through no fault of the master. Then the deed goes on to provide that at such times the apprentice should not be paid wages. It would, no doubt, be more advantageous to the infant to receive wages, but I cannot say that the presence of that clause makes the contract, looked at as a whole, one to the detriment of the infant. The advantage to the infant under the contract is the obtaining of employment and instruction.

*Appeal allowed.*

Solicitors for the appellant, *Andrew Wood & Purves*, for *Dewes & Musson*, Ashby-de-la-Zouch.

Solicitor for the respondent, *Thatcher*, for *Timms*, Swadlincote.

---

## House of Lords.

From C. A. (England). } Dec. 8, 1898.

NEW YORK BREWERIES CO. (LIMITED) v. ATTORNEY-GENERAL. (a.)

*Inland revenue—Probate duty—Testator resident and domiciled abroad—Taking possession and administering the estate—Executor* de son tort—55 *Geo.* 3, *c.* 184, *s.* 37—*Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 40.

*The foreign executors of a testator who died domiciled abroad, and was the registered owner of shares and debentures in an English company, requested the company to transfer these shares and debentures into their names. The company were aware that the executors did not intend to take out probate in this country, but the transfer was made.*

*Held, that the company had taken possession and administered the estate of the deceased in this country, and constituted itself an executor* de son tort, *and become liable to probate duty and the statutory penalties.*

*Decision of the* Court of Appeal (46 *W. R.* 193, [1898] 1 *Q. B.* 205) *affirmed.*

Appeal from an order of the Court of Appeal (A. L. Smith, Rigby, and Collins, L.JJ.), reported 46 W. R. 193, [1898] 1 Q. B. 205.

The information is set out in the report in the Queen's Bench Division, 45 W. R. 606. Shortly the facts were these:

The appellants were an English company limited by shares incorporated under the Companies Acts, 1862 to 1886, having their registered office in London, where the share and debenture registers were kept. The company's business of brewers was, however, carried on in America.

Henry Clausen, who died in 1893, was a duly registered share and debenture-holder in the company at the time of his death; he was an American citizen, resident and domiciled in the State of New York, and left a will whereby he appointed two persons, both of New York, his executors, to whom letters testamentary of his estate were granted by the court in New York.

The American executors requested the appellant company in England to pay to them the interest and dividends due, and also to transfer into their names the shares and debentures standing in the name of the deceased. The executors, to the knowledge of the appellant company, had not obtained and did not intend to obtain probate of the will in this country. The appellant company, however, paid over to the foreign executors the interest and dividends due, and also transferred into their names in the registers in this country one preference and one ordinary share and one debenture.

It was held by the Divisional Court that the appellant company had not taken possession and administered the deceased's estate so as to constitute itself executor *de son tort* and render itself liable under 55 Geo. 3, c. 184, s. 37: "If any person shall

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

take possession of and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased within six calendar months after his or her decease, . . . every person so offending shall forfeit the sum of £100," and also a further sum at the rate of 10 per cent. on the amount of the stamp duty payable on the probate or letters of administration. 44 Vict. c. 12, s. 40: "If any person who ought to obtain probate or letters of administration, . . . or who is required to deliver such account as aforesaid, shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to her Majesty double the amount of duty chargeable. . . ."

The Court of Appeal, however, reversing this judgment, held that the appellant company had intermeddled with the estate and rendered itself liable to the payment of probate duty.

*Moulton, Q.C.*, and *Asquith, Q.C.* (*A. M. Bremner* and *Gore Browne* with them), for the appellants.—The Stamp Act, 1815, imposes a penalty, but both taking possession and administration are requisite, and the appellants did neither. The Act refers here to actual administration and actual possession. Taking possession has a perfectly definite meaning. No company takes possession of its own shares by registering a transfer. [Lord WATSON referred to section 57 of the Crown Suits Act, 1865 (28 & 29 Vict. c. 104).] The appellants could not have taken out probate or administration. *Fernandes' Executors case*, 18 W. R. 411, L. R. 5 Ch. App. 314, is distinguishable. [The LORD CHANCELLOR referred to *Padget* v. *Priest*, 2 T. R. 97, in the course of the argument.]

*Sir R. E. Webster, A.G.*, and *Sir R. B. Finlay, S.G.* (*Vaughan Hawkins* with them), for the respondent.—The appellants took possession and administered. [They referred to *Attorney-General* v. *Hope*, 1 C. M. & R. 530; *Attorney-General* v. *Brunning*, 7 W. R. 308, 4 H. & N. 94; *Attorney-General* v. *Bouwens*, 4 M. & W. 171; *Hunt* v. *Stevens*, 3 Taunt. 113; *Jones* v. *Howells*, 2 Hare 342; and *Hicks* v. *Keat*, 3 Beav. 141.] The appellants are liable to probate duty for the full value of the estate in England.

*Asquith, Q.C.*, replied.

Earl of HALSBURY, L.C.—In this case I suggest to your lordships that the judgment of the Court of Appeal is perfectly right, and that this appeal ought to be dismissed with costs.

It appears to me that the question lies in a somewhat narrow compass. A good deal appears to have turned, in the course of the argument, upon the peculiar nature of the property to which the act here complained of as an act of administration related. But, apart from that question of the peculiarity of the form of property, let me deal with the case first as if those considerations did not arise. The property —I will explain presently what I mean by the word "property"—is in England and belonged to a person who is now dead. That property could only properly be taken possession of or administered by a person who by law was qualified to deal with it. It is idle to suggest that in the Taxing Acts, where they are dealing with English finance, the words "executor" or "administrator," which terms we use popularly as applicable to a person who fills that character, to whatever country he belongs, are used in any other sense than as meaning an English executor or an English administrator dealing with our own financial system. Undoubtedly the persons who are concerned in this case, having the control and dominion over the property in question, did an act whereby the title to the property belonging to the deceased person became vested in somebody else, and they are not either "executors" or "administrators" in the sense in which those words are used in the Taxing Acts. *Primâ facie* therefore they are executors *de son tort*, and *primâ facie*, as it appears to me, they have taken possession of and administered the property in respect of which this question arises. I do not suppose that if the case had arisen in this way, that it had been something which was capable of a physical handling, and that the company had handed over that thing to persons who claimed to be possessed of it by reason of the will of some one in New York, any doubt could have arisen that they, in so handing over those subjects of property capable of a manual treatment, were executors *de son tort* and liable probably under each one of those sections which have been brought before us.

Then that brings us to the question whether the point, which I have reserved for consideration, when I use the word "property" makes any difference here. In one sense it is true that you get into a difficulty by treating the word "property" as meaning something necessarily connected with physical possession, and capable therefore of being treated by manual delivery; but if one comes to analyze its meaning, it is manifest that a great many things, such as *choses in action*, with which we are dealing, are in the ordinary sense of the word, "property," and capable of being treated, not indeed by physical handling, but by documents of title and instruments recognized by the law as transferring the title, the incorporeal right to sue (that is what is strictly comprehended in such phrases)—documents which are capable of being enforced and treated as subjects of property.

The condition of things here is this: Here is an incorporated company, and the deceased person is entitled to his aliquot share of the profits earned by that company. He dies, and, according to the constitution of the company, when a shareholder is dead the only person who is to be recognized as having a right to deal with his share is—I will put in the word which by implication is manifestly there—an English executor or an English administrator. The company, therefore, being now in possession of the share of the profits which belonged to the deceased person, are bound to see that they do not hand it over, or hand over anything that represents it, to any person who is not entitled to deal with it. That is their duty according to their constitution and according to law, because they are in possession of something which is available as assets of the testator's estate, *bonâ notabilia*, in this country. Then what do they do? They think proper to create a title in a person who has no authority to receive it on behalf of the dead person, even according to the constitution of their own company. I cannot doubt that if we were dealing—that is the reason why I quoted the case of *Hiort* v. *Bott*, 22 W. R. 414, L. R. 9 Ex. 86, to Mr. Asquith at the conclusion of his argument—if we were dealing with an action of trover, and you had improperly indorsed the document of title to goods, although you had done it innocently, and thereby enabled one person to obtain property which in truth belonged to another, you would be liable for damages in trover by reason of that erroneous indorsement. It was so held in the case I have mentioned, in the Court of Exchequer, and also in another case in this House (*Hollins* v. *Fowler*, L. R. 7 H. L. 757, 23 W. R. Dig. 238). That is the state of the law. Well then, suppose this same transaction to have so taken place that innocently the appellants had been induced to do this, notwithstanding the innocence of intention, it might well

have been that they would have erroneously and improperly created a title in somebody else, the result—the natural and intentional result—of which was to enable a stranger to take possession of property which did not belong to him but belonged to somebody else; then the question might have arisen whether, even in that event, the company would not have been liable.

But your lordships are not called upon to decide that extreme case, because here it is manifest, from the record before us, that the company have acted with their eyes open—I do not mean to make any reflection upon them, for they appear to have taken a very natural and sensible course in order to have the question of law tried; but in order to have the question tried it is to be assumed against them that they have acted with full knowledge of the facts, and that full knowledge of the facts imported this: that they knew that by the entry in their register which they made, they enabled property to be diverted from one person who, in this country, was by law entitled to it, to another person who had no such title at all.

Under these circumstances, I feel very great difficulty in understanding what is meant by some of the expressions used in the court below. "All I can say," says Wills, J., "is, that it appears to me that the defendants have not really intermeddled with the administration of this estate." In what way could a person, dealing with this particular class of property, otherwise intermeddle with this estate? The appellants have done that which, as I say, has created a new title in somebody else. The peculiar character of the property is such that it does not admit of its being manually and physically handed over; but they have done a legal act, and by virtue of that legal act they have enabled it to be dealt with by somebody else, and made available by him for any purpose he desires. It seems to me, therefore, that the words of the learned judge are a little difficult to understand. Then, the learned judge goes on: "They have simply done that which the common law of England gives them the right to do—namely, to pay an executor." They have done nothing of the sort. The learned judge must forgive me for saying, when he says they have paid the executor, they have done no such thing. They have paid a person whom the learned judge calls an executor, but who is not an executor within the meaning of this Act; and when the learned judge says that they "have simply done that which the common law of England gives them the right to do—namely, to pay an executor without asking him for proof of his title by the production of the probate"—I am afraid he forgets for a moment that what was done here was done with the full knowledge that the person whom they paid, not only was not an executor, but had given distinct notice that he never intended to become an executor within the meaning of the English law. Therefore I have considerable difficulty in following the learned judge's argument.

I find that the other learned judge, Grantham, J., says: "This company are not administering the estate in any way; they are not the persons who ought to administer the estate"—in those latter words I quite agree—they ought not; but as to whether they did administer the estate or not, I have already dealt with that point—"they are not the persons who ought to take out probate, and therefore under those circumstances I cannot see how they can be liable." To my mind the scheme of the Act—in fact, of the whole of the Acts—is very plain indeed, and I think the words, of which we have heard so much—namely, the "person taking possession of and administering" the estate—are very sensible words, and very clear words, to indicate what the Legislature meant. They are dealing with a subject-matter which involves this: that in this country no person is entitled to deal with an estate unless he is one of the persons who are by law entitled to deal with it—namely, in the case of personal property an executor or an administrator—and the law says that if a person without being so entitled takes possession of and administers it certain consequences shall follow.

I have already, for another purpose, called attention to the fact that the mere indorsement of a warrant for delivery of goods has been treated as a conversion, and it really would be frittering away the meaning and substance of language to suppose that where the person happens to be actually in possession of the document, the title which enables the estate to be dealt with, he does not take it because it is already in his possession. If he alters the character in which he holds it and gives the property in it to one person rather than another, it appears to me that the moment he has done that, he has "taken possession of and administered" it in the sense which this Act of Parliament is intended to involve.

It appears to me, therefore, that the appellants are clearly within those words, and are liable to the duties and the penalties indicated by this section. I do not think that the matter admits of elaborate exposition. We have had a long argument upon the subject, but it all comes to this: That because this particular form of property is conveyed in a particular way, so that under particular circumstances you have not what I may call a physical act of handing over the property, but you have merely a signature in a book, if you alter in the register the name of the person entitled to the goods, then, although that has the effect of creating a new title and giving the complete command over the property with which you are dealing, that (it is said) is not "taking possession of or administering" within the meaning of the law. It appears to me, that so to treat it would be entirely to alter the ordinary use of language, and to suppose it to be fenced round with technicality, from which I think it is happily free. In my opinion there was here a "taking possession," and there was an "administering" within the meaning of the law, and therefore the persons who have done that are liable to these penalties and liable to the payment of this duty. Accordingly I move your lordships that the judgment be affirmed and the appeal dismissed with costs.

Lord WATSON.—In my opinion the appellants in this case have not only taken possession of part of the estate of the deceased, but have proceeded to administer it. I think they have taken possession of it in this sense: that, having a share in their hands for certain purposes, they did take possession of it for other purposes which were not legitimate, and which they had no authority to take at their own hand, and could not have taken legitimately without the express authority of the executors named after they had obtained letters of probate. The result of it is that, having taken that possession, they have used it for this purpose: for performing the first act of administration which executors having probate would have performed for themselves, with a view to, and as the first step towards, their administration.

I do not think that section 57 of the Act 28 & 29 Vict. c. 104 requires or prescribes that the persons, who are there described as "taking possession of and administering" the estate of a deceased, require, in order to bring them within the sweep of the clause, to be persons who could, if they had chosen, have taken out probate at their own hand. I do not think that is in the least necessary. It may be that certain

persons who are within the purview of the clause are persons who might have taken out probate, but do not, within the period prescribed by the Act. If so, they are within the scope of these enactments; but they cannot remove themselves beyond the reach of these enactments by simply showing that they are persons who are interfering without any legitimate title, and who could not have possessed themselves of a legitimate title.

The clause gives them a defence within a certain period if they have a title to take out probate. They are entirely without that defence if they act as executors without having that title. That is the position of the present appellants; and in my judgment the order of the Court of Appeal is in strict compliance with the Act, and ought to be affirmed.

Lord SHAND.—I am of the same opinion, and as the House is affirming a decision of the Court of Appeal I shall only add a few words to what has been said by your lordships in giving the grounds of judgment.

It is to be observed that this company have transferred a share and a debenture which belonged to the deceased owner in America, not only without having any title presented to them by an executor who has obtained probate in this country, but they have done so after a distinct intimation that there was no intention on the part of the persons who obtained the transfer to apply for English probate, and, in fact, knowing that they meant not to do so. This last circumstance is of importance, because it displaces entirely the application of those cases in which persons who were debtors to a deceased have been found entitled to deal with an executor nominate, although he had not taken out probate, on the assumption that that executor did mean to take out probate, and, therefore, that the transaction between the parties would be valid so far as concerns the probate duty. It is clear that there was no such intention here; and therefore those cases, which make the action good in respect of *bona fides*, have no application.

In that state of matters, if this question had arisen in regard to a movable estate of a different character from a share in a joint-stock company—for example, in regard to goods or furniture of value in the hands of a custodian or warehouseman—I cannot suppose that any argument such as has here been raised on the part of the appellants could have been maintained. Suppose a person in possession of furniture thinks fit to act upon a foreign nomination of an executor without probate being taken out, he hands away the goods or delivers the furniture to that person who has no title as an executor in this country. What is the position of matters in that case? It appears to me that the custodier has himself changed the possession which he had. He had possession for the deceased; he has taken the possession himself, and, having got possession, he has transferred that possession to some one else. It is quite true that in that case he has not taken possession for his own behoof, and never intended to use the possession for his own behoof. It is also true that the possession was of a temporary character only; but although both those elements are present, it is nevertheless a conversion: there is on his part a taking possession of, and intermeddling with, these goods and a dealing with them, or administering them, in the act of handing them over to a third party who had no right or title to them.

I think it would be very unfortunate if there was a different law applicable to shares in a joint-stock company or *choses in action* in this country. There is no real difference in principle. It is clear that, without the act of the intervener, without the act of what I call the intromitter, in a case of that kind, whether as regards goods or company shares, the possession could not have been changed, and a fresh title in another party could not have been created.

Therefore I concur with your lordships in thinking that this company, in agreeing by their own hands to transfer to a third party, who had no title to it as executors, the property of the deceased, were "taking possession of and administering" that estate. It may be that the expression "take possession of" admits of the criticisms made upon it at the bar as applicable to a company's shares; but in substance it is impossible to show that that case is different from the other case which I put with regard to movable subjects, of which a transfer of this kind is made. I am therefore of opinion with your lordships that there was here a "taking possession" on the part of this company. The right could never have been transferred if they had not interposed or intervened and, to that extent, intromitted in this estate. I think, therefore, that the result was that they became executors *de son tort*.

Something has been said about an information not lying in a case of this kind. For my part I think it is right to say that the decided cases which have been cited seem to me fully to warrant such an information. Those cases, no doubt, were of this class, where an executor who had a title had given an insufficient return, and the Crown required by an information that the estate, which had been under-estimated, should in the new proceeding be estimated at its proper value and duty paid upon it. There were no special enactments in the statute that hit that particular case and so warranted an information; those cases proceeded upon the broad principle that, the executor being liable to make a larger return, an information would lie, although there was no provision that it should do so in the statutes. It appears to me that an executor *de son tort*, a person who has intermeddled with an estate and so made himself liable to duty, is in no better position than an executor who had a right but who had given an insufficient return. I think, therefore, that the principle of those cases applies to the case we now have to decide; and therefore I am of opinion that an information lies, and that effect should be given to it, and that the decision of the Court of Appeal should be affirmed. It seems to me, further, that by the terms of section 40 of the Crown Suits Act probate duty is made a debt due by the person who intromits with the deceased's estate, as was here done.

Lord DAVEY.—I also concur in the judgment proposed, and I will put the grounds very shortly. In my opinion the company, by the action which they took of altering the name in the register, taking the shares out of the name of the deceased shareholder and putting them in the names of two gentlemen who requested them to do so without the authority of an executor or administrator duly authorized to give such directions by the laws of this country, did appropriate to themselves, and appropriated in their hands, and took upon themselves to exercise the control and dominion over both the share and the debenture and the dividends. I think in principle the same considerations must apply to all the three. If a man who owes money to a deceased person takes upon himself to pay that money to some one who has no authority to receive it, I think he takes upon himself an act which is an appropriation in his own hands, and a right to exercise control and dominion over the debt. I am therefore of opinion that the company did take possession of and administer these shares, debentures, and dividends within the meaning of the section of the Act of Geo. 3 which has been referred to.

I also think on section 40 that an executor *de son tort* is a person who ought to obtain probate or letters of administration. It is quite true that an executor *de son tort* is not entitled of his own right to take out probate or to obtain letters of administration; but the section in the Act does not say a person who is entitled to take out probate or obtain letters of administration—it says a person who "ought" to do so. Now, a person who takes upon himself to administer an estate is a person who ought to obtain proper authority to do so before he takes upon himself to administer the estate; and I do not think it is giving too large a meaning or extension to the words of this section to say that an executor *de son tort* is a person who ought to obtain letters of administration before he intermeddles with the estate, and that, therefore, he is liable to the penalties imposed by section 40 of the Customs Act of 1881. Mr. Asquith argued at first that he could not do so; but the Solicitor-General pointed out a section which would enable the court, if it had thought fit in this case, at any rate as the persons appointed executors under this will were out of the United Kingdom, to appoint the company or their nominees, or some person on their behalf, as the administrator of the deceased, either permanently or temporarily; and before they took upon themselves to intermeddle with the estate, and to take possession of and administer the estate, I think they were bound to have made such an application—an application for the appointment of an administrator under section 40. Therefore, without any straining or doing violence to the words of this section, they are persons who ought to have taken out letters of administration.

Lord LUDLOW.—I entirely concur with what has been said by your lordships, and I feel that I can add nothing.

*Appeal dismissed.*

Solicitors for the appellants, *Burn & Berridge.*

Solicitor for the respondent, *Solicitor for Inland Revenue.*

---

## Court of Appeal.

From Q. B. Div.
(A. L. Smith and Vaughan Williams, L.JJ.) — Oct. 25.

FLATAU *v.* CULLEN. (*a.*)

*Practice—Costs—Taxation—Fixed costs—Substituted service of writ—Ord.* 3, *r.* 7—*Ord.* 65, *r.* 27 (38)—*Central Office Practice rule* 18.

*On a taxation of costs under ord.* 3, *r.* 7, *the plaintiff claimed £2 10s. for costs of substituted service of the writ. The master allowed £1 only on the ground that by the practice adopted at chambers that was the sum invariably allowed.*

*Held, that the practice could not be justified.*

Appeal from the refusal of Lawrance, J., to order a review of taxation of costs.

The writ of summons in the action was issued on the 5th of July, 1899, and was indorsed under ord. 3, r. 7, with a claim for £410 alleged to be due under a guarantee, "and £3 3s., or such sum as may be allowed on taxation, for costs; and if the amount claimed be paid to the plaintiff or his solicitor within four days from the service hereof, further proceedings will be stayed."

Some difficulty having arisen with regard to the service of the writ, an order for substituted service was obtained, and such service was effected on the 10th of July. On the same day the defendant's solicitor called on the plaintiff's solicitors for the purpose of paying off the claim. The plaintiff's solicitors demanded, in addition to the £410 and the £3 3s., the further sum of £2 10s. for the costs of the substituted service. The defendant's solicitor objected to the demand for £2 10s., but paid the whole sum demanded under protest, and took out a summons for taxation of the plaintiff's costs.

The plaintiff's solicitors carried in a bill for £6 4s. 8d., certain further costs having been incurred in the meantime. The master followed the practice which had been adopted at chambers of invariably allowing £3 3s. for a writ indorsed with a liquidated claim, and £1 for substituted service of a writ; and he accordingly taxed the costs at £4 3s., and he ordered the plaintiff to pay the costs of the taxation, which he fixed at £3 3s.

The plaintiff applied for a review of taxation.

Lawrance, J., refused to make an order, but gave leave to appeal.

The plaintiff appealed.

*Foote, Q.C.*, and *Emanuel*, for the plaintiff.—The practice which has been adopted by the masters is bad; it amounts to a refusal to tax. If the sum allowed for the costs of a writ indorsed in accordance with ord. 3, r. 7, is in every case to be £3 3s., the provision contained in that rule that the defendant may have the costs taxed is nugatory. Ord. 65, r. 27, sub-r. 38, says that where a party is entitled to sign judgment for his costs, the taxing officer may allow a fixed sum for the costs of the judgment, and rule 18 of the Central Office Practice Rules prescribes such fixed charges. But in the present case there is no judgment, and therefore these rules do not apply. Rule 18 prescribes that in the case of judgments for not more than £50 there shall be, in addition to the ordinary costs of judgment, a fixed charge of £1 for each order for substituted service. This rule is justified by section 116 of the County Courts Act, 1888. But the masters have no power to lay down a rule that in all cases the charge for substituted service shall be only £1.

*Montague Lush*, for the defendant.—It must be admitted that the practice of invariably allowing £1 for substituted service cannot be supported. But the plaintiff was not entitled to have anything allowed him on taxation for the costs of substituted service; for the costs which the defendant may, by ord. 3, r. 7, have taxed are the costs claimed on the writ, and here no costs were claimed on the writ for substituted service.

A. L SMITH, L.J.—The defendant took out a summons to have these costs taxed under ord. 3, r. 7, and the master has taxed them under that rule, no objection having been taken that this rule did not apply. I pass over the allowance of three guineas for the writ, and come to the item for substituted service. The plaintiff said the cost of that was £2 10s., but the master only allowed him £1. The master did not really tax the item, or go into the question whether the order was necessary, but said he would allow £1, because that was the sum which by the practice now adopted at chambers always was allowed in every case for substituted service of a writ. The plaintiff now says that this practice is bad, and that the master has no power to tax the cost of substituted service in that way—viz., by allowing a fixed charge. I see no answer to that. In my opinion the practice cannot be justified. The case must therefore go back for a review of taxation.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

VAUGHAN WILLIAMS, L.J.—I agree. During the argument it occurred to me that this might be a taxation which really did not come within ord. 3, r. 7, at all, for the costs to be taxed under that rule are costs which have been claimed on the writ. But the answer to that seems to be that both parties have treated the case as being within that rule, and the taxation has proceeded throughout without objection on that basis.

*Appeal allowed.*

Solicitors for the plaintiff, *Emanuel, Round, & Nathan.*

Solicitor for the defendant, *G. B. W. Digby.*

---

From Q. B. Div. (Lindley, M.R., and Jeune, P.) } Aug. 9, 1899.

DALGLEISH *v.* LOWTHER. (*a.*)

*Practice — Discovery — Interrogatories — Objections to answer—Ord.* 31, *rr.* 1, 6.

*Each question in an interrogatory must be taken by itself and the reason for refusing to answer stated. It is no ground for refusing to answer an interrogatory that objection may be taken to a portion of it.*

*In an action for slander the plaintiff administered interrogatories asking whether the defendant had spoken the words complained of and in whose presence.*

*Held, that the interrogatories were not unreasonably wide, fishing, or oppressive, and that the defendant was bound to answer them.*

This was an action to recover damages for slander. The plaintiff in his particulars stated that the slander was spoken in the hearing of two named persons and "other persons whose names are unknown to the plaintiff." The plaintiff delivered the following interrogatories to the defendant: "(1) Did you, on or about the 1st of March, 1899, speak the following words of the plaintiff"—setting out the slander alleged—"or words to that effect? (2) Were the said words spoken in the presence of W. and of H. and other persons or any or which of them?"

The defendant objected that these interrogatories were of a fishing character and sought to discover his evidence; and also that they were unreasonably wide, oppressive, and in part irrelevant.

Lawrance, J., sitting at chambers, reversed an order of the master that the defendant should file a further and better answer.

The plaintiff, by leave, now appealed.

*Poyser*, for the appeal.

*Bonsey*, for the respondent, referred to *Stern* v. *Sevastopulo*, 11 W. R. 862, 14 C. B. N. S. 737; *Atkinson* v. *Fosbroke*, 14 W. R. 832, L. R. 1 Q. B. 628; *Peek* v. *Ray*, 42 W. R. 498, [1894] 3 Ch. 282.

[LINDLEY, M.R.—We will consult with our colleagues in the other division of the court, and will deliver judgment later in the day.]

On their lordships' return to court after the midday adjournment, judgment was delivered as follows:

LINDLEY, M.R.—We have consulted our colleagues in the other division of this court and they take the same view which we do and which we expressed in the course of the argument—viz., that the grounds assigned by the defendant for not answering these interrogatories are wholly insufficient and that he must put in a further and better answer.

Lawrance, J., took a different view upon the ground, as I understand, that these interrogatories were fishing or oppressive or unnecessary, But looking at the statement of claim and at the interrogatories we cannot think that they are fishing or that they seek to discover the evidence which the defendant intends to adduce in support of his case or that they are unreasonably wide, oppressive, or irrelevant. This is an action of slander, the alleged slander is set out in the statement of claim, and there is this further statement under the head of "Particulars," that the words alleged were uttered in the presence of two persons who are named. The interrogatory which was allowed by the master is this: "Did you on or about the 1st of March, or when, speak the following words of the plaintiff" (then the words are set out) "or words to that effect?" What objection there can be to that I am at a loss to conceive. In the general order relating to interrogations there is nothing which will justify the defendant in refusing to answer this interrogatory. There are certain well-known grounds upon which a defendant may decline to answer interrogatories which the plaintiff has obtained leave to administer—for example, that the answer would tend to incriminate himself—but the grounds which are stated here are utterly insufficient. They are really no grounds at all. Of course, if the interrogatories were fishing, or were, as the defendant says, oppressive, there would be something in his objection, but there is nothing of the kind.

The second interrogatory is this: "Were the said words spoken in the presence of two named persons and other persons or any and which of them?" The defendant need not trouble himself much about "any or which of them." The substance of the interrogating is this: "Did you say these words in the presence of these persons, or what others that you know of?" There is no harm in that. It was urged that the defendant might possibly object to some portion of the interrogatory, "or any and which of them," and that for that reason he is justified in refusing to answer at all. That is a line of defence which is quite new to me, and it is utterly unwarranted, both in practice and on principle. Each question must be taken by itself, and if the defendant objects to answer any question he must say why. He cannot decline to answer one question because there is some other question which he may object to. In my opinion the learned judge has taken a view far too favourable to the defendant, and too lenient in point of principle. The appeal must be allowed, and the order of the master restored. The costs will be the plaintiff's in any event.

JEUNE, P.—I quite agree. I think it is clear that for some time past interrogatories of this kind have been allowed. If there is any question of incriminating the defendant, he is at liberty to take that objection, but it seems to me idle to object to a question because at the end there is added "or words to that effect." The object of the addition is merely to prevent the defendant from swearing by the card, and if he has not used the words alleged or anything in substance like them, he is in no way oppressed, nor is oppression practised on him, because he can say that he did not use those words or words which, though not exactly the same, are to that effect.

*Appeal allowed.*

Solicitors, *Collisson, Prichard, & Barnes*, for *J. E. Atter*, Stamford; *Ellis & Ellis.*

---

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

From Q. B. Div.
(A. L. Smith and Vaughan Williams, L.JJ.) July 25, 1899.

ATTORNEY-GENERAL v. MAYOR, &c., OF NEWCASTLE-UPON-TYNE. (a.)

*Practice—Discovery—Affidavit of documents—Claim of privilege—Sufficiency of affidavit.*

*Where a defendant in making an affidavit of documents claims that certain documents in his possession are privileged from inspection on the ground that they relate solely to his own case and do not tend to support the plaintiff's case, it is not necessary for him to state further that they do not tend to impeach his own case.*

Appeal from an order of a Divisional Court (Day and Lawrance, JJ.) for inspection of documents in an information by the Attorney-General claiming a declaration that the foreshore of the River Tyne within certain limits was vested in the Crown.

The defendants to the information were the corporation of Newcastle-upon-Tyne, who claimed to be entitled to the whole of the foreshore of the River Tyne within the limits of the port of Newcastle, including the part claimed by the Crown; the town clerk of Newcastle, was also made a defendant for the purpose of discovery.

In an affidavit in answer to interrogatories filed for the examination of the defendants as to documents in their control or possession, the town clerk stated that the defendant corporation had in their possession, custody, or power the documents mentioned in the first and second parts of the schedule to the affidavit, but that they objected to produce the documents mentioned in the second part of the schedule on the ground, *inter alia*, that such documents related solely to the title of the defendant corporation, and did not in any way tend to prove or to support the title of the informant.

On an application by the informant the Divisional Court made an order for a further and better affidavit of documents by the town clerk, and for the production of all documents mentioned in such affidavit, except such as the deponent should state to relate solely to the case of the defendant corporation, and to contain nothing impeaching the case of the defendant corporation or supporting the case of the informant.

The defendants appealed.

*Robson, Q.C.*, and *William Graham* (*Stuart Moore* with them), for the defendants.—The defendants' affidavit is sufficient; it is not necessary that it should state that the documents for which they claim privilege from inspection do not contain anything tending to impeach their own case: *Morris* v. *Edwards*, 15 App. Cas. 309, 39 W. R. Dig. 162.

*Sir R. B. Finlay, S.G.*, and *Vaughan Hawkins*, for the Crown.—*Morris* v. *Edwards* was an action of ejectment. In all other actions a defendant in claiming that documents are privileged from inspection must state in his affidavit that the documents in question do not contain anything tending to impeach his own case: *Combe* v. *Corporation of London*, 1 Y & C. Ch. 631; *Minet* v. *Morgan*, 21 W. R. 467, L. R. 8 Ch. App. 361; *Corporation of Hastings* v. *Ivall*, 21 W. R. 899, L. R. 8 Ch. App. 1017; *Attorney-General* v. *Emerson*, 31 W. R. 191, 10 Q. B. D. 191.

A. L. SMITH, L.J.—I remember that at one time the practice used to be that, where a defendant claimed that any documents in his possession were privileged from production, he stated in his affidavit that they did not contain anything tending to impeach his own case. It was held in several cases that such a statement was necessary: *Minet* v. *Morgan*, *Combe* v. *Corporation of London*, *Corporation of Hastings* v. *Ivall*, and *Attorney-General* v. *Emerson*. There are, on the other hand, cases, such as *Emmerson* v. *Ind, Coope, & Co.*, 34 W. R. 778, 33 Ch. D. 323, which go to show that such a statement is not necessary in all cases. It would be very hard in an action of ejectment that the defendant, in order to avoid production of his title-deeds, should be obliged to say in his affidavit that there was no flaw in them. But it is pointed out that this case is not one of ejectment, and, if I had merely to give my own opinion, I should be inclined to say that the defendants in this case ought to state that the documents which they decline to produce do not contain anything tending to impeach their own case. But I cannot get over what was said in the House of Lords in *Morris* v. *Edwards*. That was an action of ejectment, but the decision is not based on that ground. The judgments say broadly and generally that an affidavit of documents need not state that the documents for which the defendant claims privilege do not contain anything tending to impeach his own title. I therefore think that the order of the Divisional Court must be varied by striking out the words "impeaching the case of the defendant corporation or."

VAUGHAN WILLIAMS, L.J.—The question is whether it is sufficient that the defendants' affidavit of discovery should say that the defendants object to produce certain documents on the ground that they relate solely to the case of the defendant corporation and do not in any way tend to prove or support the case of the informant, or whether it ought to state further that they do not contain anything which tends to impeach the defendants' case. The case of *Morris* v. *Edwards* in the House of Lords shows conclusively that an affidavit may be sufficient without containing that further statement. I do not think that it was originally necessary either at common law or in Chancery to make any such statement at all. Discovery was always said to relate to the case of your opponent, and you were not bound to disclose documents relating to your own case. But a series of decisions have been cited in which it appears to be laid down that an affidavit of discovery ought to contain a statement that the documents for which privilege is claimed do not contain anything which tends to impeach the case of the deponent. I think, however, it is clear, when the authorities are looked at, that the rule as stated by the Solicitor-General is too wide. There are clearly some cases in which a party is not bound to produce documents for inspection, although they may contain something impeaching his own case. So far as *Morris* v. *Edwards* negatives the proposition that it is always necessary to state that the documents for which privilege is claimed do not contain anything which impeaches the defendants' title, I should have come to the same conclusion. It may be that, when the line is rightly drawn, the true rule would be this—you ought to produce documents which impeach your own title, if at the same time they go to support the affirmative title of your opponent. I think the affidavit in this case is sufficient without the addition ordered by the Divisional Court.

*Order varied.*

Solicitor for the Crown, *Solicitor to Office of Woods, Forests, and Land Revenues.*

Solicitors for the defendants, *Collyer-Bristow, Russell, Hill, & Co.*, for *Hill Motum*, Newcastle-upon-Tyne.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

From Chan. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) May 31, 1899.

*In re* FROST & CO. (LIMITED). (a.)

*Company—Shares—Issue of fully-paid shares—Registered contract—Statement of mode of payment otherwise than in cash—Sufficient statement of consideration—Property purchased described merely by reference to prior contract—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

*Where the contract registered under section* 25 *of the Companies Act,* 1867, *on the issue of fully paid-up shares, merely described (by way of recital of a prior contract entered into between the vendor and a trustee for the company) the property sold as "certain leasehold messuages, shops, and premises together with the goodwill of the several businesses carried on by the vendor upon the same, together with the machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with the said several businesses,"*

*Held, that the contract sufficiently complied with the requirements of the section.*

*Judgment of* Romer, J. (47 *W. R.* 27), *affirmed.*

In re Maynards (Limited), 46 *W. R.* 346, [1898] 1 *Ch.* 515, *overruled.*

Appeal from a judgment of Romer, J., 47 W. R. 27, on the hearing of a motion on behalf of shareholders in a company that the register of the members of the company might be rectified by striking out the names of the applicants.

The facts of the case are fully set out in the report of the proceedings before Romer, J.

The learned judge dismissed the motion.

The applicants appealed.

*T. H. Carson*, for the appellants.

*Howard Spensly, jun.*, for the company.

A. L. SMITH, L.J.—The first point is whether the agreement of the 18th of November, 1895, comes within section 25 of the Companies Act, 1867, so as to get rid of any necessity for the full amount of the shares being paid up in cash. It was determined by the House of Lords in *Ooregum Gold Mining Co. of India* v. *Roper*, 41 W. R. 90, [1892] A. C. 125, that the words in that section, "unless the same shall have been otherwise determined by a contract duly made in writing and filed," meant "unless the mode of payment shall have been otherwise determined by a contract made in writing and filed." In my opinion the contract which required to be filed was the agreement of the 18th of November, and it seems to me to be beyond all questions that that agreement does determine the mode of payment otherwise than in cash.

The next point is whether the agreement of the 18th of November sufficiently shows the consideration. In the case of *In re Karaskhoma Exploring and Prospecting Syndicate*, 46 W. R. 37, [1897] 2 Ch. 451, which was cited before us, no consideration was shown at all in the contract. It is said that the consideration ought to be shown with more particularity than it is in the present case. But the statute says nothing about particularity, and in my opinion all that is required to be shown is the nature of the consideration, and not the details. I agree with the judgment of Romer, J., in this case, and not with that of Kekewich, J., in the case of *In re Maynards*, 46 W. R. 346, [1898] 1 Ch. 515.

RIGBY and VAUGHAN WILLIAMS, L JJ., concurred.

*Appeal dismissed.*

Solicitors, *Edmonds & Rutherford.*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

## High Court of Justice.

Chan. Div.
Kekewich, J. July 26, 27, 1899.

THOMSON v. LORD CLANMORRIS. (a.)

*Limitations, Statute of—Company—Prospectus—Untrue statements — Compensation for damage — Directors' Liability Act,* 1890 (53 & 54 *Vict. c.* 64), *s.* 3—*Statute of Limitations* (3 & 4 *Will.* 4, *c.* 42), *s.* 3.

*An action for compensation for loss or damage sustained by a shareholder in a company by reason of untrue statements in a prospectus under section* 3 *of the Directors' Liability Act,* 1890, *is not an action "for penalties, damages, or sums of money given to the party grieved" within the meaning of section* 3 *of* 3 & 4 *Will.* 4, *c.* 42, *and consequently need not be brought within two years after the cause of action accrued.*

This was an action brought by Joseph Thomson, a shareholder in the British Goldfields of West Africa (Limited), now in liquidation, against the directors and promoter of the company. The plaintiff claimed £100, with interest and costs, as compensation for the loss and damage sustained by him by reason of alleged untrue statements in the prospectus of the company (issued the 22nd of August, 1895), under the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), s. 3, which provides that every director at the time of the issue of the prospectus or notice and every promoter "shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice, for the loss or damage they may have sustained by reason of any untrue statements in the prospectus or notice . . . unless it is proved with respect to every such untrue statement . . . that he had reasonable ground to believe and did . . . believe that the statement was true." The plaintiff, it appeared, applied for his shares in the company (100 in number) on the 28th of August, 1895, when he paid £12 10s. On the 29th of August, 1895, he paid a further £37 10s., on the 17th of December, 1895, a further £25, and he paid the final call of £25 in December, 1898. The plaintiff commenced this action on the 9th of December, 1898. The defendants denied the plaintiff's allegations, and also pleaded that the action had not been commenced within two years after the plaintiff's cause of action (if any) arose, and that it was therefore barred by the statute 3 & 4 Will. 4, c. 42, s. 3, which provides " . . . all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force . . . shall be commenced and sued by the party grieved within two years after the cause of such actions . . ."

*Renshaw, Q.C.*, and *George Henderson*, for the plaintiff.

*Warrington, Q.C.*, and *T. W. Chitty*, for three of the directors.

*Warmington, Q.C.*, and *T. W. Chitty*, for another director.—This is an action for damages, and is therefore barred by 3 & 4 Will. 4, c. 42, s. 3, as the cause of action arose more than two years before action brought.

They referred to *Robinson* v. *Currey*, 30 W. R. 39, 7 Q. B. D. 465.

*Renshaw, Q.C.*, in reply.—The statute 3 & 4 Will. 4, c. 42, s. 3, applies only to damages by way of punishment, but the Act of 1890 merely gives a

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

remedy by means of compensation. This action is not therefore barred by the former statute. [He also referred to *Robinson* v. *Currey*.] Moreover the plaintiff could not ascertain the measure of the damage until the winding up, and the cause of action does not arise until that can be ascertained.

KEKEWICH, J.—This is one of those cases with which the court has become very familiar. It is a case in which complaint is made of untrue statements in a prospectus issued to the public. There has, however, I believe, been only one case so far which has been decided on the Directors' Liability Act, 1890, that is the case of *Greenwood* v. *The Leather Shod Wheel Co.*, 80 L. T. Rep. 462, 43 SOLICITORS' JOURNAL, 314, W. N. (1899), p. 26, 47 W. R. Dig. 33. In that case, in a considered judgment, I stated what I thought was the meaning of the Act of 1890, and it is now left for the consideration of a higher court; it would therefore be waste of time for me to repeat what I there said. In my opinion the Act means what I there stated it to mean. The question now is whether on that construction of the Act the plaintiff has made out that the defendants fall within it, or, to put it in another way, whether the defendants have proved such a defence as to show that they are outside the liability imposed on them by section 3 of the Act. I now have this prospectus before me. [His lordship then carefully considered the prospectus and found that there was one important statement in it at least which was untrue, and which the defendants did not believe to be true, and continued:] Mr. Thomson must be taken to have subscribed for shares on the faith of this as much as any other statement in the prospectus. He may have been foolish, but there is no reason why he should not have his remedy.

Then comes a point of law which is a new one, and which is not cleared up by the case of *Robinson* v. *Currey*, the only case on the meaning of the statute 3 & 4 Will. 4, c. 42, which has been brought before me. The Act of 1890, by section 3, says that every person who is a director or promoter of the company at the time of the issue of the prospectus shall be liable to pay compensation to all persons who shall subscribe for any shares on the faith of such prospectus, for the loss or damage they may have sustained by reason of any untrue statement. It should be observed that the right of action is given, not to recover damages, but for compensation —that is, for something which would give back to the person subscribing for shares what he has lost by reason of the untrue statement in the prospectus. Then section 3 of 3 & 4 Will. 4, c. 42, provides that all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force must be brought within two years after the cause of action. The question is, Is this action within that section? The period is short, shorter than that limited for actions for debt or on a covenant. Is it therefore reasonable to hold that an action of this kind should be so limited? I am of opinion that that section deals with damages or sums of money in the nature of a penalty, and not with such sums of money as we are dealing with here, which are claimed as compensation for the loss suffered through subscriptions for shares induced by misrepresentations in a prospectus. But besides that, I think I ought not to hold that the Legislature in the Act of 1890, giving a new remedy to a new class of persons, intended at the same time, without any clear expression thereof, to say that actions under that Act should be brought within the specially limited period of section 3 of 3 & 4 Will. 4, c. 42. As this case may go to the Court of Appeal I will deal with one other point. Supposing the statute 3 & 4 Will. 4, c. 42, applies, when did the cause of action in this case commence? It does not commence with the issue of the prospectus or the application for shares. The Act of 1890 deals with compensation for loss or damage sustained by a subscriber for shares. As soon as he applies for shares it is true he is liable to pay, but he cannot sustain loss or damage until he has actually paid the money. From that time therefore the cause of action commences, so that in this case the last £25, which was not paid until December, 1898, would not be within section 3 of 3 & 4 Will. 4, c. 42, even if it applied. As I hold that it does not apply, there must be judgment for the plaintiff for £100, with interest and costs; and I may add that even if he could only have brought his action for the £25 I would have given him the whole costs of the action.

Solicitors, *Herbert Toomer; Morten, Cutler, & Co.; Godfrey, Webb, & Godfrey.*

---

Chan. Div. } July 21, 1899.
Kekewich, J. }

*In re* ROBERT WATSON & CO. (LIMITED). (a.)

*Company—Partly paid-up shares—Sufficiency of filed contract—Statement of nature of consideration—Character of transaction—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).

*A mere recital in a contract filed under section 25 of the Companies Act*, 1867, *stating that, by an unfiled contract, "the vendors agreed to sell and the company to purchase the property in the agreement now in recital mentioned for the consideration and on the terms and conditions therein expressed and contained," is not a sufficient statement of the consideration.*

*The filed contract must at least state generally the nature of the consideration, and not merely set forth the character of the transaction.*

In re S. Frost & Co. (Limited), 47 *W. R.* 27, [1898] 2 *Ch.* 556, *on appeal* ante, *p.* 39, [1899] 2 *Ch.* 207, *commented on.*

Motion.

Robert Watson & Co. (Limited) was a limited company incorporated on the 25th of August, 1887, under the Companies Act, 1862, and formed for the purpose of taking over the business carried on by a firm trading under the style of Robert Watson & Co.

By the first of two agreements, both dated the 30th of September, 1887, the firm, as vendors, agreed to sell and the company agreed to purchase "all and singular the lands then belonging to the said firm whether situate in India, England, or elsewhere, the moneys, bills, notes, and other negotiable instruments and securities for money, the book and other debts and things in action belonging to the same firm and the full benefit of all contracts to which the same firm was entitled in connection with the business theretofore carried on by them, and all and singular other the property and assets of every description including the goodwill of the said business and the right to use the trade-marks or other marks of a like nature used in connection with the said business and to use the name of Robert Watson & Co. as part of the name of the company," and it was thereby agreed that part of the consideration of the said sale should be the sum of £300,000, of which £70,000 was to be paid in cash and £230,000 was to be satisfied by the issue of twenty-three shares of the nominal value of £15,000 each to the persons and in the proportions therein

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

specified, and that the sum of £10,000 and no more was to be deemed to be paid up on each of such shares, and it was also agreed that the company should before the issue of the said twenty-three shares enter into a separate agreement embodying the relevant provisions thereof and should register the same.

The second of the said agreements was made between the company of the one part and the vendors of the other part, and after a recital that by the above-mentioned agreement "the vendors agreed to sell and the company agreed to purchase the property in the agreement now in recital mentioned for the consideration and on the terms and conditions therein expressed and contained, and among others that the company should enter into the agreement hereinafter contained," it was thereby agreed "that in fulfilment of the said condition in that behalf, and in consideration of the said sale, and in part payment of the purchase-money payable in respect thereof" the company would immediately after the registration thereof (which registration the company thereby forthwith undertook to effect) issue and allot twenty-three shares of the nominal value of £15,000 each in the company to the several persons, and in the several proportions therein specified, and that each of the said twenty-three shares should be registered and held by the holder thereof for the time being as having the sum of £10,000 paid up thereon.

The second agreement was duly filed on the 30th of September, 1887, and the twenty-three shares were subsequently issued and allotted in pursuance thereof. No other agreement had been filed.

In 1892, each of the original shares of £15,000, on which £10,000 had been paid, was subdivided into ten shares of £1,500 each, on each of which the sum of £1,000 was credited as paid.

In view of the recent decisions on the subject the company became apprehensive lest the filed contract should not be a sufficient contract, and now moved the court for an order (if necessary) directing the filing of the first above-mentioned agreement or alternatively of a memorandum in writing in a form to be approved by the court.

The respondent was the holder of ten shares in the company, representing one of the original shares issued and allotted in pursuance of the filed agreement.

The company was in a thoroughly solvent condition.

*Warrington, Q.C.*, and *Armitstead*, for the applicants.—The nature of the consideration must appear in the filed contract: *In re S. Frost & Co. (Limited)*, 47 W. R. 27, [1898] 2 Ch. 556, on appeal, *ante*, p. 39, [1899] 2 Ch. 207. Now here the recital states that the transaction was a sale, the character of the transaction is stated, and that involves in itself a statement of the nature of the consideration. No one by reading the contract in *In re S. Frost & Co. (Limited)* would get any more information as to the consideration than he would by reading this agreement.

The *Kharaskhoma case*, 46 W. R. 37, [1897] 2 Ch. 451, and *In re Maynards (Limited)*, 46 W. R. 346, [1898] 1 Ch. 515, were also referred to.

*C. T. Musgrave*, for the respondent.—The contract must express the consideration, and if the real nature of the consideration is disclosed, that may be sufficient, although the details can be ascertained only by other evidence: *In re African Gold Concessions and Development Co., Markham and Darter's case*, 47 W. R. 509, [1899] 1 Ch. 414, affirmed on appeal, [1899] 2 Ch. 480.

KEKEWICH, J.—My anxious desire is to follow the guide afforded by the Court of Appeal in *In re S. Frost & Co (Limited)*, and not the less so because they did not adopt the view which I took in *In re Maynards (Limited)*. The difficulty is to know, when applying it to any particular document, what their view was. Now, in all these cases—in the *Kharaskhoma case*, in *In re S. Frost & Co. (Limited)*, both in the court below and on appeal, and in *Markham and Darter's case*—the judgments make it clear that there must be stated on the face of the contract the "nature" of the consideration, or the "kind" or "sort" of the consideration, or, as Wright, J., calls it, the "real nature" of the consideration, and the difficulty is to know what is meant by that phrase—I say "by that phrase" because, though the language used is a little different, there was the same phrase throughout.

This contract says that "the vendors agreed to sell and the company agreed to purchase the property in the agreement now in recital mentioned for the consideration and on the terms and conditions therein expressed and contained." Now, unless the argument of the applicants' counsel in support of the filed contract is sound, that is not in itself sufficient, because in *In re S. Frost & Co. (Limited)*, on appeal, Vaughan Williams, L.J., says, [1899] 2 Ch., at p. 216—and the other judges did not differ from him—"It is not a sufficient statement of the consideration if the only statement is such as to refer one to some other contract in which the consideration will be found set out." It is not, therefore, enough to say "the property in the agreement now in recital mentioned." But the applicants' counsel says that the nature of the consideration points not to the nature of the property, but to the form or character of the transaction, and that here the transaction is one of purchase and sale. This was not an exchange or anything of that sort. It was a sale, and he says that that is all you want to know. If that contention is not sound, then his argument breaks down. I do not think that the meaning contended for is within the contemplation of the statute or the decided cases.

In *In re Frost & Co. (Limited)* the Court of Appeal agreed with Romer, J., except upon the point dealing with the Statute of Frauds, with which I have nothing now to do. Romer, J., said: "Now, fairly viewed, is the consideration stated on the face of the filed document in the case before me? I think it is. The document shows that the consideration was (stating it shortly) that the vendor had agreed by a previous contract therein mentioned (but not filed) to sell and lease to the company certain leasehold premises, and to sell the goodwill of the business carried on by the vendor on those premises, together with the machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with those businesses as therein mentioned. That is a short, but, to my mind, sufficient statement of the consideration, and I do not think it was essential that the full particulars of the leasehold businesses and plant should be detailed in the filed contract"; and then he goes on to point out (what subsequently received the approval of the Court of Appeal) that if the other view be held you must set out an inventory of the property. He evidently had in his mind the distinction between a general description and a detailed inventory of the property. He said that the former was sufficient, but that the latter could not be required without an absurdity. Illustrations of the sort of particularity required are given by Chitty, L.J., in the *Kharaskhoma case*. For instance, he says: "If the consideration is a concession in South Africa, the person who reads the registered document will see that it is a concession in South Africa, and will form his own opinion about it. So if it is furniture supplied to an hotel company he may be able to go at once and see what that furni-

ture is, or he may not, because after a lapse of time the furniture may be worn out. Again, if it is the sale of a goodwill and stock-in-trade the consideration stated being the goodwill and the stock-in-trade, he sees the nature of the consideration, and he sees it stated." In all these cases an inquiring person can find out for himself what was the consideration, including the general nature of the subject-matter of the consideration, for he sees it stated in the filed document. Now, in the document before me, such a person does not see what is the nature of the consideration according to those authorities. The consideration is only stated to be the sale and purchase of property, which may be freehold, copyhold, or leasehold, or anything else that may be fairly described as property. I do not think that the Court of Appeal intended their decision in *In re S. Frost & Co. (Limited)* to mean that there need be no statement at all as to the nature of the property dealt with. In this case the general nature of the property can only be determined by referring to another document which is not filed, and with respect to that I only repeat what I said before —that what Vaughan Williams, L.J., said is in point, and it was concurred in by the other lords justices. In my opinion, therefore, the filed document is insufficient.

Solicitors, *Freshfields & Williams.*

Chan. Div. Cozens-Hardy, J. } July 28, 31; Aug. 10, 1899.

CORNWALL *v.* HENSON. (*a.*)

*Vendor and purchaser—Payment by instalments—Purchaser's repudiation of contract before last instalment —Acts amounting to—Right to recover money paid—Specific performance.*

*The plaintiff was the purchaser and the defendant was the vendor of certain land under a written agreement providing for payment of the purchase-money by certain instalments. By this agreement if the purchaser made default in payment of any instalment for thirty days the whole price was to become immediately due, but provision was made for this time being extended by agreement; and in the event of default being made for thirty days in payment of the whole of the unpaid instalments with interest the vendor was empowered to resell. The plaintiff took possession under this agreement and paid all the instalments except one, but then disappeared and never made any further payment to the defendant. More than a year afterwards the defendant let the property to B. with an option to purchase, and B. was now in possession. The plaintiff thereupon made an offer to the defendant to "make the final instalment and settlement of the ground purchased," which offer was refused.*

*This was an action for specific performance of the above agreement and damages, or alternatively damages for breach of contract and repayment of the purchase-money with interest. The claim for specific performance was practically abandoned at the hearing.*

*Held, that the plaintiff in fact abandoned the land and repudiated his contract; and further that the plaintiff having made such default as precluded him from demanding the transfer of the property, the defendant was justified in treating this as an abandonment, and in acting thenceforward as the true owner, both at law and in equity, of the property; and the plaintiff having himself repudiated this contract after having possession of the property under the contract, and there being no circumstances from which the court could imply a promise by the defendant to repay the money paid by the plaintiff, neither the claim for damages nor that for the repayment could be sustained.*

Action.

By an agreement dated the 11th of August, 1892, and made between the defendant of the one part and the plaintiff of the other part, the defendant agreed to sell and the plaintiff agreed to buy 5¼ acres of land at Pitsea, in Essex, for £150.

Clause 2 was as follows: "The purchaser has already paid to the vendor the sum of £40 on account of the said purchase-money of £150, and will pay the balance by equal quarterly instalments of £9 3s. 4d. each on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June in every year, the first of such quarterly payments to be made on the 25th day of December, 1892. The purchaser will also pay to the vendor with each such quarterly payment on account of principal such a further sum as shall be equivalent to interest at the rate of 3 per cent. per annum on the amount of principal remaining unpaid for the quarter then past, but if the purchaser shall make default in payment of any of such instalments of principal or interest or any part thereof for thirty days after the same shall have become due, the whole of the unpaid instalments of the said purchase-money with the interest thereon shall become immediately due and payable." Thus far the clause was in print, but the following words were added in writing: "I agree to grant a further extension on application of the purchaser at an increase of interest as shall be determined by both parties." The purchaser was by clause 3 to have possession as on the 1st of July, 1892, and he was by clause 6 to make and maintain certain boundary fences and hedges and also to complete and repair part of a certain road abutting on the land. By clause 8 the vendor, in the event of default being made for thirty days in payment of the whole of the unpaid instalments with interest, was to be at liberty to resell and to retain out of the proceeds of sale unpaid instalments with interest, and the net balance of the proceeds was to to be paid by the vendor to the purchaser.

The plaintiff entered into possession and cultivated the land for a considerable time, but he did not make it pay. The plaintiff was generally in arrear with his instalments, and from time to time the defendant allowed a postponement, interest being charged and paid at £5 per cent. The last instalment paid by the plaintiff became due on the 24th of June, 1895, and was paid with interest on the 27th of August, 1895. This left only one instalment due, but from August, 1895, no further payment was made by the plaintiff to the defendant.

Much correspondence took place, in which the defendant called upon the plaintiff to pay, and on the 23rd of October, 1896, the plaintiff wrote a long letter to the defendant asking him to reply to a particular address in Jamaica-road, Bermondsey. Shortly after that date the plaintiff disappeared, and letters addressed by the defendant to him at Jamaica-road were returned through the Dead Letter Office. Inquiries made by the defendant at former addresses and from his relations led to no result. The field was in a derelict state, the fences were broken down, nothing was produced by the land, the road was not made, and rates and tithe were unpaid. The land was not worth the total amount of the instalments paid by the plaintiff.

Under these circumstances the defendant took possession and advertised the property for sale, and, not being able to effect a sale, he on the 7th of March,

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

1898, agreed to let the property to a Mr. Burns with liberty to erect a house and with the option to purchase at any time during the term. Burns accordingly erected a house, and was still in possession at the trial of the action. The plaintiff now appeared upon the scene and expressed his pleasure at finding a house erected, and on the 13th of June, 1898, he wrote to the defendant that he was prepared to "make the final instalment and settlement of the ground purchased." Correspondence took place, but nothing resulted from it, and on the 13th of July, 1898, this action was commenced, the plaintiff claiming specific performance of the agreement of August, 1892, and damages instead of or in addition to specific performance, or alternatively damages for breach of contract and repayment of the purchase-money with interest.

*Astbury, Q.C.*, and *Harry Greenwood*, for the plaintiff.

*Frederic Thompson*, for the defendant.

COZENS-HARDY, J., after stating the facts as above set out, said: At an early stage it appeared to me to be reasonably clear, and it was assented to by the plaintiff's counsel, that specific performance could not be granted. The plaintiff in an action for specific performance must allege and prove that he is and always has been ready and willing to perform his part of the bargain. It would be monstrous after such delay to grant a decree for specific performance which would involve turning Burns out of possession, and giving the land with the house upon it to the plaintiff. Although the plaintiff is not entitled to specific performance, it is contended that he can claim damages against the defendant. It is necessary to consider what is the legal position of the plaintiff. It is often stated that the effect of a contract for sale of land is to make the purchaser from that moment in equity owner of the land. I think, however, that this statement is too wide. The doctrine is subject to one obvious qualification—namely, that the contract is one of which the court under the circumstances will decree specific performance. For instance, if the vendor is not in a position to obtain a decree for specific performance, whether by reason of some defect in title or by reason of some collateral misrepresentation, the purchaser never was, in the view of the court, owner in equity of the property. So, too, if by reason of delay or other circumstances the court declines to grant to the purchaser specific performance, the purchaser is not treated as being in equity owner of the property. It is settled law that where a purchase goes off by reason of some default on the part of the vendor, the purchaser has a lien upon the property for any part of his purchase-money which has been paid: see *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. Cas. 672. The same principle applies where the court declines to grant a decree for specific performance in favour of the purchaser, on the ground of his delay if there has been no part performance, and if there is not on the part of the purchaser anything which can amount to evidence of abandonment or repudiation of the contract (see *Levy* v. *Stogdon*, [1898] 1 Ch. 478, 46 W. R. Dig. 173, and [1899] 1 Ch. 5, 47 W. R. Dig. 200, where a purchaser failed to obtain specific performance, but was nevertheless declared entitled to a lien for his deposit). The question which I have to decide is, in the words of Cotton, L.J., in *Howe* v. *Smith*, 32 W. R. 802, at p. 804, 27 Ch. D. 89, whether there are here "acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract." Upon the whole, I think that the plaintiff by his conduct has shown that he in October, 1896, thought it not worth his while to have anything further to do with the land, and in fact abandoned the land and repudiated the contract. I think, further, that the plaintiff having made such default as precluded him from demanding the transfer of the property, the defendant was justified in treating this as an abandonment and in acting thenceforward as the true owner, both at law and in equity, of the property. It was in this character that he granted a lease to Burns with an option to purchase. I do not think, under these circumstances, it would be right for me to give the plaintiff a lien upon the property for the money he has paid, or an order against the defendant to repay this sum: see *Dinn* v. *Grant*, 5 De G. & Sm. 451. The defendant's rights cannot be limited to the exercise of the power of sale conferred by the contract when once it is held that the plaintiff is no longer owner in equity of the land or entitled to a lien upon it. The lease to Burns was a lawful exercise of ownership. It is, I think, plain that the plaintiff cannot obtain damages for breach of the contract which he has himself repudiated, nor do I think he can recover back the money which he has paid, as money had and received to his use. There has not been a total failure of consideration. The general rule of law is that where a contract has been in part performed no part of the money paid under such a contract can be recovered back: see *Whincup* v. *Hughes*, 19 W. R. 439, L. R. 6 C. P. 78. The plaintiff has been for a time in possession of the property under the contract, and there are no circumstances from which I can imply a promise by the defendant to repay this money to the plaintiff, especially when the land is not now worth this money. Reliance was placed by counsel for the plaintiff on *Palmer* v. *Temple*, 9 A. & E. 508; but in that case there had been no part performance of the contract, possession had not been taken, and, moreover, it is not easy to reconcile the observations in that case with the judgment of the Court of Appeal in *Howe* v. *Smith*. I ought perhaps to mention that the defendant, on receipt of the plaintiff's letter on the 13th of June, 1898, made an offer to convey subject to the rights of Burns under his tenancy and subject to the payment of a sum of £25. I regret that this offer was not accepted. But I do not think I ought to treat that offer as an admission by the defendant that the plaintiff's rights under the contract still subsisted. Except on the footing that the contract was at an end and that the plaintiff was not owner in equity of the land, Burns's lease with the option of purchase was improper and invalid. The result is that I am not able to find any legal foundation for the plaintiff's claim for damages or for the return of the instalments he has paid. I must, therefore, dismiss the action, but, under the circumstances, without costs.

Solicitors for the plaintiff, *Edwin, Son, & Edgley*.

Solicitors for the defendant, *Field, Roscoe, & Co.*, for *J. H. Mitchell*, Worthing.

---

Chan. Div. Cozens-Hardy, J. } July 25, 26; Aug. 2, 1899.

LLANDUDNO URBAN DISTRICT COUNCIL v. WOOD. (a.)

*Foreshore—Lessee from the Crown—Rights of the public—Religious meetings—Urban district council—Injunction—Trespass.*

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

ture is, or he may not, because after a lapse of time the furniture may be worn out. Again, if it is the sale of a goodwill and stock-in-trade the consideration stated being the goodwill and the stock-in-trade, he sees the nature of the consideration, and he sees it stated." In all these cases an inquiring person can find out for himself what was the consideration, including the general nature of the subject-matter of the consideration, for he sees it stated in the filed document. Now, in the document before me, such a person does not see what is the nature of the consideration according to those authorities. The consideration is only stated to be the sale and purchase of property, which may be freehold, copyhold, or leasehold, or anything else that may be fairly described as property. I do not think that the Court of Appeal intended their decision in *In re S. Frost & Co. (Limited)* to mean that there need be no statement at all as to the nature of the property dealt with. In this case the general nature of the property can only be determined by referring to another document which is not filed, and with respect to that I only repeat what I said before —that what Vaughan Williams, L.J., said is in point, and it was concurred in by the other lords justices. In my opinion, therefore, the filed document is insufficient.

Solicitors, *Freshfields & Williams.*

Chan. Div.
Cozens-Hardy, J. } July 28, 31; Aug. 10, 1899.

CORNWALL *v.* HENSON. (*a.*)

*Vendor and purchaser—Payment by instalments—Purchaser's repudiation of contract before last instalment —Acts amounting to—Right to recover money paid—Specific performance.*

*The plaintiff was the purchaser and the defendant was the vendor of certain land under a written agreement providing for payment of the purchase-money by certain instalments. By this agreement if the purchaser made default in payment of any instalment for thirty days the whole price was to become immediately due, but provision was made for this time being extended by agreement; and in the event of default being made for thirty days in payment of the whole of the unpaid instalments with interest the vendor was empowered to resell. The plaintiff took possession under this agreement and paid all the instalments except one, but then disappeared and never made any further payment to the defendant. More than a year afterwards the defendant let the property to B. with an option to purchase, and B. was now in possession. The plaintiff thereupon made an offer to the defendant to "make the final instalment and settlement of the ground purchased," which offer was refused.*

*This was an action for specific performance of the above agreement and damages, or alternatively damages for breach of contract and repayment of the purchase-money with interest. The claim for specific performance was practically abandoned at the hearing.*

*Held, that the plaintiff in fact abandoned the land and repudiated his contract; and further that the plaintiff having made such default as precluded him from demanding the transfer of the property, the defendant was justified in treating this as an abandonment, and in acting thenceforward as the true owner, both at law and in equity, of the property; and the plaintiff having himself repudiated this contract after having possession of the property under the contract, and there being no circumstances from which the court could imply a promise by the defendant to repay the money paid by the plaintiff, neither the claim for damages nor that for the repayment could be sustained.*

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Action.

By an agreement dated the 11th of August, 1892, and made between the defendant of the one part and the plaintiff of the other part, the defendant agreed to sell and the plaintiff agreed to buy 5¼ acres of land at Pitsea, in Essex, for £150.

Clause 2 was as follows: "The purchaser has already paid to the vendor the sum of £40 on account of the said purchase-money of £150, and will pay the balance by equal quarterly instalments of £9 3s. 4d. each on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June in every year, the first of such quarterly payments to be made on the 25th day of December, 1892. The purchaser will also pay to the vendor with each such quarterly payment on account of principal such a further sum as shall be equivalent to interest at the rate of 3 per cent. per annum on the amount of principal remaining unpaid for the quarter then past, but if the purchaser shall make default in payment of any of such instalments of principal or interest or any part thereof for thirty days after the same shall have become due, the whole of the unpaid instalments of the said purchase-money with the interest thereon shall become immediately due and payable." Thus far the clause was in print, but the following words were added in writing: "I agree to grant a further extension on application of the purchaser at an increase of interest as shall be determined by both parties." The purchaser was by clause 3 to have possession as on the 1st of July, 1892, and he was by clause 6 to make and maintain certain boundary fences and hedges and also to complete and repair part of a certain road abutting on the land. By clause 8 the vendor, in the event of default being made for thirty days in payment of the whole of the unpaid instalments with interest, was to be at liberty to resell and to retain out of the proceeds of sale unpaid instalments with interest, and the net balance of the proceeds was to to be paid by the vendor to the purchaser.

The plaintiff entered into possession and cultivated the land for a considerable time, but he did not make it pay. The plaintiff was generally in arrear with his instalments, and from time to time the defendant allowed a postponement, interest being charged and paid at £5 per cent. The last instalment paid by the plaintiff became due on the 24th of June, 1895, and was paid with interest on the 27th of August, 1895. This left only one instalment due, but from August, 1895, no further payment was made by the plaintiff to the defendant.

Much correspondence took place, in which the defendant called upon the plaintiff to pay, and on the 23rd of October, 1896, the plaintiff wrote a long letter to the defendant asking him to reply to a particular address in Jamaica-road, Bermondsey. Shortly after that date the plaintiff disappeared, and letters addressed by the defendant to him at Jamaica-road were returned through the Dead Letter Office. Inquiries made by the defendant at former addresses and from his relations led to no result. The field was in a derelict state, the fences were broken down, nothing was produced by the land, the road was not made, and rates and tithe were unpaid. The land was not worth the total amount of the instalments paid by the plaintiff.

Under these circumstances the defendant took possession and advertised the property for sale, and, not being able to effect a sale, he on the 7th of March,

1898, agreed to let the property to a Mr. Burns with liberty to erect a house and with the option to purchase at any time during the term. Burns accordingly erected a house, and was still in possession at the trial of the action. The plaintiff now appeared upon the scene and expressed his pleasure at finding a house erected, and on the 13th of June, 1898, he wrote to the defendant that he was prepared to "make the final instalment and settlement of the ground purchased." Correspondence took place, but nothing resulted from it, and on the 13th of July, 1898, this action was commenced, the plaintiff claiming specific performance of the agreement of August, 1892, and damages instead of or in addition to specific performance, or alternatively damages for breach of contract and repayment of the purchase-money with interest.

*Astbury, Q.C.*, and *Harry Greenwood*, for the plaintiff.

*Frederic Thompson*, for the defendant.

COZENS-HARDY, J., after stating the facts as above set out, said: At an early stage it appeared to me to be reasonably clear, and it was assented to by the plaintiff's counsel, that specific performance could not be granted. The plaintiff in an action for specific performance must allege and prove that he is and always has been ready and willing to perform his part of the bargain. It would be monstrous after such delay to grant a decree for specific performance which would involve turning Burns out of possession, and giving the land with the house upon it to the plaintiff. Although the plaintiff is not entitled to specific performance, it is contended that he can claim damages against the defendant. It is necessary to consider what is the legal position of the plaintiff. It is often stated that the effect of a contract for sale of land is to make the purchaser from that moment in equity owner of the land. I think, however, that this statement is too wide. The doctrine is subject to one obvious qualification—namely, that the contract is one of which the court under the circumstances will decree specific performance. For instance, if the vendor is not in a position to obtain a decree for specific performance, whether by reason of some defect in title or by reason of some collateral misrepresentation, the purchaser never was, in the view of the court, owner in equity of the property. So, too, if by reason of delay or other circumstances the court declines to grant to the purchaser specific performance, the purchaser is not treated as being in equity owner of the property. It is settled law that where a purchase goes off by reason of some default on the part of the vendor, the purchaser has a lien upon the property for any part of his purchase-money which has been paid: see *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. Cas. 672. The same principle applies where the court declines to grant a decree for specific performance in favour of the purchaser, on the ground of his delay if there has been no part performance, and if there is not on the part of the purchaser anything which can amount to evidence of abandonment or repudiation of the contract (see *Levy* v. *Stogdon*, [1898] 1 Ch. 478, 46 W. R. Dig. 173, and [1899] 1 Ch. 5, 47 W. R. Dig. 200, where a purchaser failed to obtain specific performance, but was nevertheless declared entitled to a lien for his deposit). The question which I have to decide is, in the words of Cotton, L.J., in *Howe* v. *Smith*, 32 W. R. 802, at p. 804, 27 Ch. D. 89, whether there are here "acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract." Upon the whole, I think that the plaintiff by his conduct has shown that he in October, 1896, thought it not worth his while to have anything further to do with the land, and in fact abandoned the land and repudiated the contract. I think, further, that the plaintiff having made such default as precluded him from demanding the transfer of the property, the defendant was justified in treating this as an abandonment and in acting thenceforward as the true owner, both at law and in equity, of the property. It was in this character that he granted a lease to Burns with an option to purchase. I do not think, under these circumstances, it would be right for me to give the plaintiff a lien upon the property for the money he has paid, or an order against the defendant to repay this sum: see *Dinn* v. *Grant*, 5 De G. & Sm. 451. The defendant's rights cannot be limited to the exercise of the power of sale conferred by the contract when once it is held that the plaintiff is no longer owner in equity of the land or entitled to a lien upon it. The lease to Burns was a lawful exercise of ownership. It is, I think, plain that the plaintiff cannot obtain damages for breach of the contract which he has himself repudiated, nor do I think he can recover back the money which he has paid, as money had and received to his use. There has not been a total failure of consideration. The general rule of law is that where a contract has been in part performed no part of the money paid under such a contract can be recovered back: see *Whincup* v. *Hughes*, 19 W. R. 439, L. R. 6 C. P. 78. The plaintiff has been for a time in possession of the property under the contract, and there are no circumstances from which I can imply a promise by the defendant to repay this money to the plaintiff, especially when the land is not now worth this money. Reliance was placed by counsel for the plaintiff on *Palmer* v. *Temple*, 9 A. & E. 508; but in that case there had been no part performance of the contract, possession had not been taken, and, moreover, it is not easy to reconcile the observations in that case with the judgment of the Court of Appeal in *Howe* v. *Smith*. I ought perhaps to mention that the defendant, on receipt of the plaintiff's letter on the 13th of June, 1898, made an offer to convey subject to the rights of Burns under his tenancy and subject to the payment of a sum of £25. I regret that this offer was not accepted. But I do not think I ought to treat that offer as an admission by the defendant that the plaintiff's rights under the contract still subsisted. Except on the footing that the contract was at an end and that the plaintiff was not owner in equity of the land, Burns's lease with the option of purchase was improper and invalid. The result is that I am not able to find any legal foundation for the plaintiff's claim for damages or for the return of the instalments he has paid. I must, therefore, dismiss the action, but, under the circumstances, without costs.

Solicitors for the plaintiff, *Edwin, Son, & Edgley*.

Solicitors for the defendant, *Field, Roscoe, & Co.*, for *J. H. Mitchell*, Worthing.

---

Chan. Div. Cozens-Hardy, J. } July 25, 26; Aug. 2, 1899.

LLANDUDNO URBAN DISTRICT COUNCIL v. WOOD. (*a.*)

*Foreshore—Lessee from the Crown—Rights of the public—Religious meetings—Urban district council—Injunction—Trespass.*

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

ture is, or he may not, because after a lapse of time the furniture may be worn out. Again, if it is the sale of a goodwill and stock-in-trade the consideration stated being the goodwill and the stock-in-trade, he sees the nature of the consideration, and he sees it stated." In all these cases an inquiring person can find out for himself what was the consideration, including the general nature of the subject-matter of the consideration, for he sees it stated in the filed document. Now, in the document before me, such a person does not see what is the nature of the consideration according to those authorities. The consideration is only stated to be the sale and purchase of property, which may be freehold, copyhold, or leasehold, or anything else that may be fairly described as property. I do not think that the Court of Appeal intended their decision in *In re S. Frost & Co. (Limited)* to mean that there need be no statement at all as to the nature of the property dealt with. In this case the general nature of the property can only be determined by referring to another document which is not filed, and with respect to that I only repeat what I said before —that what Vaughan Williams, L.J., said is in point, and it was concurred in by the other lords justices. In my opinion, therefore, the filed document is insufficient.

Solicitors, *Freshfields & Williams.*

Chan. Div.
Cozens-Hardy, J. } July 28, 31; Aug. 10, 1899.

CORNWALL *v.* HENSON. (*a.*)

*Vendor and purchaser—Payment by instalments—Purchaser's repudiation of contract before last instalment —Acts amounting to—Right to recover money paid—Specific performance.*

*The plaintiff was the purchaser and the defendant was the vendor of certain land under a written agreement providing for payment of the purchase-money by certain instalments. By this agreement if the purchaser made default in payment of any instalment for thirty days the whole price was to become immediately due, but provision was made for this time being extended by agreement; and in the event of default being made for thirty days in payment of the whole of the unpaid instalments with interest the vendor was empowered to resell. The plaintiff took possession under this agreement and paid all the instalments except one, but then disappeared and never made any further payment to the defendant. More than a year afterwards the defendant let the property to B. with an option to purchase, and B. was now in possession. The plaintiff thereupon made an offer to the defendant to "make the final instalment and settlement of the ground purchased," which offer was refused.*

*This was an action for specific performance of the above agreement and damages, or alternatively damages for breach of contract and repayment of the purchase-money with interest. The claim for specific performance was practically abandoned at the hearing.*

*Held, that the plaintiff in fact abandoned the land and repudiated his contract; and further that the plaintiff having made such default as precluded him from demanding the transfer of the property, the defendant was justified in treating this as an abandonment, and in acting thenceforward as the true owner, both at law and in equity, of the property; and the plaintiff having himself repudiated this contract after having possession of the property under the contract, and there being no circumstances from which the court could imply a promise by the defendant to repay the money paid by the plaintiff, neither the claim for damages nor that for the repayment could be sustained.*

Action.

By an agreement dated the 11th of August, 1892, and made between the defendant of the one part and the plaintiff of the other part, the defendant agreed to sell and the plaintiff agreed to buy 5¼ acres of land at Pitsea, in Essex, for £150.

Clause 2 was as follows: "The purchaser has already paid to the vendor the sum of £40 on account of the said purchase-money of £150, and will pay the balance by equal quarterly instalments of £9 3s. 4d. each on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June in every year, the first of such quarterly payments to be made on the 25th day of December, 1892. The purchaser will also pay to the vendor with each such quarterly payment on account of principal such a further sum as shall be equivalent to interest at the rate of 3 per cent. per annum on the amount of principal remaining unpaid for the quarter then past, but if the purchaser shall make default in payment of any of such instalments of principal or interest or any part thereof for thirty days after the same shall have become due, the whole of the unpaid instalments of the said purchase-money with the interest thereon shall become immediately due and payable." Thus far the clause was in print, but the following words were added in writing: "I agree to grant a further extension on application of the purchaser at an increase of interest as shall be determined by both parties." The purchaser was by clause 3 to have possession as on the 1st of July, 1892, and he was by clause 6 to make and maintain certain boundary fences and hedges and also to complete and repair part of a certain road abutting on the land. By clause 8 the vendor, in the event of default being made for thirty days in payment of the whole of the unpaid instalments with interest, was to be at liberty to resell and to retain out of the proceeds of sale unpaid instalments with interest, and the net balance of the proceeds was to to be paid by the vendor to the purchaser.

The plaintiff entered into possession and cultivated the land for a considerable time, but he did not make it pay. The plaintiff was generally in arrear with his instalments, and from time to time the defendant allowed a postponement, interest being charged and paid at £5 per cent. The last instalment paid by the plaintiff became due on the 24th of June, 1895, and was paid with interest on the 27th of August, 1895. This left only one instalment due, but from August, 1895, no further payment was made by the plaintiff to the defendant.

Much correspondence took place, in which the defendant called upon the plaintiff to pay, and on the 23rd of October, 1896, the plaintiff wrote a long letter to the defendant asking him to reply to a particular address in Jamaica-road, Bermondsey. Shortly after that date the plaintiff disappeared, and letters addressed by the defendant to him at Jamaica-road were returned through the Dead Letter Office. Inquiries made by the defendant at former addresses and from his relations led to no result. The field was in a derelict state, the fences were broken down, nothing was produced by the land, the road was not made, and rates and tithe were unpaid. The land was not worth the total amount of the instalments paid by the plaintiff.

Under these circumstances the defendant took possession and advertised the property for sale, and, not being able to effect a sale, he on the 7th of March,

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

1898, agreed to let the property to a Mr. Burns with liberty to erect a house and with the option to purchase at any time during the term. Burns accordingly erected a house, and was still in possession at the trial of the action. The plaintiff now appeared upon the scene and expressed his pleasure at finding a house erected, and on the 13th of June, 1898, he wrote to the defendant that he was prepared to "make the final instalment and settlement of the ground purchased." Correspondence took place, but nothing resulted from it, and on the 13th of July, 1898, this action was commenced, the plaintiff claiming specific performance of the agreement of August, 1892, and damages instead of or in addition to specific performance, or alternatively damages for breach of contract and repayment of the purchase-money with interest.

*Astbury, Q.C.*, and *Harry Greenwood*, for the plaintiff.

*Frederic Thompson*, for the defendant.

COZENS-HARDY, J., after stating the facts as above set out, said: At an early stage it appeared to me to be reasonably clear, and it was assented to by the plaintiff's counsel, that specific performance could not be granted. The plaintiff in an action for specific performance must allege and prove that he is and always has been ready and willing to perform his part of the bargain. It would be monstrous after such delay to grant a decree for specific performance which would involve turning Burns out of possession, and giving the land with the house upon it to the plaintiff. Although the plaintiff is not entitled to specific performance, it is contended that he can claim damages against the defendant. It is necessary to consider what is the legal position of the plaintiff. It is often stated that the effect of a contract for sale of land is to make the purchaser from that moment in equity owner of the land. I think, however, that this statement is too wide. The doctrine is subject to one obvious qualification—namely, that the contract is one of which the court under the circumstances will decree specific performance. For instance, if the vendor is not in a position to obtain a decree for specific performance, whether by reason of some defect in title or by reason of some collateral misrepresentation, the purchaser never was, in the view of the court, owner in equity of the property. So, too, if by reason of delay or other circumstances the court declines to grant to the purchaser specific performance, the purchaser is not treated as being in equity owner of the property. It is settled law that where a purchase goes off by reason of some default on the part of the vendor, the purchaser has a lien upon the property for any part of his purchase-money which has been paid: see *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. Cas. 672. The same principle applies where the court declines to grant a decree for specific performance in favour of the purchaser, on the ground of his delay if there has been no part performance, and if there is not on the part of the purchaser anything which can amount to evidence of abandonment or repudiation of the contract (see *Levy* v. *Stogdon*, [1898] 1 Ch. 478, 46 W. R. Dig. 173, and [1899] 1 Ch. 5, 47 W. R. Dig. 200, where a purchaser failed to obtain specific performance, but was nevertheless declared entitled to a lien for his deposit). The question which I have to decide is, in the words of Cotton, L.J., in *Howe* v. *Smith*, 32 W. R. 802, at p. 804, 27 Ch. D. 89, whether there are here "acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract." Upon the whole, I think that the plaintiff by his conduct has shown that he in October, 1896, thought it not worth his while to have anything further to do with the land, and in fact abandoned the land and repudiated the contract. I think, further, that the plaintiff having made such default as precluded him from demanding the transfer of the property, the defendant was justified in treating this as an abandonment and in acting thenceforward as the true owner, both at law and in equity, of the property. It was in this character that he granted a lease to Burns with an option to purchase. I do not think, under these circumstances, it would be right for me to give the plaintiff a lien upon the property for the money he has paid, or an order against the defendant to repay this sum: see *Dinn* v. *Grant*, 5 De G. & Sm. 451. The defendant's rights cannot be limited to the exercise of the power of sale conferred by the contract when once it is held that the plaintiff is no longer owner in equity of the land or entitled to a lien upon it. The lease to Burns was a lawful exercise of ownership. It is, I think, plain that the plaintiff cannot obtain damages for breach of the contract which he has himself repudiated, nor do I think he can recover back the money which he has paid, as money had and received to his use. There has not been a total failure of consideration. The general rule of law is that where a contract has been in part performed no part of the money paid under such a contract can be recovered back: see *Whincup* v. *Hughes*, 19 W. R. 439, L. R. 6 C. P. 78. The plaintiff has been for a time in possession of the property under the contract, and there are no circumstances from which I can imply a promise by the defendant to repay this money to the plaintiff, especially when the land is not now worth this money. Reliance was placed by counsel for the plaintiff on *Palmer* v. *Temple*, 9 A. & E. 508; but in that case there had been no part performance of the contract, possession had not been taken, and, moreover, it is not easy to reconcile the observations in that case with the judgment of the Court of Appeal in *Howe* v. *Smith*. I ought perhaps to mention that the defendant, on receipt of the plaintiff's letter on the 13th of June, 1898, made an offer to convey subject to the rights of Burns under his tenancy and subject to the payment of a sum of £25. I regret that this offer was not accepted. But I do not think I ought to treat that offer as an admission by the defendant that the plaintiff's rights under the contract still subsisted. Except on the footing that the contract was at an end and that the plaintiff was not owner in equity of the land, Burns's lease with the option of purchase was improper and invalid. The result is that I am not able to find any legal foundation for the plaintiff's claim for damages or for the return of the instalments he has paid. I must, therefore, dismiss the action, but, under the circumstances, without costs.

Solicitors for the plaintiff, *Edwin, Son, & Edgley*.

Solicitors for the defendant, *Field, Roscoe, & Co.*, for *J. H. Mitchell*, Worthing.

---

Chan. Div. Cozens-Hardy, J. } July 25, 26; Aug. 2, 1899.

LLANDUDNO URBAN DISTRICT COUNCIL v. WOOD. (a.)

*Foreshore—Lessee from the Crown—Rights of the public—Religious meetings—Urban district council—Injunction—Trespass.*

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

*The public have no right without the consent of the Crown or its lessees to enter upon the foreshore of the sea, when dry, except for the purposes of navigation and fishing; and therefore no one is entitled to hold meetings or deliver addresses on any part of the foreshore without such consent. An injunction is a formidable legal weapon which the court will refuse to grant where the injury or inconvenience caused by the trespass is trivial.*

Action.

The plaintiffs, the Urban District Council of Llandudno, brought this action to restrain the defendant, the Rev. John Wood, from delivering addresses upon the foreshore at Llandudno, of which, as successors of improvement commissioners, they were lessees from the Crown under a lease which would expire in 1901. Between the foreshore and the town there was a promenade, concerning which the plaintiffs had, under their Improvements Acts, power to make and had made bye-laws. One of these bye-laws prohibited any person delivering any public address.

In June, 1898, the defendant requested the plaintiffs to allow him to hold religious services on the promenade and foreshore. The plaintiffs replied expressing their regret that they could not accede to this request as they had granted a similar privilege to the organisation which had been in the habit of visiting Llandudno in past years, and proposed to come again that season. This organization was one for holding children's services.

Notwithstanding this refusal the defendant held religious meetings upon the promenade until the plaintiffs took proceedings against him before the magistrates, who fined him for breach of the bye-laws. He thereupon held the meetings upon the foreshore, conducting them from a box on which he stood. Part of his addresses were attacks upon the clergy of the Church of England for their ritualistic practices. He was told by the officers of the council to desist, but refused, asserting his right to do what he was doing. Thereupon the plaintiffs brought this action, by which they claimed: (1) A declaration that the defendant was not entitled, without the consent of the plaintiffs, to hold meetings or deliver addresses, lectures, or sermons on any part of the beach or foreshore so in lease to the plaintiffs, and (2) an injunction to restrain the defendant from doing so.

*Eve, Q.C.*, and *E. P. Hewitt*, for the plaintiffs.—The rights of the public over the foreshore are very limited. At most they have a right of passage. They have no right, for instance, of bathing: *Blundell* v. *Catterall*, 5 B. & Ald. 268 (see observations of Erle, C.J., in *Mace* v. *Philcox*, 12 W. R. 670, 15 C. B. N. S. 600). Even if the public have a right of passage over the foreshore, they have no right to assemble and hold meetings there: *Ex parte Lewis*, 37 W. R. 13, 21 Q. B. D. 191.

They also referred to Callis on Sewers (2nd ed.), p. 54, and *Attorney-General* v. *Wright*, 46 W. R. 85, [1897] 2 Q. B. 318.

The defendant appeared in person.

*Cur. adv. vult.*

Aug. 2.—COZENS-HARDY, J.—I may observe that the organisation referred to in the letter of the plaintiffs of June, 1898, is not antagonistic to the defendant; and that there is ample space on the extensive shore for more than one service. The defendant has since held services on the shore until he was restrained by an interlocutory injunction. The evidence satisfies me that there was no breach of the peace, no disorder worth mentioning, and no inconvenience except of the most trivial kind to any of the public resorting to the shore. It is, however, contended on the part of the plaintiffs that they are entitled as lessees to the possession of the foreshore, and that the public have no right at common law to enter upon the shore, when dry, except for the purposes of navigation or fishing. I think I am bound by the decision of the majority of the judges of the Court of King's Bench in 1821 in *Blundell* v. *Catterall*, 5 B. & Ald. 268, to hold that, in strict law, this proposition is well founded. The public are not entitled to cross the shore even for purposes of bathing or amusement. The sands on the seashore are not to be regarded as in the full sense of the word a highway. A more extensive right may possibly have been gained by prescription or by custom either by individuals or by the permanent or temporary inhabitants of Llandudno, but the existence of this more extensive right must be proved, and will not be presumed in the absence of proof. The plaintiffs have therefore, *primâ facie*, a right to treat every bather, every nursemaid with a perambulator, every boy riding a donkey, and every preacher on the shore at Llandudno as a trespasser. In the present case there is no evidence from which I can find the existence of a legal usage or custom entitling the defendant to deliver sermons or addresses on the shore at Llandudno. The defendant seems to imagine that his position as a clergyman of the Established Church, bound to preach the Gospel both in season and out of season, gives him some special and peculiar rights. It is needless for me to say that this contention cannot for one moment be maintained. I must treat the defendant precisely as I should treat a Roman Catholic priest, a Methodist preacher, or a Salvation Army captain. This court has nothing to do with the truth or falsehood of the doctrines which the defendant has preached. I feel bound to say that I consider this action wholly unnecessary, and one which ought not to have been brought. It is no part of the duty of the council, as lessees from the Crown for an unexpired term of two years, to prevent a harmless user of the shore. There are persons who derive satisfaction from listening to the addresses of the defendant, and the defendant derives satisfaction from delivering these addresses. I cannot conceive why they should be deprived of this innocent pleasure. Nobody is obliged to listen; nobody is molested. This action is an attempt to assert rights which the Crown would never have thought of putting forward, and which are in no way necessary for the peace and good order of the town of Llandudno. Charges have been made against the defendant in the pleadings and in the evidence for which there is no justification. I cannot refuse to make a declaration that the defendant is not entitled without the consent of the plaintiffs to hold meetings or deliver addresses, lectures, or sermons on any part of the foreshore in lease from the Crown. But I decline to go further. I decline to grant an injunction. That is a formidable legal weapon which ought to be reserved for less trivial occasions, and I make no order as to costs.

Solicitors for the plaintiff, *Belfrage & Co.*, for *Chamberlain & Johnson*, Llandudno.

---

Q. B. Div.
(A. L. Smith, L.J.) Aug. 5, 1899.

MONCKTON *v.* PAYNE. (*a*.)

*Limitations, Statute of—Copyhold manor—Admittance—Arbitrary fine—Fine assessed and demanded more than six years after defendant's admittance—Accrual*

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*of lord's cause of action—Statutes of Limitation* (21 *Jac.* 1, *c.* 16; 3 & 4 *Will.* 4, *c.* 42, *s.* 3).

*P. was admitted tenant of a copyhold manor by M. on the 5th of April,* 1892. *M., as lord of the manor, could by right of custom claim an arbitrary fine from any tenant so admitted by him, such fine to be assessed by the lord, and to be reasonable and to be duly demanded.*

*On the 2nd of September,* 1898, *the fine, which had not been assessed until February of that year by M., was duly demanded; and, not being paid, the writ in the present action to recover the fine was issued on the* 13*th of April,* 1899, *whereupon P. pleaded in defence the Statutes of Limitation.*

*Held, that, as it was the admittance by the lord that gave him the right to demand the fine, the action could not be maintained, since the lord's cause of action accrued on the 5th of April,* 1892, *or more than six years before the action was brought.*

This was an action brought by the plaintiff as lord of the manor of Duddington, Northamptonshire, to recover from the defendant, a widow, the sum of £24 demanded as the assessed fine due from her on admission as tenant to a copyhold hereditament held of the manor. The plaintiff moved for judgment under order 14, but the master gave leave to defend on the question whether the Statutes of Limitation were a bar to the lord's right of action.

The facts admitted or proved were as follow: In 1884 the husband of the present defendant died, and by his will he devised to his wife his interest in certain licensed premises known as the Royal Oak Inn, Duddington, held by him as tenant of the manor at a rental of £16 per annum. By custom of the manor, the lord was entitled to levy a reasonable fine, to be assessed by himself on every tenant he admitted as a copyhold tenant of the manor. The amount of the fine when so assessed and not objected to as excessive by the tenant before the court holden for the manor, had then to be demanded by the steward, who was to require payment to be made at a place to be named within the precincts of the manor on a particular day. At a court held for the said manor on the 5th of April, 1892, the defendant was duly admitted tenant of the Royal Oak Inn, where since her husband's death she had continued to carry on business and had regularly paid the rent of to the plaintiff. There was no evidence that the question of the fine was then raised, and nothing was done by the plaintiff in the matter until at another court holden in February, 1898, the amount of the fine was assessed by the lord at £24, or one and a half years' rent, and it was agreed by the parties that this sum was a reasonable and proper amount. On the 2nd of September, 1898, the steward duly gave the defendant formal notice of the amount of the fine, and demanded payment. The demand being refused for the reason already mentioned, the writ was taken out in these proceedings on the 13th of April, 1899, and the action in due course came on for trial.

*R. M. Bray, Q.C.* (with him *Clavell Salter*), for the plaintiff.—The Statutes of Limitation are no defence to the plaintiff's right to sue for this fine, because his right of action did not arise until the 2nd of September, 1898. Although a fine became due when the defendant was admitted tenant in 1892, this being an arbitrary fine—*i.e.*, a fine which the lord himself was to fix the amount of, the amount of the fine was uncertain until so assessed by the lord in February, 1898. Even then the right to sue for the fine was imperfect, for it was not a debt which could be recovered until there had been a demand and a refusal to pay, and the sum in question was not demanded by the steward until the 2nd of September, 1898. The lord's right therefore did not accrue until 1898, for until some date in that year the three steps necessary to be done by the lord before he could recover payment—namely, the admission, the assessment of the fine, and the demand, were not each and all complete. As a fact, therefore, the action was brought within one year of the date that it could have been commenced. In *Hayward* v. *Raw*, 6 H. & N. 308, 9 W. R. C. L. Dig. 20, it was held that a lord of a manor could not recover a fine unless it was reasonable and had been assessed, and payment demanded from the tenant. See also *Miller* v. *Dell*, 39 W. R. 342, [1891] 1 Q. B. 468.

*C. B. Matthews*, for defendant.—The right to demand a fine by the lord is on the same footing as the right to enforce any other money debt. In *Whitfield* v. *Hunt* (1781), cited in a note to a case on p. 727*b* in 2 Doug., it was held that a general *indebitatus assumpsit* will lie for a copyhold fine: see also *Hobart* v. *Hammond*, Coke's Rep., Part IV., 27*b*, p. 348. The lord's right of action accrued on the 5th of April, 1892. In *Coburn* v. *Colledge*, 45 W. R. 488, [1897] 1 Q. B. 702, which was the case of work done by a solicitor in the course of his profession, the cause of action was held to have accrued immediately after the completion of the work he was instructed to do, and that the Statute of Limitations ran from such date and not from one month after the delivery by him of his signed bill of costs. So here, the admittance by the lord was the act that entitled him to claim a fine, and from that date the statute began to run. The assessment and the demand were conditions preceding the right to sue, just as the delivery of the signed bill of costs in the case cited, but they were not the "cause of action." Otherwise a tenant would be at the lord's mercy, and liable to pay a fine at any time that the lord chose to demand it. He had no power to put an end to his liability, and the state of things would be absolutely opposed to the whole spirit of the statute, which was passed to compel the lord to exercise his right within a definite time: see also *In re Bethell*, 35 W. R. 330, 34 Ch D. 561. There is also another defence to this action. By the custom of the manor the lord must demand payment to be made at a place to be named, within the precincts of the manor, and no such place for payment was mentioned. I submit, therefore, on numerous very ancient authorities which can be cited, that there has never been a proper demand. [*Clavell Salter* objected to the second defence being argued. There were no pleadings, and the master's order gave the defendant leave to defend only on the question of time. The objection was held good.]

*Clavell Salter* in reply.—There is a distinction between a fine and an arbitrary fine—*i.e.*, one the amount of which is not fixed by the custom of the manor, but assessed by the lord. I should not argue if the fine were fixed the mere fact that it had not been formerly demanded might not be sufficient to bar the statute, for after admittance a definite debt would become due and payable from the tenant. But that is not the case here, for until the fine is assessed there is no debt, for the amount is not ascertained. The argument for the defendant does not displace the judgment in *Hayward* v. *Raw*, which is in my favour and decides this case.

SMITH, L.J.—The plaintiff seeks to get £24 from the defendant which he says he is entitled to as lord of the manor of Duddington by way of fine, according to the custom of the manor, for having admitted her tenant of a public-house which forms part of the manor. The defendant admits the plaintiff's right to claim the fine, but says, "You are out of time and you cannot enforce your claim against me because the statute of 3 & 4 Will. 4, c. 42, s. 3, protects

me." On the admitted facts it is clear that if the fine had been assessed and demanded when the defendant was admitted tenant she could then have raised no defence under that statute. But although the widow was admitted on the 5th of April, 1892, nothing was done by the lord until February, 1898, to assess the amount of the fine, and the fine so fixed was not demanded by the steward until the 2nd of September that year. Then there was correspondence, and in the result the writ was issued on the 13th of April, 1899. There is no doubt that from April, 1892, to April, 1899, is seven years, and, therefore, if the Statutes of Limitation run in favour of the widow, the plaintiff cannot maintain this action. Now, section 3 of the Act of Will. 4 says that "all actions to recover any fine due in respect of any copyhold estate shall be brought within six years after the cause of such action or suit accrued, and not after." The widow pleads this section in defence and says, "You did not sue me within six years from the date when your cause of action accrued—*i.e.*, when you admitted me, for it is in respect of that admittance which took place on the 5th of April, 1892, that you claim by custom of the manor this." I think the widow's contention is right. The whole object that the Legislature had in view and intended to carry into effect by this section was to prevent old claims being sprung upon tenants years after the fine, or whatever the debt was, ought to have been demanded, if at all, by the lord. The wording of the section is perfectly clear—no action of debt in respect of any fine due in respect of any holding shall be brought by the lord of the manor, except it be brought within six years. But to this defence the lord replied: "That is all quite true, but my cause of action did not arise until September, 1898, or at earliest in April, 1898, and therefore my action is brought within six years from the date when I could first have sued you for this £24." Now, is there anything which will support that statement? I think not. What did the defendant say in answer? She said, "The act that gave you the right to claim the fine was your formally admitting me tenant of this public-house which forms part of your manor, and that act took place in April, 1892. Therefore the six years within which your action must be brought dates from then." But the lord had another answer ready, for he replied, "I could not sue for a debt until the amount was ascertained, and that was not known, as this was an arbitrary fine, until I myself had assessed it and it had been agreed to by yourself as reasonable. Now, I did not assess the amount of the fine I should require you to pay until February, 1898, and even then I could not have taken out this writ to enforce payment until my steward had made a formal demand and you had refused to pay, and no demand was made until the 2nd of September, 1898." On that state of things the master quite rightly gave the defendant leave to defend. The meaning of section 3 of the statute of Will. 4 is that the person who has the right to sue for a debt must exercise that right within six years, otherwise the statute deprives him of a right of action and he has himself alone to blame. The right to the fine accrued when the defendant was admitted. No doubt before the lord could sue for it he had first to prove the admittance, the assessment, and the demand, But those are all three acts which the lord had the power to do and not the tenant. Having admitted the defendant she was at his mercy but for the statute, and it was just to prevent the lord in a case like the present letting the debt run on hanging over the tenant's head for ten, fifteen, or twenty years at his (the lord's) pleasure, that the statute was passed to meet. If the lord was not bound to assess and demand the fine at the time that he admitted the tenant, he was certainly bound to do so within a reasonable time afterwards, and if on the ground of saving himself trouble or expense he did not think fit to complete his right within six years of the date of admittance, so that he might in a case of refusal bring an action to recover the debt, he must expect to be met by the defence properly raised here. In my judgment, therefore, the defence to the claim being successful, judgment must be entered for the defendant with costs.

Judgment accordingly for the defendant; stay of execution refused.

Solicitors for the plaintiff, *Peacock & Goddard*, for *Phillips, Evans, & Co.*, Stamford.

Solicitors for the defendant, *Smiles & Co.* for *Welchman, Carrick, & Jackson*, Wisbech.

---

Q. B. Div. (Wright, J.) July 10, 1899.

*In re* BULLOCK.
*Ex parte* WARD. (*a.*)

*Bill of sale—Validity—Form—Covenant to produce last receipt for rents, rates, and taxes "when called upon"—Power to seize on breach of any covenant—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9.

*A bill of sale contained a covenant by the grantor to produce "when called upon" his last receipts for rents, rates, and taxes, and a proviso giving power to seize and sell on breach of any covenant. It also contained the usual proviso that the chattels included under the bill of sale should not be liable to seizure for any other cause than those mentioned in section 7 of the Bills of Sale Act*, 1882.

*Held, that the covenant to produce "when called upon" must be read as subject to the importation, in the subsequent proviso, of section 7 of the Act, and that consequently the bill of sale contained no power of seizure for non-production of the receipts except without reasonable excuse after demand in writing, and that it was a valid bill of sale.*

Motion by the trustee in bankruptcy to set aside a bill of sale, and for delivery up of the proceeds of the goods seized and sold by the grantee of such bill of sale. The bill of sale was dated the 17th of September, 1897, and made between R. G. Bullock, the bankrupt, and one W. Silverton. Bullock assigned thereby all his horses and cabs and some furniture as security for the sum of £385 10s., and covenanted, *inter alia*, to repay the said sum by monthly instalments, and also, "when called upon by the said W. Silverton to produce to him the policy of insurance and the receipt for the last premium and the last receipt of such rent, rates, and taxes, provided always that the chattels thereby assigned should not be liable to seizure by the said W. Silverton for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882," which causes were thereafter set forth in the bill.

The bill also contained the following proviso: "Provided further that if the said horses or cabs, chattels, and things hereby assigned shall be seized or taken possession of by the said W. Silverton in

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

consequence of the breach of any of the covenants herein contained, the said W. Silverton should be at liberty to remove and sell the same as therein mentioned."

On the 3rd of January, 1898, Silverton took possession under the bill of sale, default having been made in payment of the instalments, and sold the horses and cabs for £243 10s.

On the 4th of January, 1898, a receiving order was made against Bullock. He was adjudicated bankrupt, and Ward was appointed trustee in the bankruptcy.

The trustee claimed the proceeds of the sale on the ground that the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882.

*Haldinstein*, for the trustee.—This bill of sale is bad because it contains a covenant by the grantee to produce his last receipt for rent, &c., "when called upon," and confers a power to seize on breach of that covenant, whereas section 7 of the Act requires a "demand in writing" and absence of "reasonable excuse" for non-production before a power of seizure can arise.

He cited *Davis* v. *Burton*, 32 W. R. 423, 11 Q. B. D. 537, and *Ex parte Pearce, In re Williams*, 32 W. R. 187, 25 Ch. D. 656.

*Reed, Q.C.*, and *Salter*, for the grantee of the bill of sale.—The deed is in common form and is perfectly good: see *Weardale Coal and Iron Co.* v. *Hodgson*, 42 W. R. 424, [1894] 1 Q. B. 598; *In re Paxton, Ex parte Pope*, 60 L. T. Rep. 498, 37 W. R. Dig. 24; *Topley* v. *Corsbie*, 36 W. R. 352, 20 Q. B. D. 350; *Turner & Co.* v. *Culpan*, 36 W. R. 278; *Cartwright* v. *Regan*, 43 W. R. 650, [1895] 1 Q. B. 900.

*Haldinstein* replied.

WRIGHT, J.—I think this is a very ordinary and unobjectionable form of bill of sale. I think I have often met with it before, and it is one commonly in use, though, of course, that will not make it good if the decisions say that it is bad. The question is whether the third provision in the bill of sale vitiates it as amounting to a power to seize and sell whenever there is a default in the production of the receipts for rent, rates, and taxes, although there may be a reasonable excuse for their non-production and although they are not demanded in writing.

I do not see that that is the meaning of the bill of sale at all; if that was the effect, I think the bill of sale might be bad; but it seems to me that in reading the bill of sale the general language of the first provision for seizure ought, as regards the receipts for rent, rates, and taxes, to be read as subject to the fourth provision of section 7: "If the said R. G. Bullock shall not without reasonable excuse upon demand in writing by the said William Silverton produce to him his last receipts for rents, rates, and taxes." What is the use of putting that in unless it is intended to cover the more general words of the first provision. It seems to me that that was the view of Cave and Charles, JJ., in *In re Paxton, Ex parte Pope*. I think, therefore, that the contention of the trustee fails.

*Motion dismissed.*

Solicitor for the trustee, *F. W. Henry*.

Solicitor for the respondent, *A. Slater*.

---

Q. B. Div. (Bigham, J.) July 5, 1899.

HOGARTH & CO. v. WALKER. (*a*.)

*Insurance (marine)—Time policy—Ship's furniture—Grain cargo—Dunnage mats and separating cloths.*

*The dunnage mats and separating cloths which are used on board ships engaged in the grain trade in connection with the carriage of the cargo are "furniture" of the ship within the meaning of an ordinary Lloyd's time policy of marine insurance on ship.*

Action tried in the Commercial Court without a jury.

The plaintiffs, the owners of the steamship *Felbridge*, sought to recover a loss under a time policy in the ordinary Lloyd's form on the "body, tackle, apparel, ordnance, munitions, artillery, boats, and other furniture in the good ship or vessel" *Felbridge*.

*The Felbridge* was a vessel engaged in the grain trade, and was usually employed in carrying cargoes of grain from the Black Sea. It is customary for ships engaged in the grain trade to have on board dunnage mats and separating cloths. The dunnage mats are used to keep the grain off the ship's floor, and the separating cloths keep apart the different parcels of grain. During the currency of the policy *The Felbridge* was on a voyage from America with a cargo of grain. The dunnage mats and separating cloths were on board, but were not being used, as the cargo consisted of one parcel only, which is usually the case with American cargoes. On the voyage the vessel collided with a pier-head, and some of the mats and cloths were washed overboard and lost. The plaintiffs brought this action to recover the loss under the policy.

*Rufus Isaacs, Q.C.*, and *Montague Lush*, for the plaintiffs.—The mats and cloths come within the word "furniture" in the policy. They formed part of the equipment which the ship necessarily had for the trade in which she was engaged, and without them the ship would not have been seaworthy.

They referred to *Hoskins* v. *Pickersgill*, 3 Doug. 222.

*Joseph Walton, Q.C.*, and *J. A. Hamilton*, for the defendant.—These articles formed no part of the equipment of the ship as a ship. They were used by the shipowner in his business as a carrier of cargo, and they are akin to the bags in which grain is carried, which bags are certainly not covered by a policy on ship.

They referred to McArthur on Marine Insurance (2nd ed.), p. 57.

BIGHAM, J.—In my opinion the plaintiffs are entitled to succeed. The question is whether an ordinary Lloyd's time policy covers the dunnage mats and separating cloths used in connection with the carriage of a grain cargo. It is not to be forgotten that the ship in question was a grain ship, and, as a grain ship, the use of such cloths and mats would under ordinary circumstances be necessary for the proper carriage of the cargo, and if the ship went to sea without them she would be unseaworthy. They are therefore part of the ship's furniture within the meaning of the policy. There is no distinction between these things and a movable bulkhead intended to separate one lot of cargo from another. The underwriter must pay on this policy.

*Judgment for the plaintiffs.*

Solicitors for plaintiffs, *Botterell & Roche*, for *Vaughan & Roche*, Cardiff.

Solicitors for the defendant, *Waltons, Johnson, Bubb, & Whatton.*

---

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Q. B. Div. (Bigham, J.) June 29; July 4, 1899.

IREDALE AND ANOTHER v. CHINA TRADERS' INSURANCE CO. (a.)

*Ship—General average—Loss of freight.*

*The plaintiffs' ship was chartered to carry coal from Cardiff to Esquimalt. In the course of the voyage the coal heated to such an extent that, if the voyage to Esquimalt had been continued, the ship and cargo would have been burnt. The captain, for the safety of ship, freight, and cargo, put into Buenos Ayres and discharged the coal. It was found to be in such a condition that it could not be reloaded and carried to Esquimalt. The coal was therefore condemned and sold at Buenos Ayres, and the voyage to Esquimalt was abandoned, and the chartered freight was lost.*

*Held, that the freight had not been lost in such circumstances as to make the loss the subject of general average contribution.*

Action tried in the Commercial Court.

The following statement of facts had been agreed upon by the parties:

1. The plaintiffs own the iron ship *Lodore*, and by charter-party, dated the 10th of February, 1897, chartered her to load coals at Cardiff for Esquimalt at 19s. 9d. per ton delivered. By a policy dated the 3rd of March, 1897, they insured the chartered freight thereunder, valued at £1,650, with the defendants, against, *inter alia*, loss by fire and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid freight.

2. *The Lodore* proceeded to Cardiff, and there loaded a full cargo of coals, and sailed on the 29th of March, 1897, on the insured voyage. On the 26th of May, 1897, the coals began to heat, and the master decided, for the safety of the ship, freight, and cargo, to jettison cargo, and to bear up for the River Plate. About forty tons were jettisoned, and *The Lodore* subsequently anchored in Buenos Ayres Roads on the 29th of May, 1897. Between that date and the 25th of June, 1897, cargo was from time to time discharged, and various surveys were held upon the coals, and it was found that the coals continued hot, and would heat still further if the voyage was proceeded with. Accordingly, on the 25th of June, 1897, the coals were condemned and were ultimately sold. The vessel abandoned her voyage to Esquimalt and returned to the United Kingdom with another cargo, and the chartered freight was totally lost.

3. It was necessary for the safety of the whole adventure for the vessel to put into Buenos Ayres as aforesaid, and it was reasonably certain that if she had continued on her direct voyage, the temperature of the coal would have continued to rise until spontaneous combustion ensued, and that, had she continued her voyage, the ship and cargo would have been destroyed by fire before reaching Esquimalt. When and while she was at Buenos Ayres, the ship and her cargo, both the portion landed and the portion remaining on board, were in safety, but after she reached Buenos Ayres no part of the cargo could have been reloaded and/or carried with safety to Esquimalt in the same or another bottom, and it was all necessarily and properly sold at Buenos Ayres.

4. The policy and charter-party, the protest dated the 11th of August, 1897, and the average statement dated the 15th of March, 1898, with the survey reports as therein set out, may be referred to as parts of this special case.

5. This action in the defence to which all underwriters interested similarly to the defendants concur, is defended to test the question whether by way of set-off and deduction from the total loss in the policy, which is admitted, the defendants are entitled to have the said loss of freight made good in general average to any and what extent, and to deduct the contribution to the same falling on the plaintiffs as shipowners from the amount due on the policy.

6. It is not intended to allege or rely on improper condition of cargo as a defence to any claim there may be.

7. The court is to have power to draw all necessary inferences of fact, and the parties agreed to leave the adjustment of figures on such principle as may be laid down to an average adjuster.

*Joseph Walton, Q.C.*, and *J. A. Hamilton*, for the plaintiffs.

*Carver, Q.C.*, and *Scrutton*, for the defendants.

The following cases were cited: *The Knight of St. Michael*, 46 W. R. 396, [1898] P. 30; *Pirie* v. *Middle Dock Co.*, 44 L. T. Rep. 426, 29 W. R. Dig. 202; *Whitecross Wire Co.* v. *Savill*, 30 W. R. 588, 8 Q. B. D. 653; *Shepherd* v. *Kottgen*, 26 W. R. 120, 2 C. P. D. 585; *Barnard* v. *Adams*, 10 Howard 270; *Columbian Insurance Co.* v. *Ashby*, 13 Peters 331.

*Cur. adv. vult.*

July 4.—BIGHAM, J., read the following judgment: The question in this case is whether the freight of the plaintiffs' vessel *Lodore* was sacrificed in such circumstances as to make the loss the subject of general average contribution. The facts have been agreed by the parties and are stated as follows: [His lordship read the statement of facts.] I have read and carefully considered the documents incorporated in the one special case, and I have drawn from all the facts the inference that before the master of the vessel decided to alter his course and make for Buenos Ayres the freight on the coals was completely lost. I am satisfied that the condition of the coals at and before that time was such that it had become impossible to carry them to their destination so as to earn any freight at all; their inherent heat would have completely destroyed them long before their arrival at Esquimalt. This inference of fact appears to me to dispose of the case, because the law is plain that where the thing sacrificed is already valueless at the time of the general average act there can be no claim to contribution. Nothing of value is sacrificed, and therefore there is nothing to contribute to. Why was this freight lost? Not because it was sacrificed, but because the cargo could not be reshipped. And why could it not be reshipped? Because long before the alleged average act (the abandonment of the voyage) the coals had got into such a condition as to be unfit for carriage. The freight, in fact, was lost by fire—a peril insured against by the defendants—and not by any general average act at all. The case was supposed to raise some questions of law not covered by authority; but, for my part, I do not think it does. It involves the finding of an inference of fact which, once found, leaves nothing further to be determined. It was said by Mr. Carver that the case was like that of a voluntary stranding in the fact of a danger of foundering so imminent as to render the saving of the adventure hopeless; or like the cutting away of a mast in similar circumstances. He said that in such cases the loss of the vessel or the loss of the mast is a general average loss, and that it is none the less so because, before the average act, the thing sacrificed (the ship or the mast) had practically gone, in the sense that it was involved in a hopeless peril. I agree with him that by our law such losses are the subject of general

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

average; but I do not agree with him that such cases are like the case now before the court. In the illustrations given there is always an element of uncertainty. Mr. Lowndes, at p. 24 of his work on General Average (3rd. ed.), says: "The captain cannot tell but that in his last extremity a sudden shift of the wind, or lull of the storm, or, if drifting ashore, some undercurrent unknown to him may unexpectedly bring him out of danger. He can hardly ever be quite certain of destruction until his ship has been destroyed, and he substitutes a certain loss of part for a probable loss of all." If in the present case it could be said that when the captain abandoned the voyage there was a chance, even a remote chance, of saving the freight by carrying forward the cargo, then I should be of opinion that the freight was sacrificed in such circumstances as to give rise to the general average claim; the element of doubt which exists in cases supposed by Mr. Carver would then be present and would make all the cases alike. Mr. Walton contended that even if this element of doubt did exist, and there was a chance or a hope of successfully bringing forward the cargo and so earning the freight, yet the sacrifice of that chance or hope gave no claim to contribution, because the other interests were at the moment out of danger, the ship being in port and discharged, and the coal being safe on the quay; so that the sacrifice could not be described as a sacrifice for the general benefit. But I do not think this is a sound contention. Though the cargo and the ship were physically separated, the maritime adventure was not at an end; the intention to prosecute the voyage still existed, and in fact the putting in to Buenos Ayres and the discharge were all done with the object of continuing the voyage in safety; the obligation of the master, therefore, to make such sacrifices as might be necessary for attaining that object still existed, and if any such were made they would be in the general interest and the subject of contribution: see *Whitecross Wire Co.* v. *Savill.* The real difficulties in cases like the present is to ascertain the facts. Was the thing which is said to have been sacrificed absolutely lost or not before the general average act was done? I think this question ought to be answered by reference to the circumstances as they appeared at the time of the average act and not by reference to the events as subsequently ascertained. Thus, in the present case it was admitted by the plaintiffs that the loss of the freight on the forty tons of cargo jettisoned at sea was a general average loss, and I think it was rightly admitted; because, although it was subsequently ascertained that the freight was at this time wholly lost, yet the circumstances as then known did not justify that conclusion, and thus the captain may be properly said to have substituted a certain loss of part for a probable loss of the whole of the adventure so as to give rise to a general average claim. In *Shepherd* v. *Kottgen* the real difficulty with which the court had to deal was one of fact. The case turned entirely on the effect of the finding of the jury. When once the significance of that finding was ascertained the difficulty in applying the law disappeared. The facts in that case were as follows: The mast of a ship had by a storm been reduced to such a state that it was merely worthless wreckage; in this condition it incumbered the deck and constituted a common danger; it was therefore cut adrift and thrown overboard. The question was whether the shipowner could claim contribution, and it was held that he could not, because the thing thrown away was already worthless. It the arguments are examined, it will be seen that it was conceded that to constitute a claim to general average the thing sacrificed must be of some actual or potential value at the time of the sacrifice, and both Bramwell and Brett, L.JJ., in their judgments make the point clear and place it beyond doubt. The former said: "Where the thing destroyed had some peculiar condition attached to it so that it will be lost, whether the whole adventure be saved or not, then its destruction cannot be deemed a sacrifice." And Brett, L.J., said: "When, whether the act relied upon as an act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition have been of no value whatever, or would certainly or absolutely have been lost to the owner although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed—that is to say, there is no sacrifice."

Mr. Carver relied upon the case of *Pirie* v. *Middle Dock Co.* That was a case in which the ship was carrying a cargo of coal to Singapore. During the voyage a fire broke out in the coals, and water was poured upon the burning portion to put out the fire. This water wetted the remainder of the coal. The vessel put into a port of refuge, and it was there discovered that the whole of the coal not affected by the fire was so damaged by the saturation with water that it was practically impossible to forward it to its destination. The voyage was therefore abandoned, and the question was whether the consequent loss of freight should be contributed to on general average. The answer turned on the construction of one point only, which is clearly stated by the learned judge (Watkin Williams, J.) in his judgment: "It seems to me that the only question on the case is whether the operation of pouring the water on the coals and so rendering them unfit to be forwarded to their destination, causing a total loss of the freight to be earned by the delivery at their destination, can be considered as a voluntary sacrifice of the freight of the coals so wetted within the true principles of general average." Apparently it had been argued at the bar that the case was not one of general average, because there was in fact no sacrifice of cargo and its incidental freight, inasmuch as the cargo, having taken fire, was practically already lost, past redemption. Having stated this contention, the learned judge proceeded to deal with it. He disposed of it, however, not by applying any principle of law, but by finding as a fact that the pouring of the water on the burning coal involved a sacrifice of the freight on the remainder of the coal: see the end of his judgment. In other words, he found that at the time of the general average act the freight of the coals which was not burning might still possibly have been earned, and was therefore not, as contended, already lost. The argument was thus disposed of on a finding of fact. When properly examined, the judgment of the learned judge seems to me to be an authority against the defendants in the present case, because in dealing with the conditions which must concur in order to give rise to a claim for contribution, he says that the sacrifice "must be a real sacrifice, and not a mere destruction or casting off of that which had become already lost, and consequently of no value." He thus admitted the correctness of counsel's contention as to the law; but, as I have pointed out, he so found the facts as to make the contention inapplicable to the case.

I was also referred to the American case of the *Columbian Insurance Co.* v. *Ashby.* In that case the ship had been voluntarily stranded. The act was done for the safety of the crew and of the vessel and cargo. The vessel could not be got off the bank, she was totally lost, and so the adventure was frustrated. The argument apparently was that the sacrifice, to come within the rules applying to general average,

must be a sacrifice which benefits all the interests at stake, and that, therefore, a sacrifice which results in the total destruction of one of these interests is not the subject of contribution. Storey, J., disposes of the argument. He says: "Surely the question of contribution cannot depend upon the amount of damage sustained by the sacrifice, for that would be to say that if a man lost all his property for the common benefit he should receive nothing, but if he lost part only he should receive full compensation"; and he goes on to point out that it is the safety of the property, and not the voyage, which constitutes the true foundation of general average, and that, therefore, the fact that the general average act had the effect of putting an end to the voyage was immaterial. I did not understand Mr. Walton to contend that the fact of the loss of the whole freight took the present case out of the scope of general average, and if he did not so contend I do not see how the American authority affects the consideration of the question now before the court. If, however, he did so contend, it is sufficient for me to say that I do not agree with him. I believe the English law on this point to be the same as that laid down by Storey, J. In the American case it was further decided that, the freight having been totally lost by the voluntary stranding and consequent total loss of the vessel, the freight so lost should form the subject of contribution. This ruling does not, however, in any way affect the decision of the case in hand; the freight was an existing valuable property at the time of the stranding, and was sacrificed by the general average act. The conclusion I have come to is that at the time the master abandoned the voyage the freight was already hopelessly lost, and cannot, therefore, be said to have been sacrificed at all.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

Solicitors for the defendants, *Field Roscoe, & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool.

---

## Court of Appeal.

From Q. B. Div. (A. L. Smith and Vaughan Williams, L.JJ.) — Nov. 4.

DAGLISH *v.* BARTON. (*a.*)

*Practice—Appeal—Court of Appeal—Application to Divisional Court to set aside judgment of official referee—Judicature Act,* 1894 (57 & 58 *Vict. c.* 16), *s.* 1 (5).

*Where an action has been tried before an official referee, and an application is made to a Divisional Court to set aside the judgment of the official referee, the decision of the Divisional Court is final, and there is no appeal to the Court of Appeal without leave.*

Appeal from an order of a Divisional Court (Darling and Phillimore, JJ.).

The action was tried before an official referee, who gave judgment in favour of the plaintiff. The defendant applied to the Divisional Court, asking that the findings of the official referee might be varied and judgment entered accordingly, or for a new trial. The Divisional Court remitted the case to the official referee for reconsideration and determination.

The plaintiff appealed.

*Edward Bray* (*R. M. Bray, Q.C.*, with him), for the defendant, took the preliminary objection that no appeal lay to the Court of Appeal. By section 1, sub-section 5, of the Judicature Act, 1894, "In all cases where there is a right of appeal to the High Court from any court or person, the appeal shall be heard and determined by a Divisional Court constituted as may be prescribed by rules of court, and the determination thereof shall be final, unless leave to appeal is given by that court or by the Court of Appeal." The defendant's application to the Divisional Court was an appeal to the High Court from a court or person, and therefore the decision of the Divisional Court was final.

*F. A. Greer*, for the plaintiff.—The application to the Divisional Court was not an appeal to the High Court. It was a motion to the High Court to set aside a judgment of the High Court.

A. L. SMITH, L.J.—The case was tried by the official referee. The defendant, being dissatisfied with the way in which the official referee dealt with it, went to the Divisional Court—which was the only court he could go to—and asked that court to set the matter right. The plaintiff now says that that application to the Divisional Court was not an appeal to the High Court within the meaning of section 1, sub-section 5, of the Judicature Act, 1894. The argument is that the official referee is the High Court, and that the application to the Divisional Court was not an appeal, but a motion to the High Court to set aside a judgment of the High Court. The official referee is an arm of the High Court, but he is not the High Court itself, and it seems to me that the defendant appealed to the High Court; and further he had a right to appeal, for he certainly required no leave. In my judgment this case comes within the words "in all cases where there is a right of appeal to the High Court from any court or person." The official referee is clearly either a court or a person. Therefore the decision of the High Court is final, and there is no appeal to this court without leave.

VAUGHAN WILLIAMS, L.J.—I do not dissent, but I do not think the matter quite so clear as it appears to my brother. I hesitate to say that a motion to a Divisional Court to set aside a judgment which has been directed to be entered by an official referee is, strictly speaking, an appeal. The official referee is part of the machinery of the High Court, to try questions which are not convenient to be tried in court, and when he directs a judgment to be entered, that judgment is not his judgment, but it is entered as a judgment of the High Court by an officer of the court. I doubt whether a motion to a Divisional Court to set aside such judgment is really an appeal, but I think that in substance it is an appeal within the meaning of section 1, sub-section 5, of the Judicature Act, 1894, and that the intention of the Legislature is that, where a case is tried before an official referee and is then brought before a Divisional Court, there is no appeal from the decision of the Divisional Court. In such a case the Divisional Court is constituted the Court of Appeal.

*Objection allowed.*

Solicitors for the plaintiff, *Maples, Teesdale, & Co.* for *Oppenheim & Malkin*, St. Helens.

Solicitors for the defendant, *Harper & Battcock.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) Oct. 26.

ROBERTS v. GWYRFAI DISTRICT COUNCIL. (a.)

*Local government—Water supply—District council—Riparian owner—River—Water rights—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 332.

*A local authority has no power either as a riparian owner or under the Public Health Act,* 1875, *to affect the flow of a stream for the purpose of supplying its district with water if the rights of a lower riparian owner are thereby infringed, even though such riparian owner sustained no actual damage.*

*Decision of* Kekewich, J. (47 *W. R.* 376, [1879] 1 *Ch.* 583) *affirmed.*

This an appeal from a decision of Kekewich J. (reported 47 W. R. 376, [1899] 1 Ch. 583).

The plaintiff was the owner and occupier of a water-mill in the parish of Llanllyfni, in the county of Carnarvon. He claimed an injunction to restrain the defendants from interfering with the natural flow of the stream that worked his mill. The stream in question flowed from a lake called Llyn Cwmdulyn, situate at the foot of a mountain some distance above the mill.

The defendants had obtained from the Crown a lease of the lake and also a lease of adjoining land, and in May, 1893, they gave the plaintiff notice of their intention to take water from the lake to supply their district, and applied to him for his written consent thereto under section 332 of the Public Health Act, 1875; but he refused to give such consent. The defendants, without any further notice, laid down pipes and constructed a dam across the end of the lake so as to increase the water storage. A sluice was placed in the dam to regulate the outflow of the stream. The defendants offered to allow a sufficient outflow to work the plaintiff's mill. The plaintiff, however, claimed that he was entitled to the uninterrupted flow of the water past his mill.

Kekewich, J., granted the injunction.

The defendants appealed.

*Renshaw, Q.C.*, and *H. Courthope Munroe*, for the appeal.—Under section 51 of the Public Health Act, 1875, the defendants have a right to make a reservoir subject only to the restriction contained in section 332 of the Act that they shall not "injuriously affect" the stream. Here it is admitted that the plaintiff will have a supply of water as good as, if not better than, before. If the Act does not give the defendants the right to do what they have done, they rely on their rights as riparian owners. The defendants are not claiming an absolute right, but only a right to go on so long as they do no damage to anyone. Even if they have no right, the court will not interfere by injunction unless the lower riparian proprietors sustain damage.

They referred to *Earl of Sandwich* v. *Great Northern Railway Co.*, 27 W. R. 616, 10 Ch. D. 707; *McCarthy* v. *Metropolitan Board of Works*, L. R. 8 C. P. 191, 21 W. R. Dig. 125; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, 22 W. R. 212 and 415, 9 Ch. App. 451, 24 W. R. 284, L. R. 7 H. L. 697; *Owen* v. *Davies*, W. N. [1874], 175; *Shugar* v. *Grand Junction Canal Co.*, 19 W. R. 569, L. R. 6 Ch. App. 483; *Young* v. *Bankier Distillery Co.*, [1893] A. C. 691.

*Warrington, Q.C.*, and *Bryn Roberts*, for the respondents, were not called on.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

LINDLEY, M.R.—The case has taken a turn which is a little unusual; but I think I see through the rights of the parties, which we have to consider, and which is all we have to consider.

First of all, what are the rights of the parties? The right of the plaintiff as proprietor and owner of this mill is to have the water come down that river, which takes its origin from this lake, in the accustomed way. That is his right, and that is subject to the rights of the persons who are riparian proprietors above him. Subject to those rights there is no right whatever to alter the flow of the water in the old accustomed way. To say that the persons who alter the old flow improve the old flow is a matter of opinion. They have no right to interfere with the accustomed flow of the water.

Now, these defendants are certainly doing that. How do they justify it? First of all as riparian proprietors. It seems to me as riparian proprietors it is impossible to justify what they are doing. Whether you take the measure of their rights as stated by Lord Kingsdown in that very excellent judgment in *Miner* v. *Gilmour* (7 W. R. 328, 12 Moore P. C. Cas. 131), or whether you take it in some of the later cases in which that exposition of the law has been more or less adopted and expanded, it does not seem to me to matter. These defendants, apart from all statutory powers, are not exercising the rights of riparian proprietors at all. They are diverting the water from this lake, not for their own purposes, not for the use either ordinary or extraordinary of the land of which they are owners, but for a totally different purpose: supplying townships some distance off. That is no exercise of the right of a riparian proprietor within the meaning of the law laid down in the cases to which I have referred, and if we look at the case of the *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* we find that Lord Cairns alludes to the distinction. He says: "I think your lordships will find that in the present case you have no difficulty in saying whether the use which has been made of the water by the upper owner comes under the range of those authorities which deal with cases such as I have supposed, cases of irrigation and cases of manufacture. These were cases where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the appellants of the water and the use which they claim the right to make of it is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream—as great a diversion as if they had changed the entire watershed of the country, and in place of allowing the stream to flow towards the south, had altered it near its source so as to make it flow towards the north," and so on. Then he says that the use being made by the waterworks company there, is not a use by them in the exercise of their rights as riparian proprietors, but for a totally different purpose. So it is here. Therefore I take it the defendants cannot justify what they are doing under the common law doctrine as to riparian owners. They are far exceeding any rights which can be based upon that ground.

Now let us look and see how they justify it under the Public Health Act, 1875. Section 51 enables them to make waterworks, subject to the provisions contained in section 332 as to not injuring other people. Let us first see what they say. Mr. Renshaw, I think, has very fairly claimed the right to do it either as riparian proprietor or under the Public Health Act, but in neither way, it strikes me, can they acquire the right or assert the right to alter the flow of the water to the injury of the rights of other people. Mr. Courthope

Munroe says at once, "I do not claim to do it; but you, the plaintiff, have no right to complain." But that depends entirely upon whether the rights of the plaintiff are infringed or not. It strikes me they are infringed, for the reason that although Mr. Munroe's view is that they have no claim to do what they have done, they have in fact most materially altered the flow of the water to which the plaintiff is entitled. His rights are infringed by a person who admits he has no right to do it, and unless the infringer goes on to say that he is prepared to stop, the injunction goes almost as a matter of course. That is warranted by what Lord Cairns says (at p. 705, 7 H. L. Cas.) in the *Swindon case*. I do not appreciate the difference between claiming a right to do a thing and saying, "I have no right to do it, but I intend to go on." If there is any difference it is rather against the man who admits that he has no right but insists on doing what he admits to be wrong. In Lord Cairns' observations the reply to the case set up is that the appellants did claim a right, and he says that after that claim of right "it appears to me that it is impossible that the court can do otherwise than decide the issue which is thus raised between the parties. It is a matter quite immaterial whether as riparian owners of Wayte's tenement any injury has now been sustained or has not been sustained by the respondents. If the appellants are right they would, at the end of twenty years, by the exercise of this claim of diversion entirely defeat the incident of the property: the riparian right of Wayte's tenement." Now, what are we to say to a man who says "I have no right to do this, but intend to go on all the same." If he is infringing the plaintiff's right it is the duty of the court to interfere to protect the plaintiff. There is no duty of the court that I know of which it is more important to observe, and no power of the court which it is more important to enforce, than the power it has of keeping public bodies within their rights. The moment public bodies exceed their right, they do so to the injury and oppression of private people, and those private people are entitled to be protected from injury owing to those operations of public bodies. So far I feel no difficulty at all. It has been suggested that the injunction ought to be qualified by putting in "so as not to injure the plaintiff," but if the plaintiff's rights are infringed and if the defendants intend to infringe them I do not see the necessity or the advisability of putting in those words at all. On the other hand I see this, that these defendants are doing what they say they were justified in doing and what they are quite entitled to do by the necessities of the case. But there is a proper method of obtaining power to do this. There is not the slightest doubt about it. That is, to go to Parliament for authority to do it. They say they cannot do that in this case. That is very likely; but it is a very common thing for public bodies to bring in Bills although they have no power to pay the expenses. But there are methods of escaping from that difficulty, and if they choose to say they will attempt to go to Parliament in order to obtain a Bill to authorize them to do what they are doing, and it is for the benefit of the plaintiff, of course we should suspend the injunction. What I propose to do is this, with the sanction of my brethren: to dismiss this appeal with costs; do not draw up the order for a fortnight, and if at the end of the fortnight we are told that the defendants desire to go to Parliament, then stay the operation of the injunction for six months to give them an opportunity. We have not the slightest objection to putting in that. On the other hand, it is our bounden duty to see that they do not exceed their right. That is the order.

JEUNE, P.—I agree.

ROMER, L.J.—I agree.

Solicitors, *Robbins, Billing, & Co.*, for *Morris Owen*, Carnarvon; *Hamlin, Grammer, & Hamlin*, for *Carter, Mostyn, Roberts, Vincent, & Co.*, Carnarvon.

---

From Q. B. Div.
(A. L. Smith and Vaughan Williams, L.JJ.) July 28, 1899.

REG. v. NICHOLSON. (a.)

*Licensing law — Licence — Premises pulled down for public improvement—Application for licence for other premises—Notices, sufficiency of—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 *&* 33 *Vict. c.* 27), *s.* 7—*Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 40.

*The holder of a licence for the sale of intoxicating liquors on and off the premises in respect of a house which was about to be pulled down for the purpose of a public improvement, applied to the justices in special sessions, under section* 14 *of the Alehouse Act*, 1828, *for a similar licence in respect of other premises not theretofore licensed. The applicant had satisfied all the requirements of section* 14 *as to the giving of notices, but not the provisions of section* 40 *of the Licensing Act*, 1872.

*Held, that the notices were sufficient; that the express provisions of section* 14 *of the Alehouse Act*, 1828, *as to notices are not repealed, either expressly or impliedly, by section* 40 *of the Licensing Act*, 1872.

Appeal from the decision of the Divisional Court (Darling and Channell, JJ.) discharging a rule *nisi*, obtained by William Bamber and others for a *mandamus* to the justices of the county borough of Bolton to hold a special licensing sessions as by adjournment from the 26th of January, 1899, and proceed to hear and determine according to law an application by one James Paisley for a licence to sell by retail intoxicating liquors to be consumed either on or off the premises, at premises known as Halliwell Lodge, Chorley New-road, Bolton.

The facts were as follows: James Paisley was the holder of a licence to sell by retail all intoxicating liquors on or off the premises in respect of a house known as the "Rope and Anchor," Bolton. That house being about to be pulled down for the purposes of the improvement of a highway, Paisley applied, under section 14 of the Alehouse Act, 1828, at a special session of the justices for the borough of Bolton, held on the 26th of January, 1899, for a similar licence for new premises acquired by him, and known as Halliwell Lodge, Chorley New-road, Bolton. On January 18, 1899, notice in writing had been given to the chief constable and to the overseers of the poor of Bolton of Paisley's intention to make this application. On Sunday, the 22nd of January, a notice to the same effect had been posted on the door of Bolton parish church from 1 a.m. till 5 p.m., and on the front door of Halliwell Lodge. The justices heard the application and evidence in support of it, and they were informed that the notices and requirements provided by the Alehouse Act, 1828, had been given and complied with. There was no opposition to the application, and no objection was taken by anyone to the sufficiency of the notices. The justices granted the application. The rule *nisi* for a *mandamus* was obtained on the 3rd of March, the prosecutors being persons resident in the neighbour-

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

hood of Halliwell Lodge, who said that they had no knowledge of the application until after it had been granted in consequence of the proper notices not having been given; that the case was one of a removal of a licence from one set of premises to another, and that the case must as regards notices be treated as an application for a new licence, and that, therefore, under section 40 of the Licensing Act, 1872, and section 7 of the Wine and Beerhouse Act, 1869, a twenty-one days' notice and an advertisement in a local paper were requisite.

The Divisional Court were of opinion that the proper notices had not been given, but that *mandamus* ought not to be granted, because the justices had heard and determined the application. The court therefore discharged the rule.

Subsequently to this decision, on the 17th of May, an application was made to the Divisional Court, consisting of the same judges, for a rule *nisi* for a writ of *certiorari* to bring up and quash the licence granted by the justices on the 26th of January. The Divisional Court refused the application, holding, on the authority of *Reg.* v. *Sharman*, 46 W. R. 367, [1898] 1 Q. B. 578, that *certiorari* would not issue to licensing justices. On the 30th of May a similar application was made to the Court of Appeal, and was granted. The arguments on the appeal from the refusal of the Divisional Court to grant the *mandamus*, and as to the making absolute of the rule *nisi* for a *certiorari*, were heard together in the Court of Appeal.

9 Geo. 4, c. 61, s. 14: ". . . If any house being kept as an inn by any person duly licensed as aforesaid shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways or for any other public purpose . . . it shall be lawful for the justices assembled as aforesaid at a special session, holden under the authority of this Act, for the division or place in which the house so kept or having been kept shall be situate . . . to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose . . . and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail, to be drunk or consumed therein. Provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April or the 10th day of October then next ensuing as the case may be. Provided also that every person intending to apply in any of the above-mentioned cases at any such special session for a licence to sell exciseable liquors by retail to be drunk or consumed in a house or premises thereunto belonging in which exciseable liquors shall not have been sold by retail to be drunk or consumed on the premises by virtue of a licence granted at the general annual licensing meeting next before such special session, shall on some one Sunday within the six weeks next before such special session, at some time between the hours of ten in the forenoon and of four in the afternoon, affix or cause to be affixed on the door of such house and on the door of the church or chapel of the parish or place in which such house shall be situate, and where there shall be no church or chapel on some other public and conspicuous place within such parish or place, such and the like notice as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence to sell exciseable liquors by retail to be drunk or consumed in a house not theretofore kept as an inn, and shall in like manner serve copies of the said notice on one of the overseers of the poor and on one of the constables or other peace officers of such parish or place."

32 & 33 Vict. c. 27, s. 7: "Every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish, township, or place in which the house or shop in respect of which his application is to be made is situate, and to some constable or peace officer acting within such parish, township, or place, and shall in such notice set forth his name and address, and a description of the licence or licences for which he intends to apply, and of the situation of the house or shop in respect of which the application is to be made; and in the case of a house or shop not theretofore licensed for the sale, by retail, of beer, cider, or wine, such person shall also within the space of twenty-eight days before such application is made cause a like notice to be affixed and maintained between the hours of ten in the morning and five in the afternoon of two consecutive Sundays on the door of such house or shop, and on the principal door or one of the doors of the church or chapel of the parish or place in which such house or shop is situate, or, if there be no such church or chapel, on some other public and conspicuous place within such parish or place."

35 & 36 Vict. c. 94, s. 40: "Every person intending to apply for a new licence or to apply for the transfer of a licence shall publish notice of such application as follows—that is to say,

"(1) In the case of a new licence he shall cause notice thereof to be given and to be affixed and maintained in manner directed by section 7 of the Wine and Beerhouse Act, 1869, and any enactment amending the same, and shall advertise such notice in some paper circulating in the place in which the premises to which the notice relates are situate on some day not more than four and not less than two weeks before the proposed application, and on such day or days, if any, as may be from time to time fixed by the licensing justices; (2) "In the case of the transfer of a licence he shall, fourteen days prior to one of the special sessions appointed by the justices for granting transfers of such licences, serve a notice of his intention to transfer the same upon one of the overseers of the parish township, or place in which the premises in respect of which his application is to be made are situate and on the superintendent of the police of the district. This notice shall be signed by the applicant or by his authorized agent, and shall set forth the name of the person to whom it is intended that such licence shall be transferred, together with the place of his residence, and his trade or calling during the six months preceding the time of serving such notice." . . . "The provisions of this section as to notices shall extend to all cases where, under the Intoxicating Liquors Act, 1828," *i.e.*, the Alehouse Act, 1828, "notices are required to be served in a like form to or in the same form as notices for a new licence."

*Avery* and *Llewellyn Williams*, for the appellants.—The notices were bad, and the justices acted without jurisdiction in granting the licence. Section 14 of the Alehouse Act, 1828, provides that in the case of applications under that section "such and the like" notices are to be given as in the case of an application under section 10 of the same Act for a new licence. Section 10 was repealed by the Licensing Act, 1872. Section 40, sub-section 1, of that Act, and section 7 of the Wine and Beerhouse Act, 1869, now contain the provisions as to notices in the case of applications under section 14 of the Act of 1828. Those provisions have not been complied with. Sub-section 2 of section

40 of the Act of 1872, which deals with applications for a transfer of a licence, does not apply to the case of an application under section 14 of the Act of 1828; such an application is not one for "the/a transfer of a licence" as defined by section 74 of the Act of 1872. The notices being bad the justices had no jurisdiction to grant the application, and under these circumstances *certiorari* will lie. In consequence of the decision of the House of Lords in *Boulter* v. *Justices of Kent*, 46 W. R. 114, [1897] A. C. 556, that licensing justices are not a court of summary jurisdiction, it was held by a Divisional Court in *Reg.* v. *Sharman*, 46 W. R. 367, [1898] 1 Q. B. 578, that *certiorari* will not lie to licensing justices, and that case was followed in the Divisional Court in *Reg.* v. *Bowman*, [1898] 1 Q. B. 663, 46 W. R. Dig. 83, and *Reg.* v. *Cotham*, 46 W. R. 512, [1898] 1 Q. B. 802. Those decisions are wrong, and ought not to be followed. *Certiorari* will lie to a body such as licensing justices, which, although not a court in the strict sense of the word, nevertheless exercises judicial or *quasi*-judicial functions as distinguished from purely ministerial functions.

They referred to *Sharp* v. *Wakefield*, 39 W. R. 561, [1891] A. C. 173; *Reg.* v. *James*, 11 J. P. 837, 12 *ib.* 262; *Reg.* v. *Aberdare Canal Co.*, 14 Q. B. 854; *Reg.* v. *Sulford Overseers*, 18 *ib.* 687; Corner's Crown Practice (ed. 1844), p. 50; *Reg.* v. *Watermens Company*, [1897] 1 Q. B. 659, 45 W. R. Dig. 22; *Reg.* v. *Justices of Manchester*, 47 W. R. 410, [1899] 1 Q. B. 571; *Laceby* v. *Lacon*, 47 W. R. 497, [1899] A. C. 222.

*Sir E. Clarke, Q.C.* (*C. W. Mathews* and *Guy Stephenson* with him), for the respondents.—The application in this case under section 14 of the Act of 1828 was not for a new licence or for the transfer of a licence, but for a protective or emergency licence. Section 14 provides what notices are to be given in such a case and the manner in which they are to be published. The words "such and the like notice," which refer back to section 10, only apply to the form of the notice, not to the time within which it must be given, or the manner of publication. The repeal of section 10 did not involve the repeal of section 14, the provisions of which are still subsisting, and having been complied with in this case the notices were sufficient. Assuming, however, the notices are bad, and, assuming also that *certiorari* will lie to licensing justices, the circumstances of the present case are such that the committee in the exercise of that discretion, which it undoubtedly has, will not direct the writ to issue. The prosecutors are not persons directly or immediately aggrieved (see *Rex.* v. *Justices of Middlesex*, 3 B. & Ad. 938), and, further, there has been great delay on their part in coming to the court.

*Avery*, in reply, cited *Reg.* v. *Justices of Surrey*, L. R. 5 Q. B. 466, 18 W. R. C. L. Dig. 48, on the question whether the prosecutors were persons aggrieved.

A. L. SMITH, L.J.—In this case we have to deal with the application for a writ of *certiorari*, a rule *nisi* having been granted by this court after its refusal by a Divisional Court, and also with an appeal from a decision of the same Divisional Court discharging a rule *nisi* for a *mandamus*.

I will first deal with the question whether on the application for what has been called an emergency licence the proper notices were given. That question depends on the construction to be placed on the provisions of section 14 of the Alehouse Act, 1828. The legislation we have to consider is very intricate owing to the introduction of provisoes in subsequent Acts of Parliament. Section 14 deals with several matters which may happen before the expiration of a licence, and, amongst others, with the case of licensed premises which are pulled down for the purpose of public improvements. In such a case the section provides that it shall be lawful for the justices at a special session to grant to the person whose premises have been so pulled down, and who is desirous of opening other premises as a public-house, a licence in respect of those new premises to continue till the 10th of October next. Then there is a proviso as to the notices to be given by the person intending to apply for a licence in respect of premises which have not previously been licensed. The section provides that the person shall on some one Sunday within six weeks before the special session at some time between 10 a.m. and 4 p.m. affix a notice to the door of the house in question and to the door of the parish church, and shall also serve a copy of the notice upon the overseers and constable of the parish. In my opinion that provision regulates the time when and the manner in which the notice is to be given. The second part of the proviso deals with the form of the notice; it is to be "such and the like notice as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence." That refers one back to section 10 of the same Act, and if the matter stopped there, there would have been no difficulty, because everything was done by the applicant for the licence to satisfy the requirements of the section. But it is said that section 40 of the Licensing Act, 1872, provides different requirements as to notices in the case of an application for an emergency licence, and that those requirements have not been complied with. In my opinion section 40 leaves untouched the emergency cases dealt with by section 14 of the Act of 1828. Section 40 says that every person intending to apply for a new licence or for the transfer of a licence shall publish notice of such application in the manner provided by the section. That does not touch cases of applications under section 14 of the Act of 1828, because these cases are not applications for a "new licence" or for the "transfer of a licence" as defined by section 74 of the Act of 1872. Section 40, however, contains the following proviso: "The provisions of this section as to notices shall extend to all cases where, under the Intoxicating Liquors Act, 1828, notices are required to be served in like form to or in the same manner as notices for new licences." It has already been pointed out that it is only as regards the form of the notice, and not as regards the manner in which the notice is to be given, that the provisions as to notices in the case of applications for new licences are applicable to applications in emergency cases under section 14. If that is so, then section 40 of the Act of 1872 does not apply to cases under section 14 because it only applies where notices are to given in like form or in the same manner as notices for new licences. No question arises as to the form of the notices in this case, and if the manner in which they were given was right, I cannot say that the justices acted without jurisdiction—that is, on insufficient notices. I think therefore that the *certiorari* should be refused.

I only wish to add, that assuming *certiorari* to be the proper remedy, I do not think that in this case, as a matter of discretion, *certiorari* ought to go. In the first place I think that the application comes too late, as it was not made until nearly four months after the licence was granted. Secondly, the affidavits do not show that the appellants have any peculiar and distinct grievance of their own, as they ought to have shown according to *Reg.* v. *Justices of Surrey*, but are only aggrieved in common with the rest of the public.

The rule for a *certiorari* will therefore be discharged,

and it becomes unnecessary to consider the appeal as to the *mandamus*, which will be dismissed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. It is clear that the applicants (the present appellants) are not entitled to *certiorari* unless they can satisfy us that that something was done by the justices, in respect of granting the licence, beyond their jurisdiction. It is also quite clear that the applicants are not entitled to *certiorari* as of right, for the court has a discretion in a case like this with regard to the issue of the writ.

Now, a good deal has been said in the course of the argument in this case as to whether the applicants are persons who are aggrieved by what has been done. This is not a case in which any statute provides that the person applying for the writ of *certiorari* should be a person aggrieved. It is only one of those cases in which, by the practice of the court, it has been always insisted upon that the person applying must be a person aggrieved. There are two senses in which the expression "an aggrieved person" is used. Sometimes the question arises when the applicant is entitled to the writ as of right, *ex debito justitiae*. I do not think that anyone could contend that the facts disclosed by the affidavits in this case show that the applicants are aggrieved persons in the sense that they are entitled to the writ *ex debito justitiae*. If the judgment of Blackburn, J., in *Reg.* v. *Justices of Surrey* is looked at, it will be seen that he deals with the matter from that point of view, and he gives, as an illustration of a person aggrieved in that sense, a person who has been deprived of an office by the authority of the court. Such a person is entitled to the writ as a matter of right. There is no pretence of saying that the applicants in this case are persons aggrieved in that sense. But, besides the case of an aggrieved person who is entitled to the writ as a matter of right, there are aggrieved persons who are entitled to the writ in the discretion of the court. In that case the court has to consider whether, having regard to the interest of the applicant, there is sufficient ground for the issue of the writ. I do not think that the applicants here have made out such a case as would entitle them to induce the court to exercise their discretion by making the rule absolute. There is another matter which has to be considered in considering the exercise of the court's discretion. Having regard to the fact that a very considerable time elapsed after the granting of the licence before the application for the writ of *certiorari* was made, that in August the time will come round for the renewal of the application with an opportunity of then objecting to it, and that this is a matter in respect to which the justices have to act on an emergency, and make such provision as they best can for preventing an injustice, I do not think that this is a case for the exercise of its discretion by the court in favour of the applicants.

With regard to the question whether the notices were in fact wrong, there is no doubt that the whole of this legislation is very difficult to construe. Section 14 of the Act of 1828 deals with applications which may be made in cases of death, change of occupancy, and other contingencies. The proviso to the section sets out what notices are to be given, and how they they are to be published, and what form they are to be in, but unfortunately with regard to the form, instead of stating the form in so many words it does so only by reference to section 10, where the matter is expressly provided for, If the Act of 1828 stood alone, and was in no way affected by subsequent legislation, no complaint could have been made with regard to the notices given in this case. It is said, however, that the proviso at the end of section 40 of the Act of 1872 is intended to refer to the notices which are referred to in section 14 of the Act of 1828. I agree that that is so, but then one has to ascertain how far that proviso is to be treated as repealing section 14 of the Act of 1828. There is no pretence of saying that there is anything in that proviso or anywhere in the Act of 1872 expressly repealing the provisions of section 14, and therefore in my judgment when one comes to apply the proviso to notices under the Act of 1828 it must not be so applied as to make it interfere with any of the express provisions of the earlier Act. I suggested the question in the course of the argument whether, there being in section 14 an express provision as to affixing the notice to the church door on one Sunday, that was altered by the combined operation of the Wine and Beerhouse Act, 1869, s. 7, and the Licensing Act, 1872, s. 40, to a provision for the publication on two Sundays, and Mr. Avory was constrained to admit that the publication on two Sundays could not be substituted for the one Sunday. That is, I think, the right principle, and the principle which I intend to apply when I ask myself the question how far the section 40 of the Act of 1872 has added new obligations to those imposed by section 14 of the earlier Act. My answer is that there are no new obligations in any case in which the matter is found to be expressly dealt with in the earlier Act. It is said that if that principle is applied the proviso in section 40 is rendered a mere nullity, and the legislation of no effect. I do not assent to that. If the provisions of section 7 of the Wine and Beerhouse Act, 1869, are compared with those of sections 10 and 14 of the Act of 1828 it will be seen that they are not identical —for instance, in the form of application, and any one matter to which the proviso can apply is sufficient to do away with the argument that it is reduced to a nullity by adopting the principle of construction which I have indicated. Taking these matters into consideration the affidavits in this case do not satisfy me that there was anything left undone in the matter of the notices, which was a matter provided for by the Act of 1872, and was not a matter expressly provided for by section 14 of the Act of 1828.

I only wish to add a few words with regard to the conditions which are requisite for the application for a writ of *certiorari*. I do not think that it is essential that the record to be brought up must be the record of a court, or that an order to be brought up must be an order of persons exercising judicial or *quasi*-judicial functions. I think that it will be found that there are other cases in which the remedy by *certiorari* is available. It is not necessary, however, to decide that point in this case, and I only wish to guard myself against being taken to have assented to the proposition that has been put forward.

*Rule for* certiorari *discharged. Appeal against discharge of rule for* mandamus *dismissed.*

Solicitors for the appellants, *Lloyd-George, Roberts & Co.*, for *Herbert Lewis & Davies*, Liverpool.

Solicitors for the respondents, *Chester & Co.*, for *Fielding & Fernihough*, Bolton.

## High Court of Justice.

Chan. Div. } Kekewich, J. } Nov. 8.

BASCHET v. THE LONDON ILLUSTRATED STANDARD CO. AND OTHERS. (a.)

*Copyright—Artistic copyright—Infringement by printer who is mere agent—Fine Arts Copyright Act,* 1862 (25 & 26 *Vict. c.* 68), *s.* 6—*International copyright—Infringement—Nature of remedies—International Copyright Act,* 1886 (49 & 50 *Vict. c.* 33), *s.* 2, *sub-section* 3—*Minimum penalty—Costs.*

*Printers who infringe artistic copyright, though only as mere agents, are equally liable with their principals to penalties under section* 6 *of the Fine Arts Copyright Act,* 1862. *An owner of international copyright is not restricted under section* 2, *sub-section* 3, *of the International Copyright Act,* 1886, *in case of infringement in a foreign country, to the remedies available for infringement in the country of origin. A farthing is the minimum penalty that will be inflicted in a court of justice. Where in an action for infringement of copyright the defendant is guilty of infringement, but the plaintiff is held not to be entitled to any remedy in a court of equity because of his own misconduct, the action will be dismissed without costs.*

Trial of action.

This was an action against the London Illustrated Standard Co. (Limited) for an injunction to restrain them from causing to be printed copies of seven photographs, pictures, or works of art, the property of the plaintiff; and against the Temple Press (Limited) to restrain them from printing copies of the said seven photographs; and against the other defendants for an injunction to restrain them from selling and distributing copies of the same. The plaintiff also claimed an account and delivery up of all copies unlawfully dealt with, penalties, damages, and costs. It appeared from the evidence that the plaintiff was the owner according to French law of the copyright in seven photographs, pictures, or works of art, originally published in Paris. These seven photographs had been printed and published in the paper called the *London Illustrated Standard*, and sold and delivered, by the several defendants respectively. It appeared that 20,000 copies of each of the said seven photographs had thus been printed, published, sold, and distributed.

On the 30th of May, 1899, an interlocutory injunction was granted against all the defendants by Kekewich, J. On appeal this injunction was confirmed as to five of the photographs by the Court of Appeal, but was dismissed in the case of the other two on the ground of their indecency. On the action now coming on for trial before Kekewich, J., it was admitted that as to the five photographs the injunction must be made perpetual. It was also admitted that the plaintiff was entitled to damages against all the defendants. Two important points, however, on the question of penalties, arose for the decision of the court.

By section 6 of the Fine Arts Copyright Act, 1862, it is enacted that "If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10." By section 2, sub-section 3, of the International Copyright Act, 1886, it is enacted that "the International Copyright Acts and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced." By article 2 of the Berne Convention of 1887, which includes England and France, it is declared that "authors of any of the countries of the union . . . shall enjoy in the other countries for their works . . . the rights which the respective laws do now or may hereafter grant to natives. The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection accorded in the said country of origin."

*Warrington, Q.C.*, and *Scrutton*, for the plaintiff.—Under section 6 of the Fine Arts Copyright Act, 1862, there is no need for the plaintiff, in order to recover penalties, to prove *scienter* in the case of the printers and publishers. Both are included in the section. The Temple Press have clearly "repeated, copied, colourably imitated, or multiplied for sale" the photographs in question. Equally clearly the Illustrated Standard Co. have "caused or procured" the said photographs to be "repeated, copied," &c. The two classes are inserted in the section with a view to distinguishing between those who actually print, or print and publish, themselves, and those who, though they publish, yet do not themselves print, but get the printing done by someone else. But those who print at somebody else's request are certainly meant to be included. The penalty for "each offence" is not to exceed £10; and "each offence" means each copy of the photograph: *Graves* v. *Beale*, *Ex parte Beale*, 16 W. R. 852, L. R. 3 Q. B 387; *Ellis* v. *Marshall*, 64 L. T. Rep. 757. It is suggested in the case of international copyright, that by section 2, sub-section 3, of the International Copyright Act, 1886, the plaintiff is restricted to such remedies as he would have had if the infringement had taken place in France. He is entitled on the contrary to the remedies given in this country for breach of copyright. The question turns on the wording of the section. The words "greater right or longer term" refer only to the substance and amount of the copyright—*e.g.*, if in France the plaintiff were entitled only to restrain fraudulent infringement, his right in this country would be similarly limited. The words are not intended to put a limit on his remedies. This interpretation is sustained by the terms of the Berne Convention, which we are justified in referring to because of the preamble to the Act of 1886.

*Renshaw, Q.C.*, and *H. S. Simmons*, for all the defendants except one distributor.—Section 6 of the

(a.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

Act of 1862 is not meant to include those who have printed merely as agents. The distinction between the two first classes of infringers therein mentioned is the distinction between principals who infringe directly by their own act, and principals who infringe by an agent. But the agents themselves are not meant to be included. Penalties therefore do not lie against the Temple Press. As to section 2, sub-section 3, of the Act of 1886, the plaintiff is thereby limited to the remedies open to him in case of infringement in his own country. If the section had been meant to have the meaning put on it by the plaintiffs, the words "greater right" would not have been used. A "right" may be the right to an injunction, to penalties, to delivery up, to damages. It cannot possibly be restricted to the quantity or substance of the copyright. We are entitled, therefore, in accordance with French law, to escape with a single penalty for all our offences. If, however, the court construes the section against us and awards the plaintiff damages for each pirated copy, the court is not bound to take a farthing as the lowest possible measure of damages. Any fraction of a penny may be taken.

*MacSwinney*, for the remaining distributor, who had come to an arrangement with the plaintiff.

KEKEWICH, J.—In this case the Court of Appeal have practically left only a few isolated points for my decision. It is admitted that in the case of five out of the seven photographs my injunction must now be made perpetual. There remains the important question of penalties. As against those defendants who were merely distributors, it is admitted that no penalties can be inflicted. Section 6 of the Act of 1862 says plainly that such persons shall only be liable to penalties when they have acted, "knowing that any such repetition, copy, &c., has been unlawfully made." Here there is no evidence of any such knowledge, and they cannot accordingly be held liable. With regard, however, to the other two sets of defendants, it is contended that both are liable—both the London Illustrated Standard Co., who have published, and the Temple Press, who have simply printed, the five photographs. With regard to the London Illustrated Standard Co.—reserving for the moment a point of law as to the nature of the penalties—the liability is not disputed. As to the Temple Press, on the other hand, the liability is disputed. It is said that they did not act as principals, but merely as the agents of the London Illustrated Standard Co.; and it is said that the section is only meant to include those who have acted as principals. It seems to me that the words of the Act are incapable of bearing that construction. [The learned judge read the section.] It seems to me that the Temple Press, by printing copies of these photographs, have clearly "repeated, copied, colourably imitated, or otherwise multiplied them for sale." I think, therefore, that they are liable in penalties. The Legislature has drawn no such distinction between principals and agents as it is now attempted to set up; and I think it is not my business to struggle against the plain words of the Act.

There remains, however, the point of law as to what those penalties are to be. That must be determined by the view we take of section 2, sub-section 3, of the Act of 1886. [His lordship read the section.] As I understand that section, it comes to this—that a man cannot sue in respect of international copyright unless he first prove to the satisfaction of the court that he would be protected in his own country. A Frenchman, for instance, who has taken out copyright in France, could not sue for a breach of international copyright here in England, unless he first satisfied the English court that he would be entitled to sue in France in case of a breach there. But it is going a long step beyond that to say—as the defendants say—that when he has succeeded in proving his right, he is then to have no further remedies in this country than he would have had in his own land. It would be absurd if I, sitting here as an English judge, were in a position to give him only such remedies as those he might have got in France. We have been told to-day, for instance, that in France an injunction is unknown; but that is no reason why I, as an English judge, am to refuse to grant an injunction. The critical words are, "any greater right or longer term." "Greater right" can only mean "greater right to protection." As for "longer term," the mere fact that it is specified points rather to the fact that there is to be no other limitation than the limitation thus imposed on the term. I think it would be impossible to work two systems of jurisprudence side by side in the way the defendants propose. I am of opinion, therefore, on the construction of the Act, that if the plaintiff can show that he has any remedy at all in France, he is entitled here to such remedies as English courts are in the habit of granting. He is entitled, therefore, to such penalties as I choose to award him not exceeding £10 for each copy. A farthing, if not actually the smallest coin, is the smallest available, and I accordingly fix that as the penalty for each offence.

With regard to costs, I propose to follow the principle laid down in *Newman* v. *Pinto* 57 L. T. Rep. 31, 36 W. R. Dig. 204. That was a very flagrant case of imitation on the part of the defendants. The Court of Appeal, however, sitting as a Court of Equity, declined to give the plaintiff any remedy, on the ground of his own false representations—what Bowen, L.J., called "pictorial lies." The action was accordingly dismissed, but, having regard to the flagrant imitation on the part of the defendants, dismissed without costs. I apply that principle here. As to two of the seven pictures in question, the plaintiff has failed on the ground of their indecency; but as there is also no doubt that the defendants have copied these pictures, the action as to those two pictures must be dismissed without costs. The defendants will, therefore, have to pay five-sevenths of the costs of the action.

*Judgment for plaintiff.*

Solicitors, *McKenna & Co.; Braham Barnett; Seagrove & Woods.*

---

Chan. Div.
Kekewich, J. } Aug. 9, 1899.

*In re* WALLIS AND BARNARD'S CONTRACT. (*a*.)

*Vendor and purchaser—Undisclosed restrictive covenant—Notice—Form of conveyance—Summons—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.

*A vendor is not entitled to insert in the conveyance to the purchaser restrictive covenants or stipulations not expressly provided for in the contract. In determining such a question upon a summons under section 9 of the Vendor and Purchaser Act*, 1874, *it is not within the intention of that section that the court should be influenced by extraneous considerations, such, for instance, as the vendor's right to rescind the contract on the ground of mistake, or the fact that in omitting such restrictive covenants from his conveyance the vendor will be com-*

(*a*.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

*mitting a breach of some other contract. The true intention of that section is to provide that distinct and isolated questions between the vendor and purchaser on the matters therein mentioned may be raised and determined in a summary way as and when they arise, and not to enable a general declaration as to title to be made.*

Adjourned summons.

This was a purchaser's summons under the Vendor and Purchaser Act, 1874, asking (*inter alia*) for a declaration that he was entitled to a conveyance of the premises comprised in the contract free from all incumbrances save and except the restrictive covenant specifically mentioned in the contract.

The facts were as follow: Mrs. Wallis, the vendor, was the owner of the Brownhill-park Estate, near Winchester. By an indenture of lease, dated the 23rd of April, 1895, she leased to the purchaser a piece of land forming part of the estate, and gave him an option, to be exercised within a certain time, of taking a conveyance in fee of the piece of land subject to a certain restrictive covenant therein contained, but otherwise free from incumbrances.

The purchaser exercised the option, but in the draft conveyance the vendor inserted an additional covenant to the effect that the purchaser should not use any of the buildings or permit them to be used as (*inter alia*) a public-house, beershop, or hotel, or for the sale of any beer, spirits, or other intoxicating liquors, or for any other purpose except that of a private dwelling-house. The vendor insisted upon the inclusion of this covenant in the conveyance on the ground that by an earlier lease of another part of the estate—of which lease she alleged that the purchaser had notice—she had granted to the lessee thereunder the exclusive right of using his premises for such purposes, and had covenanted that all future leases and assurances of other parts of the estate should provide against the land being so used, and the vendor further alleged that the purchaser knew that the whole estate was subject to a building scheme involving the insertion in the conveyance of the restrictive covenants in question. The purchaser denied the allegations, and refused to accept a conveyance containing the additional covenant, and took out the present summons for the determination of the question in dispute.

*Renshaw, Q.C.*, and *R. J. Parker*, for the purchaser.—It is contrary to the contract to insert any stipulations in the conveyance. The purchaser is entitled to have a conveyance of the property free from incumbrances: *Cato* v. *Thompson*, 9 Q. B. D. 616, 31 W. R. Dig. 210; *In re Gloag and Miller's Contract*, 31 W. R. 601, 23 Ch. D. 320; and *Phillips* v. *Caldcleugh*, 17 W. R. 575, L. R. 4 Q. B. 159.

*Warrington, Q.C.*, and *G. B. Freeman*, for the vendor.—If the vendor specifically performs this contract she will have to commit a breach of her former covenant, and the court will not grant specific performance of a contract involving the breach of another contract: *Willmott* v. *Barber*, 28 W. R. 911, 15 Ch. D. 96. Further, this contract is not valid because the vendor entered into it under a mistake, and that is sufficient to enable her to rescind it: *Paget* v. *Marshall*, 33 W. R. 608, 28 Ch. D. 255.

KEKEWICH, J.—The opportunity of again making some remarks on the Vendor and Purchaser Act, 1874, is not ungrateful to me, because I think that our practice is drifting into a wrong channel.

The Vendor and Purchaser Act was passed in order to enable parties to raise and have decided in a summary way questions which otherwise would have to be raised in an action for specific performance. The Act says that either "a vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract"—I skip the words in brackets—"and the judge shall make such order upon the application as to him shall appear just." Now, the whole frame of that section seems to me to point to the raising in an isolated way of distinct points, and not to the question whether the vendor has shown a good title.

Observe also, that the vendor or purchaser may "from time to time or at any time or times" raise any such points. That, undoubtedly, was the object of the section, and for a very long time this section of the Act was worked on those lines. Lately, however, we have drifted into other forms, and in more recent instances the order of the court has gone to say that the vendor has shown or has not shown a good title. I believe that it was intended that that question should be left for an action for specific performance.

I must speak with bated breath of *In re Scott and Alvarez's Contract*, 43 W. R. 694, [1895] 1 Ch. 596, [1895] 2 Ch. 603, 43 W. R. Dig. 185, because the Court of Appeal in that case did not agree with me, but I think that the history of that case shows that the practice into which the courts are drifting is a mischievous one.

It seems to me that it would be a very great improvement to restrict these summonses to a distinct question—for instance, whether A. is seised in fee, or whether a disentailing assurance has effectually barred the entail. That, I think, is the general question which the court has to take into consideration, and is what must be borne in mind in this case.

Now here there is no question as to the existence of the contract. Mr. Warrington raises a question as to the validity of the contract, and says there was a mistake. But how can that question arise on this summons? The contract remains until it is rescinded by the court. The statute therefore applies, and I think that the summons properly raises a distinct question, and it asks the court to decide whether there shall or shall not be a particular covenant in the deed of conveyance. Now what is in question? The purchaser contracts to buy under a certain agreement. There was notice given to him of a restrictive covenant, but that notice did not contain any mention of the further restriction which the vendor now seeks to put into the deed of conveyance. There is no doubt that the vendor is in a difficult position, and there is also no doubt that another contract is likely to be broken. That circumstance brings under my notice another novelty in practice. The court used originally only to decide the simple question in dispute between vendor and purchaser. In more than one recent instance, however, the court has gone further, and has decided that the title is so doubtful that it cannot be forced on a purchaser. I have done it myself. But it is not a proper question for a vendor and purchaser summons, because on such a summons the court has not the proper evidence upon which to decide such a question. Here the purchaser says that the insertion of the covenant cannot be forced on him, but I do not think that if I were trying an action for specific performance, I could say that the vendor was obliged to commit a breach of her former contract by conveying in the manner required by the purchaser. But that is not the point now before me. The summons only raises the question whether the deed of conveyance shall be in one form or in another, and all that I am asked to

say is, shall the deed contain, or shall it not contain, a certain restrictive covenant? On that point I do not think there is much room for doubt. I was referred to the case of *In re Gloag and Miller's Contract*, where it is well laid down that a purchaser is entitled to a conveyance, according to the terms of the contract. Now, in the present case, why should not the vendor convey in the terms of the contract? To that question it is answered, "Yes, according to the contract the conveyance must be in a certain form; but at the time of the contract the purchaser knew of this other restrictive covenant, and it ought to be inserted in the conveyance." But the answer seems to me to be that by the insertion of the covenant the vendor is no better off than he was before, because if the purchaser knew of the covenant, then its insertion in the conveyance cannot help the vendor, for the purchaser is affected with notice from outside. All I am deciding in this case, then, is that when the existence of the contract is not denied and the validity of it cannot be questioned, the conveyance must be in such and such a form—*i.e.*, in the form which the purchaser has already prepared.

Solicitors, *Geare & Pearse*, for *Bowker & Sons*, Winchester; *Peacock & Goddard*, for *Sharp & Brain*, Southampton.

---

Chan. Div. Kekewich, J. } Aug. 4, 1899.

*In re* KELCEY.
TYSON *v.* KELCEY. (*a.*)

*Mortgage—Charge upon "all my real and personal estate whatsoever and wheresoever"—Enforcement—Definite property—Valid charge—Public policy—Vagueness.*

*A charge by a man upon "all his real and personal estate whatsoever and wheresoever, and of what nature or kind soever, the same may be or consist," will not be void on the ground of vagueness or as offending against public policy, if it is possible, at the time when the charge is sought to be enforced, to construe fairly the document creating the charge, and to point to the property comprised in it.*

Adjourned summons.

On the 10th of November, 1869, the applicant, Sarah Ann Foord, advanced to Francis Finn Kelcey, then known as Francis Finn, the sum of £2,500 upon his promissory note and the further security created by a memorandum of charge, which was in the following form: "Memorandum made this 10th day of November, 1869, that I, the undersigned, Francis Finn, of Scene, in the parish of Newington-next-Hythe, in the county of Kent, farmer and grazier, do hereby charge all my real and personal estate whatsoever and wheresoever, and of what nature or kind soever the same may be or consist, with the payment to Sarah Ann Foord, of Smeeth, in the said county of Kent, widow, of the sum of £2,500, this day lent and advanced by her to me, and secured by my promissory note bearing even date herewith, together with interest for the same at the rate of £4 10s. per cent. per annum. And I do hereby undertake and agree that I will, when thereunto required, make and execute all such deeds and assurances as shall be reasonable and necessary for charging the said premises with, or further securing the repayment of, the said sum of £2,500 and interest as aforesaid."

By the 1st of September, 1896, the debt had been reduced to £500, and all interest due was paid up to the 1st of September, 1897.

Francis Finn Kelcey died on the 12th of September, 1898, having duly made his will, dated the 21st of November, 1854, and on the 5th of November, 1898, letters of administration to his estate, with the will annexed, were granted to the respondent, Stephen Finn Kelcey.

A creditor's action for the administration of the testator's estate was subsequently commenced, and as the validity of Sarah Ann Foord's charge was called in question by other creditors, she took out the present summons asking that Stephen Finn Kelcey, as the administrator with the will of Francis Finn Kelcey annexed, might be ordered to pay to her out of moneys coming to his hands as such administrator, the sum of £500, with interest thereon at the rate of £4 10s. per cent. per annum computed from the 1st of September, 1897, secured by the said memorandum of charge, together with her costs in the action.

At the date of the memorandum of charge the testator was possessed of a policy of assurance on his life for £1,000 in the Minerva Life Assurance Co. (subsequently taken over by the Standard Life Assurance Co.). Notice of the charge was given to the company, who were now holding the policy moneys until the applicant's charge should be satisfied or removed.

*J. G. Wood*, for the applicant, Sarah Ann Foord.—This charge is good. Future property was not included in the charge, but only all the borrower's property at the date of the charge, and that property was then definite and ascertainable.

*Warrington, Q.C.*, and *H. C. Hull*, for the plaintiffs in the action.—This charge is invalid on the grounds of public policy, for it is so wide that the court will consider it wrong to enforce it, because, if fully carried into effect, it would prevent the debtor from paying his debts, and would deprive him of his means of subsistence: *In re Count D'Epineuil*, 30 W. R. 702, 20 Ch. D. 758; *In re Clarke, Coombe* v. *Carter*, 36 W. R. 293, 36 Ch. D. 348. The charge also is too vague: *Belding* v. *Read*, 13 W. R. 867, 3 H. & C. 955; *Clements* v. *Matthews*, 11 Q. B. D. 808, 31 W. R. Dig. 23; *In re Turcan*, 37 W. R. 70, 40 Ch. D. 5. In *Tailby* v. *Official Receiver*, 37 W. R. 513, 13 App. Cas. 523, Lord Macnaghten doubted whether a charge by a man on "all his present and future personalty" could create a specific lien of any sort or kind.

*Bardswell*, for another creditor.

*Gatey*, for Stephen Finn Kelcey, the administrator.

KEKEWICH, J.—In this case we are free from any question whether future property is included in the security, and the actual words used seem to me to point directly to property belonging to the testator at the date of the charge only. The words are: "I do hereby charge all my real and personal estate whatsoever and wheresoever, and of what nature and kind soever, the same may be or consist," and I do not think that what follows can fairly be construed to enlarge what in itself would be confined to then existing property. Now, why should not those words create a good charge upon property that he had at the time? The first answer urged in argument against that view is that such a construction would be against public policy, that in fact it is not desirable that a man should be able to create a charge on everything he has, even down to the clothes on his back, or to create such charges secretly, and so possibly be trading under false colours. To that argument I think there is more than one complete answer, and first, it is not

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

possible to keep too forcibly before one the remarks of Burrough, J., on public policy in *Richardson* v. *Mellish*, 2 Bing. 229, at p. 252. "It is," he says, "a very unruly horse, and when once you get astride it you never know where it will carry you." That seems to me to apply here. There is certainly no law to the effect that a man may not create a charge on all his real and personal property. It may be that a bill of sale or some formality is necessary, but he may create the charge if he pleases. There is no doubt that such charges can be effectively and validly created by the assistance of the law, and to say that what can be done in one way by lawyers, cannot, so far as public policy is concerned, be done in another way by other persons is absurd.

Then, again, it is said that such a document is invalid because it tends to defeat creditors, but the same thing is also true of a great many other documents. Take, for instance, a marriage settlement, by means of which a man may, to a certain extent, prejudice his creditors. I think that it would be going too far to adopt that point of view.

Then as to the question of vagueness. The contract itself is not vague; the only vagueness which exists arises from the uncertainty whether the property purported to be charged can be really charged or not. On that point I refer to the remarks of Bowen, L.J., in *In re Clarke* (36 Ch. D., at p. 355) where he says: "Vagueness is a misleading term. A contract may be so vague in its terms that it cannot be understood, and in that case it is of no effect in law or in equity. There is another kind of vagueness which arises from the property not being ascertained at the date of the contract, but if at the time when the contract is sought to be enforced the property has come *in esse* and is capable of being identified as that to which the contract refers, I cannot see why there is in it any such vagueness as to prevent a court of equity from enforcing the contract," and then he goes on to hint at the suggestion which is the basis of the present argument, and he takes one illustration. "Thus," he says, "it is said a contract by a man to assign all the property that shall come to him would be too wide to be enforced. I will give no opinion on that point till it comes before us for decision." Here, however, the question of future property does not arise, and I think that if it is possible to construe the document fairly, and to point to the property comprised in it, then the charge is a good charge. I put aside, therefore, the ground of public policy. It might, perhaps, be a great advantage that charges of this kind should be registered, but that has not been hitherto the policy of the English law.

There is no authority at the present time saying that a charge similar to this is invalid; the nearest approach to any such authority is this one passage of Lord Macnaghten's judgment in *Tailby* v. *Official Receiver*, where, with reference to the case of *In re Count D'Epineuil*, he says, "I much doubt whether a memoradum like that on which the plaintiff relied could create a specific lien of any sort or kind." Lord Macnaghten has suggested a doubt which may have to be solved hereafter, and I venture to think that the doubt which he suggests must be set at rest by the House of Lords. It might be solved, perhaps, by the Court of Appeal, but I am perfectly sure that it could not be done by a judge of first instance. I therefore hold that the charge is valid, and I direct that it be paid out of the policy-moneys.

Solicitors, *Ford, Lloyd, Bartlett, & Michelmore; Bower, Cotton, & Bower*, for *H. B. Bradley*, Folkestone; *Hamlin, Grammer, & Hamlin*, for *Bridgman, Weaver, & Wild*, Chester; *Warren, Murton, & Miller*, for *Hallett, Creery, & Co.*, Ashford, Kent.

Chan. Div.
Kekewich, J. } July 8, 1899.

*In re* MAYNARD'S SETTLED ESTATES. (*a.*)

*Settled estate—Minerals—Lease—Open or unopened mine—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18). *s.* 4.

*A settled estate was divided into two portions by a strip of land belonging to a different owner. A seam of coal underlay the whole. When the tenant for life of the settled estate came into possession the part of the seam underlying the northern portion of the estate was an opened mine. The tenant for life subsequently acquired the coal underlying the dividing strip. The tenant for life now proposed to grant a lease of the part of the seam underlying the southern portion of the estate which had not yet been worked. This part of the seam it was practicable to work from the opened mine, but it was not commercially convenient, and it was therefore intended to sink a new shaft in the southern portion of the estate.*

*Held, that the part of the seam underlying the southern portion of the estate was an unopened mine.*

Petition.

Under the will of Viscount Maynard, who died in 1865, the Countess of Warwick was tenant for life in possession of an estate known as the Bayworth Estate, in the county of Leicester, and her eldest son, Lord Brooke, an infant, was tenant-in-tail in remainder expectant on her decease. The Bayworth Estate was divided into two separate portions by a strip of land belonging to a different owner running east and west. There was amongst others a seam of coal called the Lower Main Seam underlying the northern portion of the Bayworth Estate which ran across under the strip of land and was continued under the southern portion of the estate. At the time of Lord Maynard's death the coal under the northern portion of the estate was leased to the Bayworth Colliery Co. and was worked by them from a shaft sunk therein, but the coal underlying the southern portion of the estate had not been leased or worked. In 1885 Lady Warwick, out of her own moneys, purchased the coal, including Lower Main Seam, underlying the dividing strip of land, and subsequently leased them to the Bayworth Colliery Co. Lady Warwick now proposed to grant a lease of the coal, including the Lower Main Seam, which underlay the southern portion of the Bayworth Estate, and which had not yet been worked, to Henry Bramall. It appeared that it would be possible to work the Lower Main Seam underlying the southern portion of the estate from the shaft of the Bayworth Colliery Co. in the northern portion, through the coal underlying the dividing strip, but that it would be very expensive and from a commercial point of view unlikely to be successful. It was, therefore, intended to work from a new shaft sunk in the southern portion of the estate. This was a petition under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), for the approval of the court to the proposed lease, and the question arose whether the coal underlying the southern portion of the Bayworth Estate must be regarded as an open mine or as an unopened mine. In the former case one-fourth only of the rent would have to be set aside and invested, but in the latter three-fourths as provided by section 4 of the Settled Estates Act, 1877.

*Warrington, Q.C.*, and *Darlington*, for the petitioner.—The coal underlying the southern part of the estate now proposed to be demised is a continuation of the seam which had already been opened by the colliery company before the testator's death from their shaft in the northern part of the estate, and it must therefore be

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

regarded as an open mine, although for commercial purposes we propose to sink a new shaft in the southern part. *Elias* v. *Snowdon Slate Quarries Co.*, 28 W. R. 54, 4 App. Cas. 454; *Clavering* v. *Clavering*, 2 P. Wms. 388; *Bagot* v. *Bagot*, 12 W. R. 35, 32 Beav. 509; *Lord Cowley* v. *Wellesley*, 14 W. R. 528, 35 Beav. 635, L. R. 1 Eq. 656. One-fourth of the rent only, therefore, need be set aside.

*P. O. Lawrence* and *F. L. Wright*, for the infant tenant-in-tail in remainder.—The coal underlying the southern part of the estate is an "unopened mine," for it is separated from the coal underlying the northern part of the estate by a strip of land belonging to a different owner. *Campbell* v. *Wardlaw*, 8 A. C. 641; 32 W. R. Dig. 176. Three-quarters of the rent ought, therefore, to be set aside.

*Church*, for the trustees of the will.

KEKEWICH, J.—For my present purpose I think it will be sufficient to treat this as if it were a lease of the Lower Main Seam only, although I do not say that the same construction would not be arrived at after looking at the other facts of the case; but I think this is the simplest way of looking at the case.

What is said is this, that the Bayworth Colliery Co. having, as the lessees of the settlor, worked the Lower Main Seam in the northern portion of the Bayworth estate, there has therefore been an opening of that seam, or of the mine which is to be treated as the seam in the southern portion of the estate, which is now proposed to be demised under the rules of the court.

That is the question which I have to consider. What Mr. Warrington has called the *dictum* of Lord Selborne in the case of *Elias* v. *Snowdon Slate Quarries Co.*, but which I think is more than a *dictum*, gives us in a few sentences what is the settled law on the subject. What he says is this: "When a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or a new quarry." It is quite possible to construe that so as to give Mr. Warrington all that he wants, but it is obvious that there must be some limitation. It cannot mean that a settlor, a person owning estate in one county, in which there is a seam of coal, and owning another estate in another county where the same seam is found, and who has only worked the seam under one estate, is not, upon opening the ground in the adjoining county, opening a new mine. I do not think it would be right to wrest Lord Selborne's language to make it fit such an extreme case as that, and I am justified in making that limitation because Lord Selborne, though he laid down the law, thus clearly says this immediately afterwards: "And for this authority is to be found in the cases which are cited at the bar of *Clavering* v. *Clavering*, *Bagot* v. *Bagot*, and *Lord Cowley* v. *Wellesley*. I must treat this statement of the law as thoroughly agreeing with the cases to which he refers. It is not difficult to obtain a principle from from these cases, and particularly from *Clavering* v. *Clavering* and *Lord Cowley* v. *Wellesley*." I do not think it is necessary to refer to *Bagot* v. *Bagot* further. We have the judgment of King, L.C., in *Clavering* v. *Clavering*, which contains a curious expression relating to a practice in the county of Devonshire, that "Any person having a right to dig in mines may pursue the mine, and open new shafts or pits to follow the same vein." The point which was before the Lord Chancellor's mind, and which he brings out in a very clear manner, is that really you are pursuing the same mine in the same seam. It is a pursuing by means, not of pushing forward the same seam in the old pit but, of sinking a new pit so as to work the minerals in connection with the old shaft. That is what he means by pursuing the same vein, notwithstanding that it is reached by a different way. In *Lord Cowley* v. *Wellesley* we find the same principle with reference to a different subject. I take the report in 1 Equity Cases because, although the report is shorter, it brings out the point more exactly. There there was waste land under which was gravel and no coal, and the gravel was reached by pits dug on the surface, each pit being separate. The gravel had been taken thence for some time, and the question was whether each new gravel pit was a new working or a continuance of the old working, and Lord Romilly said: "The whole of the gravel or sand on the waste land must be treated as a mine, and each gravel pit as if it were a fresh pit in the mine," that is to say he treats the waste of the manor, and the gravel or sand under it as one mine. The lord of the manor digs a pit here and there all over the waste, and on each occasion he is doing what King, L.C., calls "pursuing" the vein; he does not pursue in the sense of working it out inch by inch through the soil by continuing along the line of the vein, but by attacking the vein from another point he is still working the vein in the waste land. Now, I fail to see how you can apply that to this case. The property now intended to be demised, the southern portion of the Bayworth Estate, is separated from the northern portion, which was demised to the Bayworth Colliery Co., by the strip of land. There is as much distinction between these two properties as if they were two separate estates in two adjoining counties or in two counties separated by an intervening county. I assume that it is the same vein which is the subject of the demise, but not only is it to be approached from a different pit, but it is quite impossible to approach it from the old pit. Lady Warwick has a clear right to work the lower main seam under the dividing strip of land, but for this purpose she must be treated as an entire stranger. She is willing that the two pits should be worked together, because she happens to be interested in both, but I must treat her for the present purpose as if she had no interest in the former. She comes here as tenant for life desirous of demising the Lower Main Seam under the southern portion of the estate; that seems to me an entirely different seam from that leased to the Bayworth Colliery Co. on the northern portion of the estate. It is not like the case of working the waste of a manor, nor like the pursuing a vein as King, L.C., says. For this purpose it is a different estate. Of course I quite follow the evidence that if this was all under one ownership the result would be, that for convenience, for commercial purposes, a new pit would be opened, but it seems to me that the intervention of the strip of land which belongs to others, and is not part of the settled estate, prevents this mine from being held to be an "open mine" within the meaning of the law as laid down by Lord Selborne in *Elias* v. *Snowdon Slate Quarries Co.* and in the other cases. It never was in Lord Maynard's time in any sense under the same hands or worked under the same control. It could not have been in his contemplation to work under the southern portion of the estate by means of a pit to the north of the dividing strip of land, because he knew that that dividing strip of land did not belong to him. Upon the principle laid down in the cases to which I have referred, I think that this is not an open mine, and therefore a proportion of three-fourths of the rent must be reserved to the

trustees of Lord Maynard's will, and set aside and invested.

Solicitors, *Farrer & Co.; Frere, Cholmeley, & Co.; G. B. Laurence & Co.*

---

Chan. Div. } Byrne, J. } June 2, 7; July 29, 1899.

MUTTON *v.* PEAT. (*a.*)

*Banker—Account—Rule in* Clayton's case—*Application of rule as between bank, customers, and third parties.*

*T. & Co. had two accounts with their bankers, a current and a loan account. On the latter they owed £7,500, and in November, 1895, had deposited as security certain securities belonging to some of their clients. In January, 1896, T. & Co. had paid into their current account £790 4s. 6d., which had been paid to them by P., another client of theirs, to invest on his behalf. With this sum the current account showed a credit of £1,362 10s.*

*On the 24th of January, 1896, T. & Co. were adjudicated bankrupt. On the 20th of January the bank closed the current account, and transferred the credit balance of £1,362 10s. into a new account entered in a book kept in cases of bankruptcy and liquidation. At various times the bank proceeded to sell the securities deposited to secure the £7,500, and, as was shown by the new account, specifically appropriated the receipts to the specific balance then remaining at the dates of such sales. They did not deal with any part of the £1,362 10s., out of which P. now claimed to be repaid his £790 4s. 6d.*

*Held, that having regard to the bank's mode of appropriation, the rule in Clayton's case did not apply, and that the* cestuis que trustent *of the securities which had been sold had no equity as against P. to enforce the rule, and that P. was entitled to be repaid the £790 6s. 4d.*

Adjourned summons.

Messrs. Tatham & Co., stockbrokers, had two accounts with their bankers, Messrs. Glyn, Mills, Currie, & Co.—a current account and a loan account. On the latter account there was owing, on the 30th of December, 1895, a sum of £7,500, and to secure this debt there had been deposited by Messrs. Tatham before the 30th of November, 1895, certain securities which really belonged to some of their clients, one of whom was the plaintiff in this action.

On the 11th of January, 1896, Tatham & Co. paid into their current account the sum of £790 4s. 6d., which they had received from one Parker, another client of theirs, for investment. Two days afterwards Tatham & Co. were declared defaulters on the Stock Exchange. On the 21st of January a receiving order was made against them, and on the 24th of January they were adjudicated bankrupt. On the 20th of January, Messrs. Glyn, Mills, & Co. closed Tatham's current account, and transferred the credit balance, amounting to £1,362 10s., partly made up of Parker's above-mentioned £790 4s. 6d., into a new account. The bank also, on the 20th of January, 1896, credited this new account with a sum of £3,342 15s., which had been produced by the sale of some of the before-mentioned securities held as security for the loan account. On the 22nd of January, 1896, the debit side of this account showed: "Loan (part) discharged, £3,340; twenty days' interest to the 20th of January, £3 13s. 2d."

Further sums were similarly received and entered in this new account by the bank in respect of sales of others of the said securities, so that on the 30th of January, 1896, on the debit side there appeared "loan (balance) discharge, £3,590; thirty days' interest, £5 17s. 11d."

It did not appear from this new account that any part of the said sum of £1,362 10s., which had been the credit balance on Tathams' current account, had been applied in reduction of their debt on the loan account, but that the proceeds of the sales of the securities were specifically appropriated in discharge of this debt, leaving a small balance in the hands of the bank.

Parker then took out this summons claiming to be repaid the sum of £790 4s. 6d., which, as above-mentioned, had been paid by him to Tathams for investment out of the £1,362 10s., the balance on the current account transferred to the new account.

*George Lawrence*, in support of the summons.—The rule in Clayton's case does not apply; that rule only applies as between debtor and creditor, not as between third parties: *Cory Brothers* v. *Owners of "Mecca,"* 45 W. R. 667, [1897] A. C. 286. Here the owners of the deposited securities have no right to claim as against Parker in respect of his £790 4s. 6d.

*Kenyon Parker*, for defendants in same interest.

*Levett, Q.C.*, and *Hall*, for Mutton, the owner of some of the securities sold.—All the accounts must be taken to be as one account as between the bank and their customer. The rule in *Clayton's case* is applicable.

They referred to *Pedder* v. *Preston Corporation*, 10 W. R. 773, 12 C. B. N. S. 535; *In re European Bank*, 21 W. R. 45, L. R. 8 Ch. App. 41; *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282, 41 W. R. Dig. 9; Grant's Law of Banking (5th ed.), p. 250.

*Younger*, for a defendant in the same interest, referred to *Hancock* v. *Smith*, 37 W. R. 459.

*Daniel Jones*, for the defendant Peat.

*S. Dickinson*, for the bank.

*George Lawrence*, in reply.

*Cur. adv. vult.*

July 29.—BYRNE, J., after stating the facts, proceeded: It is conceded that the bankers might, had they been so minded, have applied the balance transferred from current account in part discharge of the amount due to them on loan account, but they did not do so.

They were entitled to appropriate the proceeds of the sale of securities as they did, namely, in discharge of the indebtedness on the loan account, to secure which the securities had been deposited. It is to be noted moreover, that interest is charged in the liquidation account on the amount due in respect of loan account, a part of which would not have been chargeable had the balance of current account been applied in part discharge of loan account.

But it is argued on behalf of owners of securities which have been realised and which were wrongfully deposited by Messrs. Tatham, being securities belonging to customers of theirs, that it does not matter as between rival claimants to the funds what entries the bankers made in their books or what they in fact did by way of appropriation; that as between banker and customer all the accounts make but one account (which is true for certain purposes) and that the rule in *Clayton's case*, 1 Mer. 572, at pp. 585, 608, ought to be treated as applicable, not only as between the bankers and other persons but as between third parties claiming the balance. The rule in *Clayton's case* applies where there is one unbroken account, and it applies as between *cestuis que trust* in an appropriate case: see *In re Hallett's Estate*, 28 W. R. 732, 13 Ch. D. 696;

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

*In re Stenning*, [1895] 2 Ch. 433, 43 W. R. Dig. 9. In *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca,"* Lord Macnaghten cites ([1897] A. C. p. 295) what was said by Jessel, M.R., in *In re Hallett's Estate*: "It is a very convenient rule, and I have nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then, of course, that which is a mere presumption of law gives way to these other considerations." And after citing a passage to a similar effect from the judgment of Baggallay, L.J., in the same case, Lord Macnachten proceeds to deal with the case of *Cory* v. *SS. Mecca* upon the footing of the qualification referred to.

Suppose the bankers had not made any appropriation of the moneys received by them from the sale of securities, but had simply made one account by means of transfer to the credit of the liquidation account of the balance on current account and had added the amount received by them from sale of securities, entering items on the debit side without distinguishing, it may well be that the rule in *Clayton's case*, would have applied, but I have, in what was actually done by the bankers, clear evidence that they appropriated, as they were clearly entitled to do, specific receipts to payment of a specific balance due from the customer. I think that this excludes the application of the rule in *Clayton's case* and I cannot find authority for saying that there exists any equity entitling the *cestuis que trust* of the deposited securities as against the *cestuis que trust* of the transferred balance from the current account to require the application of the rule in *Clayton's case*, or to maintain a right to say that the moneys ought to be deemed to have been dealt with otherwise than they in fact were. I think that Mr. Parker has established his claim. This decision applies also to the other claimants to the cash balance if they succeed in tracing their moneys into the fund.

Solicitors, *Longbourne, Stevens, & Co.; Foyer & Hordern; Bower, Cotton, & Bower*, for *H. B. Bradley*, Folkestone; *Duffield & Bruty; Blunt & Co.; Murray, Hutchins, Stirling, & Murray.*

Q. B. Div.
(Ridley and Darling, JJ.) Oct. 26.

THE UCKFIELD DISTRICT COUNCIL (*Appellants*) *v.* THE CROWBOROUGH WATER CO. (*Respondents*). (a.)

*Local government — Water-tower erected by company under special Act—Non-compliance of undertakers with bye-laws made under Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157—*Jurisdiction of district council to enforce obedience to bye-laws.*

*The Uckfield District Council laid two informations against the respondent water company for having begun to build a water-tower without giving any of the notices prescribed by, or in any otherwise complying with, the provisions of certain bye-laws made by the council under powers conferred on them by the Public Health Act*, 1875.

*The justices dismissed the information on the ground that as the erection of the water-tower was expressly authorized by the company's private Act of* 1897 *the bye-laws did not apply.*

*Held, on appeal, that the justices were wrong. The special Act was merely to enable the respondent company to build the water-tower on land belonging to someone else; but, being so empowered, they were then in the same position as a private person intending to erect a building on his own land, and under a similar obligation to comply with bye-laws duly made under the Public Health Act*, 1875, *which Act, although not expressly incorporated in the respondent company's private Act of* 1897, *must, in the absence of any expression to the contrary, be held to apply.*

*Held, also, that there was no such inconsistency between the powers conferred by the special Act of* 1897 *upon the respondents to erect their tower and the provisions of the Public Health Act*, 1875, *empowering the appellants to make bye-laws, as would support an inference that the latter had been repealed.*

Case stated by justices of the petty sessional division of Frant, Sussex, who had dismissed two informations preferred by the surveyor to the Uckfield District Board charging that the Crowborough District Water Co. had in October, 1898, begun to construct a water-tower without first giving any of the notices prescribed by, or in any other wise complying with, the provisions of the bye-laws with respect to new streets and buildings made by the district council under powers conferred on them by the Public Health Act, 1875, s. 157.

It appeared from the case that the appellants were a rural district council and the respondents a waterworks company incorporated by 60 & 61 Vict. c. cxvii. (1897). By section 25 of this Act the respondents were empowered to erect and maintain in a field within the appellants' district a high-service water-tower "in the lines and situations and according to the levels shown on the deposited plans and sections."

The private Act of 1897 incorporated the Waterworks Clauses Act, 1847, s. 93 of which provides as follows: "Nothing herein or in the special Act contained shall be deemed to exempt the undertakers from any . . . Act for improving the sanitary condition of towns and populous districts which may be passed . . . in any future session of Parliament."

The appellants had all the powers of a rural sanitary authority under the Public Health Act, 1875, and Acts amending the same, and had also duly acquired the same powers to make and enforce bye-laws with respect to new streets and buildings as are conferred upon urban sanitary authorities by section 157 of the Public Health Act, 1875, and they had in accordance with these powers enacted certain bye-laws requiring persons intending to erect buildings, before doing so to deliver to the district surveyor plans and sections of such buildings, with other particulars, including the date when such buildings would be commenced.

The respondents began to erect the water-tower authorized by their private Act of 1897 without depositing plans or giving notice.

On a summons for breach of the above bye-law the justices dismissed the information.

The district council appealed.

*R. E. Moore*, for the appellants.—The justices ought to have convicted, for the bye-laws, being made under the provisions of the Public Health Act, 1875, and having therefore statutory force, are binding on the respondents in so far as they are not inconsistent with the provisions of that company's special Act. Here there is no such inconsistency, and I rely upon *Hill* v. *Hall*, 1 Ex. D. 411, 25 W. R. Dig. 278. This water-tower is none the less a "building" within the meaning of that term as used in the bye-laws because the company were authorized to erect it by their private Act. The respondents do not deny that the deposited plans give no details or method of construction to be adopted by them in the erection of the water-tower.

*W. Whateley* (*W. P. Boxall* with him), for the

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

respondents.—The private Act of 1897 expressly authorized the waterworks company to erect this tower in accordance with plans deposited by the undertakers when the Bill was moved for. It is not alleged against the respondents that the tower in course of construction is not strictly in accordance with those plans. Having obtained the necessary sanction of Parliament to proceed with this work, the local authority cannot fetter the undertakers by requiring them to conform to bye-laws, which we say, moreover, do not apply at all to a water-tower built in accordance with statutory powers by a water company. Moreover, the bye-law was promulgated on the 15th of January, 1897, while the special Act was not passed until the 15th of July of the same year. We say the bye-laws and the special Act are inconsistent, because the latter obliges the company to construct all proper and necessary works, which means proper and necessary in the view of the undertakers, while the former makes the district council the judges of what is proper and necessary. The judgments in *London and Blackwall Railway Co.* v. *Limehouse Board of Works*, 5 W. R. 64, and *City and South London Railway* v. *London County Council*, 40 W. R. 166, [1891] 2 Q. B. 513, show that the appellants' contention is erroneous, and the appeal ought to be dismissed.

*R. E. Moore* replied.

RIDLEY, J.—The question here is whether the respondents, having been empowered by section 25 of their special Act to construct all proper and necessary works, including a high-service water-tower, are thereby exonerated from submitting plans and giving notices to the local authority in accordance with two bye-laws numbered 93 and 94. The first of these bye-laws provides that any person about to erect a new building shall give notice to the local authority of his intention, and shall deliver to the clerk or surveyor of the council plans and sections of such building, and a description in writing of the materials of which it is intended to construct the same, and also a description in writing of the mode of drainage and water supply. The second bye-law provides that notice shall be given of the date on which it is intended to commence such building; and there are other bye-laws which impose penalties for breach of the foregoing, and contain provisions for removal of works executed in contravention thereof. I do not agree with the contention put forward by the respondents' counsel that when once the company were authorized by their Act to erect a water-tower, they were empowered to construct it as they thought fit. The effect of their special Act was to enable them to erect a tower on land which was not theirs; an Act was necessary to enable them to do that. But when they had been so empowered they were in the same position as a private person intending to build a house upon his own land, and under a similar obligation to comply with bye-laws duly made under the provisions of the Public Health Act. It was argued that these bye-laws did not apply because the Public Health Act was not expressly incorporated with the special Act, but a general Act must be taken to apply unless it can clearly be shown that it was the intention of the Legislature that it should not apply to the provisions of the special Act obtained subsequently, to which it would otherwise be applicable. Section 93 of the Waterworks Clauses Act begins by stating that "Nothing herein or in the special Act contained shall be deemed to exempt the undertakers from any general Act relating to waterworks, or any Act for improving the sanitary condition of towns and populous districts . . . passed in any future session of parliament," and clearly expresses a contrary intention on the part of the Legislature to that which we are asked to assume here so far as the provisions of that Act are applicable to the present case. With regard to the existing sanitary Acts, section 25 of the special Act was silent with reference to them. That left untouched the general principle that the general law of the land applies when construing a private Act. I think with regard to the cases cited they are both distinguishable. In *London and Blackwall Railway Co.* v. *Limehouse Board of Works*, the earlier Act was a special Act, and the later a general Act. There was, therefore, no such inconsistency as would lead the court to infer that the earlier Act was by implication intended to be repealed. In my judgment that is the true test. In *City and South London Railway Co.* v. *London County Council* the court held there was a distinct inconsistency, and the special Act had to give way; but for that inconsistency the decision of the court would probably have been the other way. It cannot be said successfully that there is any inconsistency here between the special Act and the bye-laws, which have the force of a general statute, and the company are subject to the provisions of the latter. It was argued that the water-tower was not a "building" within the meaning of the bye-laws, and that they must be limited to the powers with respect to new streets and the like conferred on rural district councils constituted under the Local Government Act, 1894, having the powers of a rural sanitary authority conferred by section 157 of the Public Health Act, 1875. I cannot accept that view, and for the reasons I have given I think the appeal must be allowed.

DARLING, J., concurred.

*Case accordingly remitted to justices with a direction to convict.*

Solicitors for the appellants, *Lewis & Holman*, Lewes.

Solicitors for the respondents, *Verrall & Borlase*, Brighton.

---

Q. B. Div. (Bigham, J.) — July 5, 7, 1899.

ANGLO-ARGENTINE LIVE STOCK AND PRODUCE AGENCY v. TEMPERLEY STEAM SHIPPING CO. (a.)

*Ship—General average—Depreciation in cargo—Maintenance of cattlemen—Fodder for cattle.*

*The plaintiffs shipped in the defendants' steamship a cargo of live cattle for carriage from Buenos Ayres to the United Kingdom under a charter-party, which provided that average (if any) should be adjusted according to the York-Antwerp Rules; and that the vessel should on no account call at Brazilian or Continental ports before landing her live stock. The reason of this proviso was that by the law of the United Kingdom live cattle could not be landed in the United Kingdom if the ship carrying them had touched at the ports specified. In the course of the voyage the vessel sprang a leak, and it became necessary for the safety of all concerned to put into Bahia, a Brazilian port, for repairs. Consequently the cattle could not be landed in the United Kingdom, and were sold in Antwerp, realizing less than they would have done if they had been sold in the United Kingdom.*

*Held, that the loss sustained by the owners of the cattle was the subject of general average contribution.*

*During the execution of the repairs to the vessel at*

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

*Bahia the owners of the cattle incurred expense in the maintenance of the cattlemen in charge of the cattle on the ship and in the supply of fodder and water to the cattle.*

*Held, that these expenses were not recoverable in general average either under the York-Antwerp Rules, 1890, or at common law.*

Action tried in the Commercial Court.

The plaintiffs claimed a declaration that they were entitled to recover by way of contribution in general average from the defendants, as owners of the steamship *Edenbridge*, and from the other interests at risk the sum of £2,324 19s. 3d.

The following statement of facts was agreed upon:

(1) By a charter-party dated the 4th of February, 1898, John Williams, Son, & Sharp, on behalf of the defendants, the owners of *The Edenbridge*, chartered her to Williams & Co., of Buenos Ayres, for a voyage from the River Plate to Deptford, and a further port in the United Kingdom or Continent within certain limits. The charter-party contained the words "charterers to provide a full deck load of live stock for Deptford in accordance with Argentine Government regulations," and "average, if any, payable according to York-Antwerp Rules, 1890."

(2) By a live stock charter-party dated the 26th of March, 1898, John Williams, Son, & Sharp, on behalf of the defendants, the owners of *The Edenbridge*, agreed with the plaintiffs that she should load from the plaintiffs a full deck cargo of cattle and sheep for Deptford. This agreement contained the words "other conditions as per Williams & Co.'s live stock bill of lading, which shall be deemed to form part of this agreement," and "all other conditions as per bill of lading, which must be subservient to and governed by this contract," and "steamer on no account to call at Brazilian or Continental ports before landing her live stock."

By the Foreign Animals Order of 1896, made by the Board of Agriculture in exercise of their powers under the Diseases of Animals Acts, 1894 and 1896, foreign animals cannot be landed alive in the United Kingdom if the steamer conveying them has touched at Brazilian or Continental ports on her voyage.

(3) The plaintiffs loaded on board *The Edenbridge* 201 bullocks and 862 sheep at Buenos Ayres, and the captain of *The Edenbridge* signed a bill of lading for such live stock dated the 15th of April, 1898. This bill of lading was in the form of Williams & Co.'s live stock bill of lading, and contained the words, "average, if any, is to be adjusted according to the York-Antwerp Rules of 1890," and "neither the steamer nor her cargo, nor the owners thereof, are to be liable under any circumstances for contribution in average for jettison of animals."

(4) On the 15th of April 1898, at 1 p.m. the vessel finished loading at Beunos Ayres and proceeded through the docks. In passing through the junction between Nos. 2 and 3 docks, the vessel's head fell off slightly to starboard, and her port bow bumped against the dock wall. The tanks and wells were immediately sounded, but the vessel was found to be making no water, and proceeded down the channel. On the 16th of April a rivet blew out of the port boiler, rendering the boiler useless, and after consultation with the officers, the master, for the safety of all concerned, determined to put into Montevideo for repairs, and proceeded under one boiler, and arrived at 2.30 p.m. On the 18th of April, the necessary repairs having been effected, the vessel left Montevideo. On the 20th of April the weather increased in violence, blowing a gale, and on the 26th of April the carpenters sounding the well of No. 1 hold at 6 a.m., thirteen feet of water were found in the hold. The pumps were immediately set to work, and these were able to keep the water down. As it was impossible to ascertain at sea the exact position or the extent of the leak or to repair it when ascertained, it being obviously below the water-line, the captain determined to put into Bahia, where she arrived at 4.30 a.m. on the 27th of April.

(5) At Bahia expenses were incurred for extra fodder, water, and otherwise in connection with the live stock while the vessel was in port. Owing to the vessel having put into Bahia, a Brazilian port, the animals, by reason of the order aforesaid, could not be landed alive in the United Kingdom. It was therefore arranged, and was the best course to take in the interests of all concerned, that the vessel should proceed direct to Antwerp and deliver them at that port, and a contract dated the 9th of May, 1898, was entered into between the defendants, the owners of *The Edenbridge*, and Pritchard, Moore, & Cruit, to whom at that time the bill of lading had been indorsed, for the carriage of the live stock to Antwerp. The contract contained the words "other conditions to be as per live stock bill of lading, which is to be governed by this contract," the animals to be delivered at Antwerp to the holders of the bill of lading of *The Edenbridge* from Buenos Ayres to Deptford, the said bill of lading to be indorsed by them as follows: "Received the within animals at Antwerp instead of at Deptford in full satisfaction of the shipowners' obligations under the bill of lading." The vessel left Bahia on the 12th of May, 1898, and arrived at Antwerp on the 7th of June, and the bill of lading was indorsed as above by Pritchard, Moore, & Cruit on delivery of the live stock there. The live stock did in fact realize at Antwerp lower prices than they would have realized if they had been landed alive in the London market.

(6) It is in dispute whether to any, and if so to what, extent outlay in connection with the live stock at Montevideo and Bahia and loss on realization at Antwerp are to be made good in general average, and the following figures taken from the average statement show the items and amounts so disputed. (The case proceeded to give figures and contained provisions for adjusting the same).

(8) The above-mentioned charter-parties and bill of lading form part of this case, and reference may be made, if necessary, saving all just exceptions, to the adjustment of Messrs. Manley Hopkins, Son, & Cookes, dated the 10th of November, 1898, and to the abstract thereof bearing the same date. The court is to be at liberty to draw any necessary inferences of fact.

York-Antwerp Rules, 1890:

Rule X (*c*).—Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of re-loading and stowing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted, but when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average.

Rule XI.—When a ship shall have entered or been detained in any port or place under the circumstances or for the purposes of repairs mentioned in Rule X, the wages payable to the master, officers, and crew, together with the cost of maintenance of the same during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage shall be admitted as general average; but when the ship is condemned or does not proceed on her original voyage the wages

and maintenance of the master, officers, and crew incurred after the date of the ship's condemnation or of the abandonment of the voyage shall not be admitted as general average.

*Carver, Q.C.*, and *Scrutton*, for the plaintiffs.

*Joseph Walton, Q.C.*, and *J. A. Hamilton*, for the defendants.

The following cases were cited: *Birkley* v. *Presgrave*, 1 East 220; *Power* v. *Whitmore*, 4 M. & S. 141; *Wilson* v. *Bank of Victoria*, 15 W. R. 693, L. R. 2 Q. B. 203; *The Pomeranian*, [1895] P. 349, 44 W. R. Dig. 81; *Atwood* v. *Sellar*, 28 W. R. 604, 5 Q. B. D. 286; *Svendsen* v. *Wallace*, 34 W. R. 369, 10 App. Cas. 404; *The Notting Hill*, 32 W. R. 764, 9 P. D. 105.

*Cur. adv. vult.*

July 7.—BIGHAM, J., read the following judgment: Shortly stated the facts of this case are as follows: The plaintiffs in April, 1898, shipped on board the defendants' steamer *Edenbridge* at Buenos Ayres a deck cargo of cattle and sheep for carriage to Deptford. The contract of carriage stipulated (1) that the steamer should on no account call at any Brazilian or Continental ports before landing her live stock; and (2) that average, if any, should be adjusted according to the York-Antwerp Rules. The reason for the insertion of the first of these stipulations was that by an order made under the Diseases of Animals Acts, 1894 and 1896, foreign animals cannot be landed in the United Kingdom if the steamer conveying them has touched at Brazilian or Continental ports on her voyage. The loading of the vessel finished on the 15th of April, and on that day she left Buenos Ayres. On the 20th of April it was discovered that the vessel was making water from a leak below the water-line, and for the safety of all concerned the captain put into Bahia, arriving there on the 27th of April. The putting into Bahia was a general average act. Bahia being a Brazilian port, the ultimate landing of the cattle at Deptford was by this general average act rendered impossible, and the plaintiffs having thus lost their English market acted for the best by making arrangements for the carriage of their cattle to Antwerp. The cattle were accordingly carried to Antwerp, where they sold at a much less price than they would have realized if they had been carried to and delivered at Deptford. The repairs to the vessel at Bahia were done between the 27th of April and the 12th of May. On the 12th of May she sailed for Antwerp and arrived there on the 7th of June. The plaintiffs incurred a large loss by reason of their cattle having been rendered incapable of being landed at Deptford. They were also put to the expense of maintaining their cattlemen and of providing fodder and water for the cattle while at Bahia. The questions are whether any, and if so which, of these losses form the subject of general average contribution. The facts will be found set out more fully in a joint statement which was produced at the hearing of the arguments.

As to the damage sustained by putting into Bahia, I think it is recoverable in general average. It is the direct and immediate consequence of the general average act. The moment the vessel touched the Brazilian port the plaintiffs' property was *ipso facto* rendered of less value than it was before, because by that act the plaintiffs were deprived of one of the means, and that the best, of realizing their property. It was said by the defendants that a claim such as this was not recoverable in general average, because the shipowner and the other cargo-owners could not, at the time the voyage began, have contemplated such a claim arising; and the captain was called before me to say that, though he knew it was of importance to the plaintiffs that he should not touch at a Brazilian port, he did not know what the precise consequences of touching might be. If it be material to inquire what the captain knew or thought, I am satisfied that he knew well enough that the effect of putting into Bahia would be to render the discharge of the cattle at Deptford impossible, and that this would cause serious loss to the plaintiffs. As to the other cargo-owners, I daresay it is the fact that many of them were unaware even that cattle were being carried, and therefore unaware that they were running the risk of having to contribute to such a loss as that which they are now asked to make good. But it would be a dangerous thing to make the liability to contribute depend upon what each cargo-owner may be supposed to have contemplated at the beginning of the voyage with reference to the character or incidents of the cargo of the other cargo-owners. The captain, when he determines on the general average act, is the agent of all parties interested—the occasion makes him their agent; and if in doing the act he causes direct injury to the property of any one of them, it must be taken that the others there and then promise to contribute to make it good. If one ought to consider what was in the contemplation of anyone, it ought to be what was in the contemplation of the master at the time he determined upon the sacrifice. Mr. Lowndes in his work on General Average (4th ed), p. 36, says: "We have to determine *quod pro omnibus datum est*, and since giving must always imply an intention to give, what we have here to ascertain must be what loss at once has in fact occurred, and likewise must be regarded as the natural and reasonable result of the act of sacrifice? or, in other words, what the shipmaster would naturally or might reasonably have intended to give for all when he resolved upon the act? If, then, upon the act of sacrifice any loss ensues which the master did not in fact bring before his mind at the time of making the sacrifice, it would have to be considered whether it were such a loss as he naturally might or reasonably ought to have taken account of." Ulrich, in his Grosse-Haverei, p. 5, says: "General average comprises not only the damage purposely done to ship and cargo, but also (1) all damage or expense which was to be foreseen as the natural (immediate) consequence of the first sacrifice, since this unmistakably forms part of that which was given for the common safety; (2) all damage or expense which, though not to be foreseen, stands to the sacrifice in the relation of effect to cause, or in other words was its necessary consequence. Not so, however, those losses or expenses which, though they would not have occurred but for the sacrifice, yet would not have occurred but for some subsequent accident." These two passages seem to me to express accurately the principles upon which the damages to be made good in general average are to be ascertained; and applying those principles to the present case, I think that as, when the master of *The Edenbridge* resolved upon the average act, he knew, or ought to have known, that he was sacrificing the advantages which the plaintiffs then possessed by reason of the ship not having touched a Brazilian port, he must be taken to have intended that the value of those advantages should be made good in general average; and the master's intention is the intention of the parties interested whose agent he is. I am further of opinion that the damage in question is the direct consequence of the general average act.

Then it was said that this was like a claim for damages for wages of crew and detention of ship while in a port of refuge, and it was pointed out that such damages are never recoverable in general average when (as

here) the vessel puts into port to repair damage which is not itself caused by a general average act: *Atwood* v. *Sellar*. But there is a distinction between such a case and the one in hand. In the case supposed the shipowner has contracted with all the other co-adventurers to keep his vessel tight, staunch, and strong to the end of the voyage, and if by storm or by any other similar misfortunes (not voluntary) she is damaged, and then for the benefit of all concerned the master has to seek a port of refuge, he must when he gets there repair the damage and so perform his contract; and he must do it at his own expense, part of which will consist of the wages of his crew during the necessary delay, and the damages arising from the detention of the ship. In the case before the court the plaintiffs were under no contractual obligation to bear the loss which they now seek to recover.

It was further contended that the loss was like the case of loss of market for which damages could not be recovered: *The Notting Hill*. But it is not like such a case. Damages resulting from loss of market arise by reason of fluctuations in price which happen not in consequence of the act complained of, but by reason of events which are independent of the act. Here, the instant the ship touched Bahia, and by that fact of itself, the goods became of much less value than that which they otherwise would have had. The goods did not arrive too late for the English market, but by the average act they were prevented from ever arriving at all. For these reasons I am of opinion that the plaintiffs are entitled to succeed in respect of the main part of their claim.

Then as to the keep of the cattlemen and the cost of the fodder and water. The cattlemen were the servants of the plaintiffs, the cargo-owners, and were paid by them. The defendants, the shipowners, gave them a free passage on the vessel, but otherwise, they gave them nothing. Their duty was to attend to the wants of the cattle; they had nothing to do with the navigation of the ship. Mr. Carver contended that Rule XL of the York-Antwerp Rules gave the plaintiffs the right to have the cost of maintaining the men during the ship's detention at Bahia made good in general average. The rule is as follows: [His lordship read the rule.] Mr. Carver said that inasmuch as the cattlemen worked on the ship they ought to be regarded as part of the "crew." In my opinion they were not part of the crew at all; they were not under the command of the master; they were not in the services of the shipowners; they did not sign the ship's articles; nor were they in any way engaged in the navigation of the vessel. As to the cost of fodder and water for the cattle during the same period, it was said that it was recoverable under Rule X (c) which is as follows: [His lordship read the rule.] It was said that the cost of fodder and water ought to be covered by the words "all storage charges on such cargo." But the cattle were never discharged at all at Bahia, so that in my opinion the rule does not apply; and even if they had been discharged I should have had great difficulty in saying that the cost of fodder and water could be properly called storage charges. Storage charges comprise the cost of putting into store and the rent of the place hired. They do not include expenditure on the goods themselves.

But it was said that, though these two claims may not be recoverable under the York-Antwerp Rules, they are nevertheless recoverable at common law. I am, however, of opinion that they are not. Everyone concerned in the adventure suffers damage by the delay at the port of refuge. Each cargo-owner is delayed in getting payment of his freight, and the shipowner is deprived of the use of his ship. Yet none of these cases afford the foundation of any claim in general average according to our common law. Perhaps it is desirable that they should; and when the York-Antwerp Rules are by contract made applicable, some of them do form the subject of contribution. But the common law is clear, and it will be found laid down in the cases collected by Mr. Lowndes and referred to in section 57 of his work.

The loss which each owner sustains may be out of proportion to the loss which the others have to bear. There may be accidental circumstances making the loss in one case more serious proportionally than it is in others. But this fact gives rise to no claim. I see no ground for distinguishing the present case from those to which I have referred. The delay threw upon the plaintiffs the burden of keeping their cargo in good condition during fifteen days longer than they would otherwise have had to do, and the burden involved them in the expense of maintaining their cattlemen and supplying the cattle with fodder and water. These damages are exactly of the same character as those suffered in the cases I have instanced, and therefore are, in my opinion, equally irrevocable. If Mr. Carver could have persuaded me that they came within the meaning of the York-Antwerp Rules he would have succeeded on this part of the claim; but he has failed to do that, and I am satisfied that the common law on which he fell back would not support him. Therefore I direct that the charges for the maintenance of the cattlemen and for the fodder and water should not be treated as subjects of general average.

*Judgment accordingly.*

Solicitors for the plaintiffs, *Parker, Garrett, & Holman.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

---

## Court of Appeal.

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — Nov. 7, 9.

*In re* CLEMENT ET CIE.'S TRADE-MARK. (*a.*)

*Trade-mark — Registration — "St. Raphael" — Geographical name—Descriptive name—Fancy word—Patents, Designs, and Trade-Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *ss.* 64 (1) (c) (2), 74 (a).

*The company had registered under the Patents, Designs, and Trade-Marks Act,* 1883, *as their trade-mark a label upon which the words "St. Raphael" appeared several times. On the application by a rival company to have this mark removed from the register unless a disclaimer of the said words was entered,*

*Held, that the words, being contained in a distinctive label, registered as a whole under the Act of* 1883, *need not be disclaimed under section* 74, *inasmuch as they formed a part of the label and were not additions to it.*

*Decision of* Kekewich, J. (47 *W. R.* 407), *affirmed.*

This was an appeal from a decision of Kekewich, J., reported in 47 W. R. 407, where the facts are set out at length. Shortly the point was this: The applicants, the proprietors of a medicinal wine called "St. Raphael—Quinquina," desired to register a mark bearing the name of their article variously printed; the comptroller refused it, as the respon-

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

dents, since May in 1888, had on the register in the same class a mark associated with and containing the name of their natural wine, known as "Vin de St. Raphael," or "St. Raphael's Wine." The evidence was conflicting as to the possible connection of the respondents' wine with any place of the name "St. Raphael." The applicants had asked for the rectification of the register by the removal of the respondents' trade-mark, or, alternatively, by adding thereto a disclaimer as to the words "St. Raphael," the matter being entirely under the Act of 1883. Kekewich, J., refused the summons of the applicants with costs.

The applicants appealed.

*R. Nevill, Q.C.*, and *T. R. Warrington, Q.C.*, (*G. F. Hart* with them), for the appellants. The word "St. Raphael" is not a fancy word, but a geographical name or the name of a personage: *In re Van Duzer's Trade-Mark*, 35 W. R. 294, 34 Ch. D. 623 ("Melrose"). Under section 74 of the 1883 Act, the word is *primâ facie* distinctive, being an addition; and therefore, not being a common word or a direction for use or the like, it must be disclaimed: *Burland* v. *Broxburn Oil Co.*, 38 W. R. 89, 42 Ch. D. 274 ("Washerine"); *Thompson* v. *Miller*, 13 Pat. Cas. Rep. 35 ("Roadster"). If the respondent's mark is distinctive without reference to the words "St. Raphael," then it is good; if not, either it is bad, or those words must be disclaimed.

*L. B. Sebastian*, for the respondents.—It is not a question of a "fancy word" at all. What the respondents claim to have protected is their label as a whole, being in the two parts as originally entered on the register; without the words in question it would not be the label as used; and it is a distinctive label, not in the sense of being an invented object, but as being the thing which designates their goods. Unless the words are held to be an addition, *cadit quaestio*. The kind of words that can be called an addition are, "This label is issued only by, &c." The respondents rely on the law as laid down in *In re Smokeless Powder Co.'s Trade-Mark*, 40 W. R. 507, [1892] 1 Ch. 596, in which case are cited *In re Apollinaris Co.*, [1891] 2 Ch. 186, 8 Pat. Cas. Rep. 137, 39 W. R. Dig. 237; and *Pinto* v. *Badman*, 8 Pat. Cas. Rep. 181.

LINDLEY, M.R.—This case, like all the other trade-mark cases, is important to the parties, and extremely difficult for the court. The difficulty in construing Acts of Parliament is one which we have to grapple with every day, but this Act of Parliament of 1883 has given, and is likely to give, rise to a great deal of difference of opinion. But after all, now that we understand the case, the conclusion at which we have arrived (though I am speaking for myself only at present) is that the decision of the learned judge is right, and that Mr. Sebastian has brushed away a good deal of dust which was raised by the ingenious argument of the appellants, by pointing out that the respondents are not claiming as the registered owners of the words "St. Raphael," or of a fancy name, or of anything else except the label which they have registered. The label which they have registered is a label which they are entitled to register under section 64; and as to the words "St. Raphael" I think Mr. Sebastian is quite right, and the learned judge was quite right, in treating it not as an addition to the mark. It is part of their label, it is a part of the thing registered, and there is no reason, therefore, for calling upon the person who registered to disclaim it under section 74. That section applies to things which are additions to and not parts of a registered mark or label. Here I cannot hesitate to say in my opinion this evidently is part of the mark, and not an addition to it. I am not going to lay down any general principle for distinguishing between what are parts of the mark and what are additions to it. I can easily see that there may be cases in which it is extremely difficult to say which is which, but here, to my mind, it is well on the obvious side that this is part of the mark. That is an answer to the case, and the appeal must be dismissed. As to whether this could be regarded as a fancy word, I will say nothing. The evidence is not altogether satisfactory, but there are difficulties in either view of the case, and I will say nothing at all about it. It is sufficient for us to say that the decision appealed from was right, and the appeal must be dismissed, and dismissed with costs.

JEUNE, P.—I am of the same opinion.

ROMER, L.J.—I agree. The upper label registered by the respondents was, in my opinion, a perfect label in itself, and the words upon it are not in addition to that label, but form part of the label. It appears to me that the lower label was a true addition in the sense in which the words are used in section 64—that is to say, were words added to the label; but section 64 permits that to be done, for it says that there may be added to any one or more of the particulars pointed out in that section "any letters, words, or figures, or combination of letters, words, or figures, or of any of them." That being so, the registration of both labels, if I may refer to them as two separate labels for the moment, was a right registration. And then under section 74 no disclaimer of the lower label is required, inasmuch as it was not *primâ facie* distinctive, so that it appears to me that the label as registered was rightly registered as a whole, the two labels together, without any disclaimer as to the lower portion. I would only desire to say this, that this judgment ought in no way, I think, give rise to any idea that it would sanction the registration of words which in themselves would not constitute a proper trade-mark merely because some flourishes were colourably put round them to try and make out a distinct label a compound label, when, in fact, what was really sought to be registered, and intended to be registered was the words alone.

*Appeal dismissed.*

Solicitors, *Chappel, Griffith, & Broadbridge; Frere, Cholmeley, & Co.*

---

From Q. B. Div.
(Lord Russell of Killowen, C.J., and A. L. Smith and Vaughan Williams, L.JJ.) — Oct. 31.

DAVENTRY DISTRICT COUNCIL *v.* PARKER. (*a.*)

*Local government — Highway — Liability to repair* ratione tenuræ*—Recovery of expenses incurred by district council in effecting repairs—Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 25, *sub-section* 2.

*Proceedings under section* 25, *sub-section* 2, *of the Local Government Act*, 1894, *to enforce liability to repair a highway* ratione tenuræ *must be taken against the occupier of the land charged with the repair, and not against the owner.*

Cuckfield Rural District Council *v.* Goring, 46 *W. R.* 541, [1898] 1 *Q. B.* 865, *affirmed.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Appeal from a judgment of a Divisional Court (Wills and Bruce, JJ.) on the argument on a point of law raised in an action.

The action was brought by the District Council of Daventry, under section 25, sub-section 2, of the Local Government Act, 1894, to recover from the defendant £136 17s. 6d., the amount of costs incurred by the plaintiffs in repairing two roads which passed through a farm, of which the defendant was the owner, but not the occupier.

Section 25, sub-section 2, of the Local Government Act is as follows: "Where a highway repairable *ratione tenuræ* appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same fails when requested so to do by the district council to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing."

The point was taken on behalf of the defendant that "the person liable to repair the highway" was the occupier of the land charged with the repair, and not the owner.

The point was ordered to be argued first.

The Divisional Court, on the authority of the case of *Cuckfield Rural District Council* v. *Goring*, 46 W. R. 541, [1898] 1 Q. B. 865, decided the point in favour of the defendant.

The plaintiffs appealed.

*R. M. Bray, Q.C.*, and *Morten*, for the plaintiffs.—This is in effect an appeal from the judgment in *Cuckfield Rural District Council* v. *Goring*. Formerly the liability to repair a highway *ratione tenuræ* could only be enforced by indictment. In *Reg.* v. *Barker*, 25 Q. B. D. 213, 38 W. R. Dig. 85; it was held that the only person indictable for non-repair of a highway repairable *ratione tenuræ* was the occupier of the lands charged with the repair, and that an owner who was not in occupation was not indictable. This decision was based upon a passage in Rolle's Abridgment, Chim'n Common, B. (2), which, however, probably refers only to liability to repair *ratione clausuræ*. In *Rex* v. *Sutton*, 3 A. & E. 597, the question was argued whether a person who was owner, but not occupier, of lands charged with the repair of a bridge, was indictable for non-repair of the bridge; but it was not necessary to decide the question. In *Reg.* v. *Ramsden*, E. B. & E. 949, 6 W. R. C. L. Dig. 48, it was held that, in the case of liability to repair *ratione clausuræ*, only the occupier of the lands inclosed could be indicted, and not the owner as owner. That case does not cover liability to repair *ratione tenuræ*. The Local Government Act, 1894, by section 25, sub-section 2, has created a new method of enforcing liability to repair *ratione tenuræ*, and the question now is, not who is liable to be indicted, but who is liable to repair. The case of *Baker* v. *Greenhill*, 3 Q. B. 148, shows that, when the only remedy was by indictment, the occupier, who had been indicted, had a right to be reimbursed by the owner for any repairs which he had been obliged to do. Therefore the person ultimately liable was always the owner. According to the true construction of the section "the person liable to repair the highway" is the owner.

*H. W. Rowsell* (*Macmorran, Q.C.*, and *J. P. Grain* with him), for the defendant, cited Viner's Abridgment, vol. 4, p. 507, and referred to section 34 of the Highway Act, 1862.

Lord RUSSELL OF KILLOWEN, C.J.—The point raised in this case is a narrow one, and I am disposed to deal with it on the construction of the statute, and I will not embarrass myself with a consideration of the cases which have been cited. It seems clear that before the passing of the Highway Act, 1862, the uniform method of enforcing liability to repair a highway whether *ratione tenuræ* or *ratione clausuræ* was by indictment against the occupier only. No case has been found of an owner being indicted for non-repair. I think that section 34 of the Highway Act, 1862, was intended only to alter the procedure for enforcing the existing liability to repair, and not to shift the *onus* of the liability. Then came section 25, sub-section 2, of the Local Government Act, 1894. [His Lordship read the section and proceeded] Can it be said that the landlord was the person liable to repair? It is pointed out that, where an occupier was indicted, the owner was liable to indemnify him. But the liability to indemnify was not the same thing as a liability to repair. In my opinion the Legislature have merely altered the procedure, and the occupier still remains the person liable to repair.

A. L. SMITH, L.J.—I am of the same opinion. I think the case of *Cuckfield Rural District Council* v. *Goring* was rightly decided.

VAUGHAN WILLIAMS, L.J., concurred.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Kingsford, Dorman, & Co.*, for *W. F. & W. Willoughby*, Daventry.

Solicitor for the defendant, *A. J. Harman*, for *H. F. Bennett*, Banbury.

---

## High Court of Justice.

Chan. Div. Kekewich, J. — Nov. 1, 2.

ATTORNEY-GENERAL v. HANWELL URBAN DISTRICT COUNCIL. (a.)

*Local government — Land — Compulsory purchase for sewage—Use for hospital*—Ultra vires—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 175.

*The Local Government Board has no power under section* 175 *of the Public Health Act*, 1875, *to direct that land acquired by a local authority under statutory provisions for a specified object shall be retained by the authority for purposes permanently inconsistent with that object.*

By a provisional order of the Local Government Board dated the 30th of April, 1881, made under the provisions of the Public Health Act, 1875—and duly confirmed by Act of Parliament—the sanitary authority for the Rural Sanitary District of the Brentford Union was empowered to put in force the powers of the Lands Clauses Consolidation Acts, 1845, 1868, and 1869, with respect to the taking of lands otherwise than by agreement, and to take certain land in the parish of Hanwell in the district of the Brentford Union belonging to the Earl of Jersey "for the disposal of the sewage of the parish of Hanwell in their district." Accordingly about twelve acres of the lands were conveyed to the sanitary authority on the 28th of December, 1883. The Urban District Council of Hanwell, the successors in title of the sanitary authority of the Brentford Union, being desirous of erecting a hospital on a part of the lands, applied to the Local Government Board under section 175 of the Public Health Act, 1875, and on the 3rd of April, 1897, obtained from them an order directing that

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

about two acres of the lands so acquired "for purpose of sewage disposal," but which were "not required for such purposes," should be retained by the council as a site for the erection of a hospital for infectious diseases other than small-pox.

Section 175 of the Public Health Act, 1875, provides, *inter alia*: "Any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold at the best price, &c."; and section 295 provides: "All orders made by the Local Government Board in pursuance of this Act shall be binding and conclusive in respect of the matters to which they refer. . . ."

This was an action by the Attorney-General at the relation of the Earl of Jersey. and the earl, against the Urban District Council of Hanwell, in which the plaintiffs claimed an injunction to restrain the defendants from erecting the hospital on the land or from using the same as the site of any such hospital, on the ground that their so doing would be a nuisance or injury to the plaintiff or his tenants or his adjacent land. The defendants denied that the proposed hospital would be a nuisance or injury, and relied on the order of the 3rd of April, 1897, of the Local Government Board.

*Renshaw, Q.C.*, and *Howard Wright*, for the plaintiffs.—Land compulsorily purchased for a specified purpose under statutory powers cannot be applied to different purposes nor be sold as superfluous land. The order of the 3rd of April, 1897, is *ultra vires*: Glen on the Public Health Acts (11th ed.), p. 390; *Attorney-General* v. *Corporation of Southampton*, 1 Giff. 363, 8 W. R. Ch. Dig. 2; *Attorney-General* v. *Corporation of Sunderland*, 24 W. R. 991, 2 Ch. D. 634, W. N. (1873), pp. 174 and 221; *Attorney-General* v. *Teddington Urban District Council*, 46 W. R. 88, [1898] 1 Ch. 66; Public Health Act, 1875, ss. 175 and 131. The plaintiffs have a right to compensation if their land is injured: *Cowper Essex* v. *Acton Local Board*, 38 W. R. 209, 14 App. Cas. 153.

*Warrington, Q.C.*, and *F. Stallard*, for the defendants.—Land acquired for a specified purpose need not be used only for that purpose. Superfluous land not wanted may be sold. The part of the land in question is unsuitable for sewage purposes on account of its elevation. The Local Government Board had power to make this order under section 175 of the Public Health Act, 1875. The order was obtained to avoid selling and then repurchasing under section 131 of the Act and section 11 of the Isolation Hospitals Act, 1893. The order of the Local Government Board is binding under section 295 of the Public Health Act, 1875. The plaintiffs cannot interfere with the erection of the hospital if the defendants are justified by the Acts, although they may get compensation if they are injured: *Attorney-General* v. *Manchester Corporation*, 41 W. R. 459, [1893] 2 Ch. 87.

KEKEWICH, J.—The question falling for decision in this case is an exceedingly simple one, and one, in my judgment, not admitting of reasonable doubt. The defendants, the Urban District Council of Hanwell, obtained powers by provisional orders granted under the authority of the Public Health Act of 1875 to purchase lands of the Earl of Jersey for sewage purposes, and they are proposing to use some parts of the lands so acquired for purposes which are not sewage purposes.

The land which it is proposed to devote to the hospital is not land which, according to present sewage science, can be devoted conveniently to the disposal of sewage. It lies higher than the other land and cannot be used for sewage purposes at present. It may be confessed by the defendants, and it is confessed, that it was a mistake to acquire that land for sewage purposes, though, of course, it was honestly acquired for that purpose in the first instance. I put that altogether aside. The principle on which one approaches a case of this kind is, that no public body, whether simply entrusted with powers for the benefit of the public, or, as a railway company, entrusted with powers primarily for the benefit of the public, can properly acquire land for the purposes sanctioned and then devote that land to purposes which are not sanctioned. Mr. Warrington suggested that in some of the cases there had been a breach of trust, but I am not sure that that may not introduce some confusion. The principle is that which I have mentioned, that the public body is authorized to buy land for the particular purpose. So far as it is not wanted for that purpose it is land which in one sense they ought not to hold. Whether they hold it under the Lands Clauses Consolidation Act as superfluous land or whether they hold it under the Public Health Act with a direction to sell, is immaterial—it is not theirs. They have not got the fee simple freed from all charges, incumbrances, and limitations. They hold it only for certain purposes. The question, therefore, resolves itself into this, Can this particular public body be said to hold this particular land for the purpose of applying it as a site of a hospital? If they have not that power — if that is not within their ownership, the result is that they are proposing to use the property for purposes for which they are not authorized to use it, and on application by proper persons they must be restrained. The question as put by the defendants really depends on section 175 of the Public Health Act. They acquired the land originally with perfect propriety. They got a provisional order and they acquired the land under the Public Health Act, 1875, for sewage purposes. Now, the Act by section 175 says any lands acquired by a local authority in pursuance of any powers in this Act contained—that is to say, such lands as these—and not required for the purposes for which they were acquired—on that Mr. Warrington says that does not mean not required at any particular moment, but which, by some means or other, have been ascertained will never be, cannot possibly be required—for the particular purpose. To that I entirely assent. It is not a question of whether some one is of opinion that they cannot be required now or whether they will be required in time to come, but in order to make the section apply you must ascertain—a very difficult thing to do—that the land absolutely is not required for the purpose for which it has been acquired. Unless you arrive at that, you cannot apply the section at all. What is to happen then? It has to be sold at the best price that can be got from its sale, and directions are given as to the disposal of the proceeds of sale. I am not concerned as to whether this land ought to be sold now or not. That is not part of my inquiry now. The words of section 175 are "shall unless the Local Government Board otherwise direct be sold." If the Local Government Board has directed that it shall not be sold, then for the present purpose no further inquiry can be made; it will not be sold. But then Mr. Warrington goes on to argue that means and must mean that the Local Government Board may not merely direct the authority not to sell, but may at the same time direct the local authority to apply the land for other purposes. That seems introducing words which certainly are not in the statute, and for which, as far as I can see, there is no necessary implication. All that the Local Government Board has to say is, that they shall not be sold, leaving

everything else open. Some further inquiry may be necessary, some further provisional order may be necessary, when the land may be applied to other purposes; but I see no reason for concluding that because the Local Government Board have a discretion to say that land not required, however conclusively it may have been ascertained that it is not required, shall not be sold, therefore it is empowered to say that it shall be applied to purposes other than those for which the land was originally required.

But then one is met by this order of the Local Government Board of the 3rd of April, 1897, and it is strange that though it purports to be made under the provisions of section 175 of the Public Health Act the draughtsman of the order did not see fit to follow the words of the Act. He does not say that the land "shall not be sold," he does not even say that the land shall be retained, which might be considered to be a verbal equivalent to the words "shall not be sold"; but the order says "shall be retained by the said council as a site for the erection of a hospital for infectious diseases other than small-pox."

If I am right in my construction of the Act, there is not the slightest jurisdiction on the part of the Local Government Board to make any such order as that. That is giving the local authority a new power—a power entirely alien to that for which the land was acquired, and as I say on my construction of the Act entirely unauthorized. It is attempted to answer that by section 295, that "all orders made by the Local Government Board in pursuance of this Act shall be binding and conclusive in respect of the matters to which they refer." Yes, but that will not prevent the court from considering the question of jurisdiction on the part of the Local Government Board. It cannot be that an order by the Local Government Board made without jurisdiction shall be held conclusive in a court of justice. It must be the duty of the court to inquire whether the order could properly be made. If it could properly be made, then under section 295 it would be held to be conclusive, though perhaps there might be some irregularities about it, and though perhaps it ought not to have been made. But those are matters into which, at any rate for the present purpose, I shall assume the court ought not to inquire.

The authorities I do not think need be examined in detail; they were cited on behalf of the plaintiffs, and have been examined on behalf of the defendants. The only one I need refer to is that one before Romer, J., which shows precisely how the matter stands, and how it is viewed by the courts. I will assume now that the land need not be sold. I am not considering whether it ought to be sold or not. Nobody is complaining that it has not been sold. I am not going into that at all; the land is now in the possession of the defendants. The courts have held in more than one case—and Romer, J., held in that case—that retaining it for particular purposes did not necessarily mean that it was to be applied immediately to those purposes, but that the local authority must not devote the land so retained, and which had been acquired for particular purposes, to any purposes permanently inconsistent with the purposes for which had been acquired. Some of the other cases—the *Sunderland case*—showed that the courts would be liberal in construing the purposes for which it had been acquired—that purposes of an ancillary character might very well be brought within the description of the primary character of the purpose, but Romer, J., held, and it seems to me to be perfectly clear, that the local authority is not, without further order, justified in devoting the land acquired for a particular purpose to purposes which are not merely alien to that original purpose, but which will permanently interfere with the devotion of the land to the original purpose. It cannot be suggested that building a hospital is not permanently inconsistent with the use of this land for sewage purposes. It would be a permanent interference with the application of the land for those purposes.

To my mind Mr. Glen in the passage cited from his work on the Public Health Acts, is perhaps a little wanting in accuracy, having regard to the decisions, in saying that land compulsorily purchased for the purposes specified in the Act cannot be used for a different purpose. I think the statement ought to be, that it cannot be used for a different purpose which would permanently interfere with its devotion to its original purpose; but substantially no doubt to my mind that proposition is sound. The result is, therefore, that this local authority is, without any order on which it can properly rest, endeavouring to use this land for purposes for which it was not originally acquired; and that, it has no authority to do.

Now, as regards the parties. The Attorney-General, of course, is a proper complainant when we come to consider whether the local authority is exceeding its powers. Of course about that there could be no question. As regards Lord Jersey, the matter requires a little more consideration. He has sold this land for special purposes. He has not sold it except for special purposes, and it seems to me there must necessarily be vested in him some residuum of interest—that is to say, what is left out of a conveyance of the fee for special purposes only. He has not conveyed it for all purposes. But quite apart from that he is the owner of the surrounding property. Under the 128th section of the Lands Clauses Consolidation Act, which is incorporated in the provisional order by means of the Public Health Act of 1875, he has certain rights of acquiring this property if eventually it is determined that it will not be required, and there is no direction to retain it given by the Local Government Board. That gives him, to my mind, a sufficient interest to maintain the action; but besides that there is no doubt it cannot be contended to the contrary that his adjoining land would become less marketable and less valuable by reason of the erection of this hospital. In that respect he has got an interest in preventing the authority from devoting the land to purposes for which he has not sold it. I think there must be an injunction to restrain the defendants from what I consider an excess of their statutory powers—that is, from using this two acres as a site for their hospital, and that they must pay the costs of the action.

Solicitors, *Freshfields & Williams; Warren S. James.*

---

Chan. Div.
Byrne, J. } Aug. 3, 8, 1899.

*In re* DIXON.
HEYNES *v.* DIXON. (*a*).

*Statute of Limitations* 3 & 4 *Will.* 4, *c.* 42), *s.* 5—*Husband and wife—Bond by husband—Life interest in bond property of wife—Interest on bond.*

*Acting within the provisions of the marriage settlement the trustees lent part of the trust funds to the husband on the security of his bond, conditioned for repayment of the sum advanced six months after date with interest at £4 per cent. The interest on the trust*

(*a*.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

*property so lent was payable to the wife for life, then to the husband for life. The wife died in* 1876, *the husband died in* 1896, *having lived together in amity during their joint lives, but the husband never having paid any interest on the bond.*

*Held, that under the circumstances the principle of* Caton *v.* Rideout, 1 *M. & G.* 399, *must be applied, and the hand to pay and to receive the interest having been the same, no payment over was necessary, and therefore the Statute of Limitations did not run, and the bond was still subsisting.*

*Interest is payable as interest and not as damages under a bond having a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, even though no express mention of interest is made in the bond.*

By a settlement dated the 7th of October, 1847, made on the marriage, which was afterwards solemnized, of Thomas Dixon with Jane Heynes, the one-fifth part of certain real estate was vested in trustees on trust to pay the income to the wife for life, with remainder to the husband for life, with remainders over. The settlement contained a power of sale and for re-investment with the consent of the husband or wife on real or personal security.

In 1852 the real estate was sold, and on the written request of the wife, Jane Dixon, the trustees lent the proceeds, amounting to £1,928 5s. 10d., to her husband, the said Thomas Dixon, on his giving to them his bond or obligation in writing. In pursuance of this, Thomas Dixon, by his bond dated the 13th of February, 1852, bound himself, his heirs, executors, and administrators, in the penal sum of £3,856 11s. 8d., the consideration of the bond being that if he, his heirs, executors, or administrators should pay to the trustees of the settlement the full sum of £1,928 5s. 10d., with interest for the same at and after the rate of £4 per cent. per annum upon the 13th of August then next ensuing without any deduction or abatement whatsoever, then the obligation should be void and of no effect, or else should remain in full force and virtue.

The wife, Jane Dixon, was by the terms of the settlement entitled to the interest of the money secured by the bond for her life. She died in May, 1876, and her husband, the said Thomas Dixon, then became entitled to such interest for his life. He died on the 1st of January, 1896, never having repaid to the trustees any part of the said sum of £1,928 5s. 10d., and never having paid any interest in respect of the bond. It appeared that Thomas and Jane Dixon had since their marriage wholly lived together in amity.

The present action was instituted by the trustees of the settlement of the 1st of October, 1847, against the defendants, who were the executors of Thomas Dixon, and they claimed that there was due to them from the estate of the said Thomas Dixon under the bond the sum of £1,928 5s. 10d., with interest at 4 per cent. from the 1st of January, 1896.

*Farwell, Q.C.*, and *Christopher James*, for the plaintiffs.—The debt is not statute-barred. The explanation of the trustees not demanding payment of interest must be that, as the husband and wife were living together she allowed her husband to receive her separate income. The hand to pay and the hand to receive were the same, and the statute does not run: *In re Hawes*, 41 W. R. 173; *Caton* v. *Rideout*, 1 Mac. & G. 599; *Mills* v. *Borthwich*, 13 W. R. 707; *Amos* v. *Smith*, 10 W. R. 759, 1 H. & C. 238.

*Levett, Q.C.*, and *W. Baker*, for the defendants.—A bond debt such as here did not strictly carry interest, and if recovered in an action it really is as damages for breach of the contract: *Cook* v. *Fowler*, L. R. 7 H. L. 27, 22 W. R. 260; *In re Roberts*. 22 W. R. 870, 14 Ch. D. 49. The debt here is statute-barred.

*Farwell, Q.C.*, in reply.

BYRNE, J.—The case of *Bonafous* v. *Rybot*, 3 Burr. 1370, was heard on argument of a rule obtained under the Act 4 & 5 Anne c. 16, s. 13, whereby it was enacted "That if at any time pending an action upon any such bond with a penalty ('such bond' meaning any bond with a condition or defeasance to make it void on payment of a lesser sum at a day or place certain) the defendant shall bring into the court where the action shall be depending all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond; the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly," and in giving judgment Lord Mansfield said: "It is surprising that after the Statute of Usury, 37 Hen. 8, which excepts obligations with condition made upon a just and true intent, the courts of law did not consider the just intent of a bond to be principal, interest, and costs secured by a penalty, and suffer the party at any time to save the forfeiture by performing the intent. It is more extraordinary that, after this was settled in a court of equity 'to be the nature of a bond' and therefore every party to a bond understood it in this sense, the courts of law did not follow equity but still continued to do injustice as of course, and put the parties to the delay and expense of setting it right elsewhere as of course." I ought to add that Lord Bramwell in *Preston* v. *Dania*, 21 W. R. 128, L. R. 8, Ex. 19, at p. 22 expresses disagreement with the observations of Lord Mansfield as to the injustice of the course formerly adopted by the courts of law, but I do not understand him to dissent from Lord Mansfield's statement of the practice of courts of equity, nor does he dissent from the construction put upon the statute of Anne as applied to common money bonds; but this case did decide that the statute of Anne does not apply to bonds for moneys payable by instalments.

Reading these cases with the cases of *Farquhar* v. *Morris*, 7 T. R. 124, and *Amos* v. *Smith*; I think that interest is payable as interest and not as damages under a bond having a condition or defeasance to make void the same upon payment of a lesser sum at a "day or place certain," even although no express mention of interest is made in the bond, and I cannot see any just reason for holding that the amount of interest recoverable is diminished by reason only of the bond being conditioned for payment of principal and interest up to or at a certain date. The bond may be so framed as to show an intent to limit interest recoverable as up to a specified date; but in my judgment it wants more than the circumstance I have referred to to show such an intent.

In the present case the trustees lawfully lent a sum of money on the personal security of his bond to the husband. That loan on bond was an investment within their power, and the trustees could have recovered interest from the husband so long as the bond was unredeemed. If they had claimed and received interest it would have been their duty to hand it over to the wife, who might or might not have handed it to the husband for their common use. For more than twenty years no interest was claimed from the husband, the wife (being a party to the direction to the trustees to lend the money) never called upon the trustees to enforce payment. She and her husband lived in amity until her death, and I think the right inference to draw under the circum-

stances is that she allowed her trustees to forbear demanding interest from her husband to avoid the absurdity of obtaining payment by the husband to the trustees, payment by the trustees to herself, and then handing it back to her husband.

It appears to me that the principle of *Caton* v. *Rideout*, applies. In *Edward* v. *Cheyne*, 13 App. Cas. 385, 36 W. R. Dig. 173, Lord Watson says (p. 390): [His lordship read the passages he referred to, and proceeded:] I do not think that Kindersley, V.C., in *Mills* v. *Borthwich*, meant to lay down any rule adverse to what I have stated as my view in reference to a bond conditioned like the present, although he did call attention to the fact that the condition was not that the husband should pay in six months certainly, but only if he should be called upon to do so. *Cook* v. *Fowler* was not the case of a bond, but the case of a warrant of attorney and defeasance, and not such a debt as before 3 & 4 Will. 4, c. 42, would have been held to carry interest, so that interest could only have been given by way of damages. The case, therefore, does not appear to be applicable to the present one.

I think that *In re Hawes*, although distinguishable from the present case on the ground that it had relation to an advance to the husband upon mortgage, is nevertheless in point when once the conclusion is arrived at that the loan upon bond was an authorized security within the terms of the trust, and was one, moreover, which the trustees could not change without the consent of husband and wife.

In *Spickernell* v. *Hotham*, 2 W. R. 638, Kay 673, the covenant was to transfer certain £4 per cent. annuities to trustees to hold upon certain trusts, and Wood, V.C., held that as the trust fund never had any existence he could not assume that a person had been paying himself the interest of a non-existing fund—that is, the trust security never came into existence.

In *Stone* v. *Stone*, 18 W. R. 225, L. R. 5 Ch. App. 74, no trust fund or security had ever come into existence, and it was held that the covenant was simply a legal obligation barred by lapse of time. These cases seem to me to be distinguishable, therefore, from the present one.

I do not think that the fact of the bond being found in the possession of the husband is sufficient evidence from which I ought to infer payment. I think that the explanation suggested in the affidavits—namely, that it came into his possession by mistake, is probably the true one.

The result is that I feel entitled to hold, and do hold, that the hand to pay and the hand to receive were, during the lifetime of the wife as well as afterwards, the same, and that consequently the bond debt is not barred.

Solicitors, *Thomas White & Sons; Fallows & Rider.*

---

Chan. Div. } Aug. 4, 1899.
Byrne, J. }

*In re* DANSON. (*a*.)

*Trustee—Felon—Removal from trusteeship—Trustee Act,* 1893 (56 & 57 *Vict. c.* 53), *s.* 25—*R. S. C., ord.* 55, *r.* 13*a*.

*The court has jurisdiction on an application by originating summons to make an order for the removal from the trust of a trustee who has been convicted of felony, but who is unwilling to retire.*

(*a*.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Adjourned summons.

This was an application by originating summons by two of the trustees of the will of the late Henry Danson for an order under section 25 of the Trustee Act, 1893, appointing a new trustee of the will in the place of one R. J. Martinez Danson, who had been convicted of felony and sentenced to one year's imprisonment. On behalf of the convict trustee the objection was taken that the court had no jurisdiction on an application by originating summons to make an order removing a trustee against his will, and it was urged that such an order could only be made in an action commenced by writ, and that the case did not come within ord. 55, r. 13*a*, which set out the applications under the Trustee Act which could be made by summons.

*Farwell, Q.C.*, and *Prior*, in support of the summons.

*Levett, Q.C.*, and *Gregson*, for R. J. Martinez Danson.

BYRNE, J., acting upon the authority of the case of *In re Betts* (see 41 SOLICITORS' JOURNAL, 209), where the Court of Appeal confirmed an order made by Romer, J., on an application by summons under section 25 for the removal of a trustee who was bankrupt, held that he had jurisdiction to make the order asked for on summons.

Solicitors, *Borradaile; H. B. Bell.*

---

Q. B. Div. } Nov. 7.
(Ridley and Darling, JJ.) }

WRIDE (*Appellant*) *v.* DYER (*Respondent*). (*a*.)

*Landlord and tenant—Yearly tenant—Notice to quit—Alternative notice—"End of current year's tenancy"—Sufficiency of notice.*

*A notice given on the 24th of March,* 1898, *to a tenant from year to year holding from the 25th of March to the 25th of March in each year, to quit "on the 24th of June,* 1898, *or at the end of your current year's tenancy," is a good notice to quit on the 25th of March,* 1899, *and determines the tenancy on that day.*

Case stated by justices of the peace for Weston-super-Mare.

On the 5th of May, 1899, an application by the respondent to recover certain premises known as No. 4, Holland-street, Weston-super-Mare, from the appellant under the Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), was heard by the justices, when the following facts were proved or admitted.

The respondent was the owner of the premises, which were held by the appellant as tenant to the respondent upon a yearly tenancy from Lady Day to Lady Day, at a rent not exceeding £20 a year. The contract of tenancy was verbal, and there was no special agreement or any custom as to the time or mode of determining the tenancy.

On the 24th of March, 1898, a notice to quit was served by the respondent upon the appellant, which notice was as follows:

"I hereby give you notice to quit and deliver up to me all that cottage, garden, and premises which you hold or rent of me, situate at and known as No. 4, Holland-street, Ashcombe, Weston-super-Mare, on the 24th day of June, 1898, or at the end of your current year's tenancy."

The appellant did not quit the premises, and, after due notice, application was made to the justices to issue their warrant as provided by the Small Tene-

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

ments Recovery Act, 1838, directing constables to enter and take possession of the premises and eject the appellant.

The appellant appeared before the justices and contended that the tenancy had not been duly determined by a legal notice to quit, and that consequently the justices had no jurisdiction under the statute to issue their warrant, and the grounds of the objection were that the notice was not a legal notice and did not operate to determine the tenancy, as the tenancy being a yearly tenancy from the 25th day of March of each year could only be determined by at least half-a-year's notice to quit at the end of a year of the tenancy; and that the notice was either a three months' notice to quit on the 24th of June, 1898, which was not the end of a year of the tenancy, or a one day's notice to quit on the 25th of March, 1898, which day was the end of the year's tenancy current on the 24th of March, 1898, when the notice was served.

It was admitted for the respondent that the notice was not a legal notice to quit on the 24th of June, 1898, but it was contended on his behalf that it was a legal notice to quit on the 25th of March, 1899, and that the yearly tenancy was determined by such notice.

The justices held that the notice was a legal notice to quit on the 25th of March, 1899, and that the yearly tenancy of the appellant was thereby determined, and they issued their warrant accordingly for ejecting the appellant.

The question of law for the opinion of the court was whether the notice to quit was a legal notice to quit on the 25th of March, 1899, and whether the yearly tenancy of the appellant was thereby determined on the 25th of March, 1899.

*Brooke Little*, for the appellant.—It is conceded that the notice was not a good notice to quit on the 24th of June, 1898, and the only question is whether it was a good notice to quit on the 25th of March, 1899. There is no ambiguity in the terms of the notice, and it must be read strictly. It is a notice given on the 24th of March, 1898, to quit at the end of the current year's tenancy—that is, on the 25th of March, 1898, which could not be a good notice. The case of *Doe* v. *Morphett*, 7 Q. B. 577, shows that the notice is not a good notice. In that case the previous case of *Doe* v. *Culliford*, 4 Dow. & Ry. 248, in which a notice of this kind was held to be a good six months' notice was commented upon, and was said to be bad law, and it may be taken as having been overruled, and is treated as overruled in Cole on Ejectment, p. 52. *Doe* v. *Morphett*, being the later case, ought to be followed, and that case shows that this is not a good notice to quit on the 25th of March, 1899.

*Layman* (*Weatherly* with him), for the respondent, was not called upon.

RIDLEY, J.—I think this appeal should be dismissed, and I should say very little about the case but for the authorities that have been cited to us. Now, the notice is in these terms: "I hereby give you notice to quit on the 24th of June, 1898, or at the end of your current year's tenancy"; and the question is whether that is a good notice to quit on the 25th of March, 1899.

I think it was a good notice to quit on the 25th of March, 1899. I think that in considering these notices it is necessary to consider the terms of each notice as the application of the principle varies in each case. No two notices are identical, and we can only extract the principle from the previous decisions. In *Doe* v. *Morphett* the earlier case of *Doe* v. *Culliford* was disapproved of and treated as bad law, and it was said that the judgment of Bayley, J., in that case was incorrect. With the greatest possible respect I think that judgment was correct, and I do not find anything in conflict with it in the later case. In *Doe* v. *Culliford* it seems to me that precisely the same principle of law was applied as is usually applicable in such cases. Abbott, C.J., there says that the rule of construction in such cases is to give such a sense to ambiguous words as will effectuate the intention of the parties; and Bayley, J., says that the rule is to make the notice sensible, not insensible. In this case I do not think that any person could have intended to give a notice to quit to expire in a few hours afterwards; and therefore we ought to say that the notice ought not to be read as applying to the current year ending on the 25th of March, 1898, but to the year ending on the 25th of March, 1899.

DARLING, J.—I am of the same opinion. It is argued that we should read these words in the notice, "at the end of your current year's tenancy," as meaning this—that "I, the landlord, give you notice to quit on to-morrow," because, if we are to construe these words strictly, the notice would be a notice to quit on the morning after the notice. What is the rule we have to apply? It was laid down in 1824 in *Doe* v. *Culliford*, and in 1836 in the case of *Doe d. Williams* v. *Smith*, 5 A. & E. 350, the case of *Doe* v. *Culliford* was cited in argument, and Lord Denman, C.J., said "I think this notice was well enough"; and Littledale, J., said that we must endeavour to give the notice a rational interpretation. Would it be giving a rational interpretation to this notice to say that it was a notice to quit on the following morning? If we wanted to give the notice an irrational interpretation that would be the one to give. It is then said that the judges in the later case of *Doe* v. *Morphett* intended to overrule what was said in *Doe* v. *Culliford*; but in *Doe d. Williams* v. *Smith*, *Doe* v. *Culliford* was cited, and not a word of disapproval of it was expressed by the court. Then, nine years later, came the case of *Doe* v. *Morphett*, which disapproved of *Doe* v. *Culliford*; but, apart from that, there is plenty of authority for us to decide that this was a good notice for the 25th of March, 1899, and, in so holding I found myself on the words of Lord Denman himself in *Doe d. Williams* v. *Smith* when he said, "I think this notice was well enough."

*Appeal dismissed.*

Solicitors for the appellant, *Darley & Cumberland*, for *Gilmore, Mawer, & Lloyd*, Bristol.

Solicitors for the respondent, *Meredith, Roberts, & Co.*, for *Baker & Co.*, Weston-super-Mare.

## Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — April 27, 29; May 1, 2, 3, 5, 6, 8; June 26, 1899.

LAGUNAS NITRATE CO. v. LAGUNAS NITRATE SYNDICATE (LIMITED). (a.)

*Company—Promoters—Directors—Sale by promoters to company—No independent board—Duties of directors—Validity of contract—Breach of trust—Misrepresentation—Voidable contract—Rescission—Change of position.*

*There is no obligation on promoters of an intended*

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*company to furnish the company with an independent board of directors, if the truth is disclosed to the persons who are induced to join the company. Consequently, if a company is avowedly formed with a board of directors who are not independent, but who are stated to be the intended vendors, or agents of the intended vendors, of property to the company, the company cannot set aside an agreement entered into by the directors for the purchase of such property simply because they are not an independent board.*

*In the absence of fraud, the right to rescind such a contract on the ground of misrepresentations contained in the prospectus of the company cannot be enforced where the property has been worked so as to materially alter the position of the parties.*

*Directors who act within their powers and honestly for the benefit of the company, and with reasonable care, discharge both their legal and equitable duties to the company. The fact that they are both promoters and directors will not necessarily be held to prove that it was impossible for them to discharge their duties to the company, at any rate in a case where there was full disclosure of their position.*

*A syndicate formed a company to buy certain property of the syndicate. The directors of the company were the directors of the syndicate, and before a prospectus was issued they entered into an agreement with the syndicate to buy the property. A prospectus was subsequently issued, which disclosed the fact that the directors were vendors, but contained misrepresentations of fact. The company bought and worked the property. Subsequently fresh directors were appointed, and they commenced an action against the syndicate for misrepresentation. The company continued to work the property after the action had commenced.*

*Held, by* Lindley, M.R., *and* Collins, L.J. (Rigby, L.J., dissentiente), *that the company were not entitled to rescission merely on the ground that the contract had been entered into without independent advice, and that the working of the property by the company had so altered the position of the parties as to deprive the company of its right to rescission on the ground of misrepresentations contained in the prospectus. The directors of the company, having acted* intra vires *and with reasonable care and honestly for the benefit of the company, were not liable to make good any loss the company might have sustained through entering into the agreement with the syndicate.*

*Decision of* Romer, J., *affirmed.*

This was an appeal from a decision of Romer, J.

The facts of the case and the view taken by the court of the evidence will appear from the judgments, and it will be sufficient to state them shortly as follow:

The defendants, the Lagunas Syndicate (Limited), was incorporated in 1889, with a capital of £110,000, to acquire by agreement with Colonel North the "Lagunas Nitrate Works," which consisted of 548 estacas of land in Chili and the buildings, plant, and machinery in and about the same, and to resell portions to companies to be formed by the syndicate. An estaca is a Spanish measure equivalent to between six and seven acres. The property was acquired for £110,000, payable as to £109,300 in fully paid-up shares of the syndicate and as to the balance in cash.

In the year 1894 the Lagunas Nitrate Co. (Limited) was promoted by the syndicate for the purpose of acquiring 200 of the 548 estacas with an oficina or factory erected thereon, otherwise called a maquina, with the plant and stock and a certain supply of water. The directors of the syndicate prepared the memorandum and articles of association of the syndicate and thereby provided that the company should carry into effect a draft agreement which they also prepared.

The company was registered under the Companies Acts on the 15th of June, 1894. The directors of the syndicate, seven in number, were the first directors of the company, and they, with two other persons, signed the memorandum. The memorandum stated that the company had been formed to acquire lands and works the property of the syndicate, and in particular to carry into effect an agreement already prepared by the syndicate.

By article 5 the directors were authorized to carry the agreement into effect, and on the 18th of June, 1894, the agreement was entered into under the seals of the company and the syndicate. The agreement provided that the company should acquire 200 estacas of the syndicate's nitrate grounds and one-third of the existing water supply of the syndicate for a price of £850,000, of which £550,000 was payable in cash and £300,000 in fully paid-up shares of the company. The company were to be bound by an agreement of the 1st of July, 1890, between the Nitrate Railways Co. (Limited) and the syndicate for the carriage of goods over the company's line for ten years, also by an agreement of the 19th of August, 1890, whereby the syndicate had appointed the firm of North & Jewell port agents of the syndicate on the west coast of South America for ten years, and by an agreement of the 21st of December, 1891, whereby the syndicate had appointed the firm of W. & J. Lockett, of Liverpool, the sole mercantile agents in England of the syndicate for ten years. If the company failed to satisfy the syndicate on or before the 24th of June, 1894, that the £600,000 for which the public were by the prospectus to be invited to subscribe had been subscribed for in cash and allotted to responsible persons, the syndicate might, by notice at any time before the 30th of September, 1894, the date fixed for completion of the contract, annul the sale. On the 18th of June, 1894, the directors of the syndicate, in their character as directors of the company, issued a prospectus substantially in the form of the draft they had already prepared. The prospectus invited subscriptions for £600,000 of the nominal share capital of the company. It stated that the nitrate grounds of the syndicate acquired by the company were "believed to contain the richest deposit of caliche" (the raw product from which nitrate was manufactured) "in the province of Tarapaca," that the officina was capable of manufacturing 300,000 quintals of nitrate of soda per month, that the syndicate had obtained and had brought in pipes into Lagunas a supply of water, and that the company would have the right of using one-third of the surplus water of the syndicate after supplying the requirements of the railway company, that the company would have the benefit of the said agreements with Messrs. North & Jewell and Messrs. W. & J. Lockett, that the syndicate was formed in 1889 to acquire and develop the Lagunas, and that it was now selling (at a profit) to the company a portion only of its property, with an oficina "in complete working order." It also stated that the directors of the company were directors of the syndicate and held a considerable portion of the shares of the syndicate. The only agreement entered into was stated to be the agreement of the 18th of June, 1894. The company's shares were duly allotted and the property comprised in the agreement was conveyed to and worked by the company. The syndicate, at the company's request, made considerable outlays in putting the oficina in complete working order, and in providing further necessary water supply, which was completed in December, 1894. Large dividends were paid by the company and the shares received by the syndicate in

part payment of the purchase-money were sold by the syndicate at a premium. In January and February, 1895, resolutions were passed for a voluntary winding up of the syndicate, and liquidators were appointed, one of whom, George Fleming, was a director both of the company and the syndicate. Towards the end of 1895 the shareholders of the company compelled three of the original directors to retire and appointed three independent directors in their places. These new directors proceeded to investigate the facts connected with the formation of the company and the sale to it of the Lagunas. On the 3rd of December, 1895, a Mr. Porlitz, another independent director, joined the board. After the death of Colonel North on the 9th of May, 1896, the voting power of the board ceased to be under the control of the syndicate directors. Ultimately on the 12th of June, 1896, the present action was commenced against the syndicate and its liquidators, the five original directors of the company and the syndicate, and the executors of the two original directors of the syndicate and the company who were dead, Colonel North and Maurice Jewell. The plaintiffs claimed (1) rescission of the agreement of the 18th of June, 1894; (2) payment by the defendants of £39,000 expended by the plaintiffs in putting the oficina into working order; (3) an indemnity by the defendants in an action brought in the Queen's Bench Division by Messrs. W. & J. Lockett to recover various sums of money alleged to be due under the agreements of the 21st of December, 1891, and the 18th of June, 1894; (4) alternatively an account of all profits made by the syndicate and the directors, and payment made to the company of the amount so due with interest; (5) damages against the syndicate and the directors, and the estates of such of them as were dead, for misrepresentation, misfeasance, breach of trust, and breach of warranty; (6) damages against the syndicate. At a meeting of the company held on the 29th of July, 1896, a resolution was passed sanctioning the continuance of the action. In August the same year the remaining syndicate directors retired. The company continued to carry on business notwithstanding the action, and in April, 1897, an *interim* dividend of 4 per cent. was declared, but on legal advice was not paid. The company did not allege fraud but based its action on misrepresentations of fact in the prospectus, the want of independent advice, and non-disclosure of Colonel North's interest in the agreement with Messrs. Lockett.

Romer, J., directed an inquiry as to loss sustained by the company by reason of the maquina not being in complete working order on the 30th of June, 1894, and of defective water supply, and dismissed the rest of the action.

The company appealed.

*Swinfen Eady, Q.C., A. T. Lawrence, Q.C., Kirby,* and *Peterson,* for the company.

*Carson, Q.C., Hon. E. C. Macnaghten, Q.C.,* and *E. Russell Clarke,* for the syndicate, and the defendants other than Colonel North's executors.

*Farwell, Q.C.,* and *O. L. Clare,* for Colonel North's executors.

*Swinfen Eady, Q.C.,* replied.

*Cur. adv. vult.*

June 26.—LINDLEY, M.R.—This appeal involves the proper application to a company peculiarly formed and to a large number of disputed facts of a few well-settled principles of law which, in their application to this case, appear to me to conflict with each other. The first principle is that in equity the promoters of a company stand in a fiduciary relation to it and to those persons whom they induce to become shareholders in it, and cannot in equity bind the company by any contract with themselves without fully and fairly disclosing to the company all material facts which the company ought to know. *The New Sombrero Phosphate Co.* v. *Erlanger,* 25 W. R. 436 and 27 *ib.* 65, 5 Ch. D. 73 and 3 App. Cas. 1218, is the leading authority in support of this general proposition. The second principle is that a company, when registered, is a corporation, capable by its directors of binding itself by a contract with them as promoters, if all material facts are disclosed. *Salomon* v. *Salomon & Co.,* 45 W. R. 193, [1897] A. C. 22, is the leading authority for this principle. The third principle is that the directors of a company, acting within their powers, and with reasonable care and honestly in the interest of the company, are not personally liable for losses which the company may suffer by reason of their mistakes or errors in judgment. *Overend, Gurney, & Co.* v. *Gibb,* L. R. 5 H. L. 480, is the leading authority on this head. A fourth principle, not confined to companies but extending to them, is, that a contract can be set aside in equity on proof that one party induced the other to enter into it by misrepresentations of material facts, although such misrepresentations may not have been fraudulent. A fifth principle is that a voidable contract cannot be rescinded or set aside after the position of the parties has been changed so that they cannot be restored to their former position. Fraud may exclude the application of this principle, but I know of no other exception. With these preliminary observations I proceed to examine the facts of this case. The Lagunas Nitrate Co. was promoted and formed by the directors of another company called the Lagunas Nitrate Syndicate, in order to buy property belonging to the syndicate. The memorandum and articles of association of the syndicate show that in promoting and forming the nitrate company the directors of the syndicate were acting within and not beyond their powers as such directors. The syndicate, therefore, as a company, may be properly described and ought to be regarded as the promoter by its directors of the nitrate company. The syndicate, therefore, is responsible for the acts and omissions of its directors in promoting and forming the nitrate company. The directors of the syndicate and the actual promoters and creators of the nitrate company were Colonel North, Messrs. Harvey, R. R. Lockett, Edmondson, Fleming, Murray, and M. Jewell. These seven persons and two others signed the memorandum and articles of association of the nitrate company. The nitrate company was registered on the 15th of June, 1894. The memorandum and articles of association require attention, for they contain statements of great importance. The memorandum states that the company has been formed to acquire land and works of the syndicate, and its engagements and liabilities with reference thereto, and particularly to complete and carry into effect (with such modifications, if any, as may be thought fit) an agreement already prepared and settled for the purchase of that property from the syndicate. Article 5 required the directors to complete and carry into effect (with such modifications, if any, as they might think fit) the agreement with the syndicate referred to in the memorandum of association. Article 57 named the seven persons above mentioned as the first directors of the nitrate company, and stated that they were all directors and the only directors of the syndicate. In addition to these three articles, it is to be observed that article 66 enabled the company by extraordinary resolution to remove any director, and articles 82 and 83 conferred upon the directors extensive powers of acting for the company in all matters of business. Before any prospectus

was issued, and before any other person in addition to the nine who had subscribed the memorandum of association had joined the company—viz., on the 18th of June, 1894—the agreement referred to in the memorandum and articles of association was executed by the syndicate and the company under their respective seals. It is important to consider the effect of this step. By sections 11 and 16 of the Companies Act, 1862, the memorandum and articles became binding on the company and the members thereof. These sections did not render the nitrate company bound to the syndicate by the agreement referred to in the memorandum and articles of the nitrate company, but those documents clearly authorized the directors to affix the seal of the nitrate company to that agreement, with or without modification, and to bind that company to the syndicate by so doing. As soon as that agreement was sealed by the two companies that which before was no agreement at all became the agreement of both of them. The decision in *Erlanger's case*, on which the appellants mainly rely, and which is one of the most valuable decisions on the duties of promoters to the companies which they bring into existence, does not warrant the conclu ion that the contract between the two companies can be treated as no contract at all, and as a piece of paper not binding the nitrate company either at law or in equity. Nor is it possible, after the decision in *Salomon's case*, to treat that contract as so opposed to the Companies Acts as to be *ultra vires* the nitrate company, or to be void upon the ground that there were not in truth two parties capable of contracting with one another. If the syndicate brought an action against the nitrate company for a breach of the agreement, the nitrate company could not successfully defend itself by a plea of *non est factum*, or by a mere denial of the existence of any agreement. If the agreement can be set aside, it must be upon some other ground. The first ground relied upon is this—the formation of the nitrate company itself without an independent body of directors. Notwithstanding all that was said in *Erlanger's case* about the duty of the promoters of a company to furnish it with an independent board of directors, that decision does not require, or, indeed, justify, the conclusion that. if a company is avowedly formed with a board of directors who are not independent, but who are stated to be the intended vendors, or the agents of the intended vendors, of property to the company, the company can set aside an agreement entered into by them for the purchase of that property simply because they are not an independent board. What vitiated the agreement in *Erlanger's case* was the concealment of the fact that two out of the three managing directors were agents of the vendors and promoters; and the untrue statement that a provisional contract had been entered into by the directors, while in fact it had only been framed by the promoters and adopted by three directors, two of whom were not known to be agents of the promoters, and the third of whom knew nothing about the matter. In the present case there is no secrecy or concealment of the true position of the first directors, and no untrue statement as to what they did for the company. In the face of the memorandum and articles of association it is impossible to treat the nitrate company, or the members thereof, as ignorant of the real truth as to the position of its directors. After *Salomon's case* I think it impossible to hold that it is the duty of the promoters of a company to provide it with an independent board of directors if the real truth is disclosed to those who are induced by the promoters to join the company. Treating promoters of companies as in a fiduciary relation to them and as having a power of appointing trustees (viz., directors) I cannot treat companies or their shareholders as so many *cestuis que trustent* under disability, nor even as *cestuis que trustent* for whom trustees are appointed without their consent. No one need join a company unless he likes, and if a person knows that if he becomes a member he will find as directors persons who in his opinion ought not to be directors he should not join the company. If he does he has no right to redress on the ground that improper persons were appointed trustees. *Volenti non fit injuria* applies in such a case to the members of the company, and *Salomon's case* shows that the company in its corporate capacity is in this respect in no better position. On these grounds the nitrate company is not, in my opinion, entitled to relief against the syndicate or its directors on the ground that they did wrong in creating the nitrate company with such provisions as are contained in the instruments by which it was created and which govern its existence. The principles on which *Salomon's case* was decided by the House of Lords are quite consistent with those on which *Erlanger's case* was decided, but are quite inconsistent with such an extension of those principles as would be necessary to give the nitrate company relief against those who formed it on the ground that they formed it with an objectionable constitution. But it by no means follows that the nitrate company has no rights against the syndicate or its directors for misrepresentation or breach of duty as promoters. Notwithstanding the memorandum and articles of association of the nitrate company, that company may have a right to repudiate the contract into which it entered with the syndicate. It is necessary, therefore, to consider the principles on which such a right must be rested. The possible grounds for impeaching the agreement are (1) fraud; (2) misrepresentation, although not fraudulent; (3) nondisclosure of material facts. Fraud was distinctly abandoned as a ground of relief both as against the syndicate and as against the other defendants. But the abandonment of the charge of fraud does not affect the right to relief on the other grounds if established. Nor can evidence to prove them be rejected simply because the same evidence might be used to support a charge of fraud if made. But the abandonment of the charge of fraud as a ground for relief extends to the whole case and precludes the nitrate company from seeking relief on the ground of fraud either in entering into the contract or in not repudiating it. It is important to bear this in mind, because there are cases in which fraud subsequent to a contract may not only afford a defence to an action on it, but may confer a right to have it rescinded: see *Panama and South Pacific Telegraph Co.* v. *India Rubber, &c., Co.*, 23 W. R. 583, L. R. 10 Ch. App. 515, where, after a contract was entered into, fraud was committed by one of the parties by bribing the agent of the other. Misrepresentation and concealment of material facts remain to be considered. With reference to these it is important to ask to whom any misrepresentation was made and from whom any material facts were concealed before the agreement was entered into. There is no evidence to show, nor any reason to believe, that any misrepresentation was made to or any material fact was concealed from any person who was a member of the company at that date. The seven promoters of the company and the two other persons who signed the memorandum were then the only members. Three of the promoters were personally acquainted with the Lagunas, and their four associates, who were co-directors of the syndicate, had learned from them all the material facts relating to the property which they were selling. One of the two remaining signatories

of the memorandum and articles of association of the nitrate company was the solicitor both of the syndicate and of the nitrate company, and the other was a brother of one of the seven promoters and secretary of the syndicate. It would be unreasonable to treat them as in any way deceived or misled. They do not allege that they were, and the history of the case fairly leads to the inference that they were not. If, then, the case stopped here the decision of the House of Lords in *Salomon's case* would preclude the company from having the agreement set aside. But in that case care was taken to point out that no other persons besides the promoter and his nominees ever became shareholders. No prospectus was issued, and no one else was invited to take, nor did any one else take, any share in the company. Here it was intended from the first to raise a large capital by appealing to the public. The promoters prepared a prospectus before the company was formed, and, although it was not issued until after the company was formed and until after the contract was executed, its issue must, as between the two companies, be treated as the act of the syndicate and of its directors, and not merely as the act of the nitrate company. The nitrate company, although in one sense formed when registered, was not completely formed as contemplated by the promoters until a prospectus had been issued and a large capital had been subscribed. The issue of the prospectus was the last act of the promotion. If, therefore, the prospectus concealed or misrepresented any material facts the nitrate company would be in a position to impeach the agreement, and *Salomon's case* would be inapplicable. The nitrate company would be in a position to say that there was such a breach of duty on the part of the promoters and directors in misrepresenting and concealing material facts that the contract could not stand in equity. To such a state of things *Erlanger's case* and *Adam* v. *Newbigging*, 37 W. R. 97, 13 App. Cas. 308, and the well-known observations of Sir George Jessel, M.R., in *In re British Seamless Paper Box Co.*, 29 W. R. 690, 17 Ch. D. 467 at p. 471, are much more applicable than *Salomon's case*. The prospectus must, I think, be read in connection with the recitals in the contract between the two companies. The two together contain the statements which the syndicate and its directors made when they were promoting and forming the nitrate company, and were inducing persons to join it. The most important document is the prospectus. The case is remarkable in one respect. There is no person who has come forward to say that he was misled by the prospectus. But it does not follow that the nitrate company in its corporate capacity may not prove a case entitling it to relief. It may prove such concealment of material facts or such misrepresentations as to entitle it to repudiate the contract unless the defendants can show that the members of the company knew the real truth and were not, therefore, imposed upon. I proceed, therefore, to consider the respects in which the prospectus and the recitals in the contract are alleged to be misleading. The matters complained of relate to (1) the land, that is the ground or mineral to be taken; (2) the water supply necessary for working it; (3) the oficina or works and their state and sufficiency; and (4) the agreement with W. & J. Lockett. The evidence bearing on these matters was minutely examined by counsel, and it would be sheer waste of time to examine it again. I will state the conclusions at which I have arrived. (1) As regards the land or mineral to be taken, the evidence satisfies me that all the 200 acres were not rich in caliche. Some contained little, if any; how much it is extremely difficult to say. Most of the 200 acres are, in my opinion, shown to have contained a large quantity of rich caliche. They had contained more, but a considerable quantity had been worked out. The prospectus did not contain any positive misrepresentation, but I think it exaggerated the truth. (2) As to the water supply, the conclusion at which I have arrived is that, if there were nothing else to complain of, the prospectus was in this respect distinctly and seriously misleading. The evidence, in my opinion, establishes (*a*) That there was in the district in which the Lagunas belonging to the syndicate were situate an ample supply of fresh water; and Colonel North and the other vendors who knew the district were perfectly confident that such was the case, and they were right. (*b*) That attempts to get this water in sufficient quantity had been made by the vendors all through the first six months of 1894, and that until the well No. 10 was sunk all those attempts were disappointing and were known to the syndicate to be unsatisfactory. (*c*) That in June, 1894, well No. 10 was sunk, and it was believed to be all that was required. (*d*) That before that prospectus was issued this well also was found and was known to the syndicate not to be yielding enough water. (*e*) That the cause of this was not due to injury by riot nor to wilful breaking by workmen or others. That mismanagement was one cause, but there was also an insufficient supply of water at that well for the works dependent on it. (*f*) That between June and December, 1894, the syndicate made strenuous efforts to get more water, and ultimately succeeded in getting an adequate supply for the wants of the nitrate company which has never in fact suffered from a defective supply since the end of 1894. (*g*) That even now if the nitrate company got only one-third of the total supply obtained by the syndicate such one-third might not be sufficient for the wants of the nitrate company. (3) As regards the oficina or works I am not prepared to say that if there had been adequate water supply and an adequate supply of labour and if the works had been complete and in good working order they would not have been capable of turning out, if required, the amount of nitrate of soda mentioned in the prospectus. Nor do I think that a few things, however essential, which had been ordered and had not arrived when the prospectus was issued, but which were supplied soon afterwards, afforded any ground for repudiating the contract. Nor do I think the non-existence of an iodine house afforded, by itself, any ground for repudiating it. Moreover, I am satisfied that many of the outlays made by the nitrate company for buildings and entered in the construction account were not necessary for working the oficina, however desirable in other respects. But, after making all due allowance for these matters and for no little exaggeration, I have come to the conclusion that, looked at fairly, the oficina was not really complete and in such good working order as it was represented in the prospectus. The heavy cost of the repairs goes far to show this. (4) As regards the Lockett agreement, it was no doubt both onerous and unusual. But it was distinctly referred to, and I am not prepared to say that the prospectus can be fairly regarded as so misleading by reason of this agreement as to confer on the nitrate company a right to repudiate its contract. But it cannot be cast aside as wholly immaterial. Another matter, not perhaps in itself sufficient to vitiate the contract, but still by no means to be neglected as unimportant, is that the promoters knew that in order to ensure success the market price of nitrate of soda would have to be kept up by a combination of manufacturers, which the nitrate company would have to join. There is nothing in the prospectus to lead the shareholders to suppose that the company's prospects of success depended on anything of this sort, although, of course, as

business men they must have known that the profitable working of the company depended on the price at which it could sell its nitrate when obtained, and that the market price must depend on supply and demand. Having regard to what was disclosed and to the avowed object of the company, I do not consider the non-disclosure of the price paid by the syndicate for the Lagunas and of the profit made by the sale to the nitrate company as fatal to the validity of the sale. But, putting together the results arrived at from the evidence, and above summarized, I consider it established that the prospectus was seriously misleading, and that the nitrate company had a right to repudiate the contract by reason of the failure of the syndicate to inform it of the real state of things, which was, in fact, seriously misrepresented, or, at least, not properly disclosed in the prospectus, although such misrepresentation and non-disclosure were not fraudulent. The directors of the nitrate company no doubt knew all the facts, but they were the persons who failed to disclose them, and who, as directors of the syndicate, formed the nitrate company. To impute to the nitrate company the knowledge which the directors had acquired in another capacity, and which knowledge they did not disclose to any one, is neither law nor sense. Again, it is true that the prospectus was issued by the nitrate company and would have to be so treated as between that company and any one except the directors and the syndicate for whom they acted in issuing the prospectus. But the circumstance that the prospectus was issued by the nitrate company itself could not avail the syndicate who procured the issue of the prospectus by the nitrate company, and thereby completed the promotion and formation of the nitrate company. If the nitrate company had sued the syndicate for a rescission of the contract shortly after it had been entered into, the syndicate would, in my opinion, have had no defence to the action. It becomes necessary to consider now the position of the nitrate company and of the syndicate relatively to each other after the promotion of the former company by the latter was ended. The two companies cannot, in my opinion, be regarded any longer, and as to future acts unconnected with the promotion of the nitrate company, as in any fiduciary relation to each other. They are distinct commercial bodies with the same persons as directors, but they cannot be regarded as two firms with common partners. Still less can the directors of the nitrate company in transacting its business as its agents be treated as agents of the syndicate. What the directors do as the agents of the one company cannot be properly treated as done by them for the other. For all business purposes the two boards must be kept distinct. The incorporation of the two companies renders this essential. The obligations of the syndicate towards the nitrate company arising out of its promotion stand, however, on a different footing, and we have to consider whether the nitrate company has lost the right to have the contract set aside, which right I have already stated I am of opinion it had. This right rests, in my judgment, not on the memorandum or articles of association, nor on the formation of the nitrate company, but on the issue of the prospectus for which as between the two companies the syndicate is responsible. The persons who issued the prospectus and whose failure to disclose the material facts gave rise to the right to rescind were the directors of the nitrate company and the agents of the syndicate. Had those same persons any authority to release or discharge the syndicate from the consequences of their own breach of duty? Special authority conferred by the members of the nitrate company there was none. Their authority, if any, to do so must be found in the general authority conferred upon them by the articles of association of the nitrate company. But I cannot construe that general authority as authorizing the directors to screen or absolve themselves and their principals the syndicate from the consequences of their own misdeeds. If such misdeeds were fraudulent there could be no doubt whatever on the point. But, although the issue of the prospectus was not fraudulent, it was seriously misleading, and its issue was a clear breach of duty on the part of the directors, and it would be contrary to the plainest good sense, and also to well-settled legal principles, to hold that they could, whilst they concealed the facts from the members of the nitrate company, deprive that company of the rights acquired by the concealment of those very facts. In considering, therefore, the position of the nitrate company, I disregard entirely the circumstance that its directors did not rescind the contract whilst they were in office. Mere lapse of time whilst the original directors were in office cannot, in my opinion, avail the syndicate in this action. But it does not follow that all that the nitrate company did by its directors can be disregarded. The real difficulty in the way of rescission turns on the impossibility of restoring the parties to their original position. I have looked carefully into *Erlanger's case*, where this difficulty had also to be considered, but the reports do not show what was done except that the property there acquired was more or less worked for a time and always at a loss. That case, moreover, was one of fraud, and here there is none. In the present case the nitrate company in fact worked their property vigorously as soon as they could; they called upon the syndicate to make large outlays upon it, and such outlays were made; the company's business was carried on at a profit and large dividends were declared and paid; the syndicate has sold the shares it received in part payment of the purchase-money. In December, 1895, Porlitz joined the board; an entirely new board was formed in March, 1896; rescission is not thought of, but damages are claimed; the works are carried on as before; the action is commenced in June, and rescission is then thought of for the first time. Even then the works are carried on, not merely to keep them going, but with a view to profit, and a dividend is declared, though under counsel's advice it is not paid. As late as December, 1896, the plaintiffs called for more water from the syndicate. The works have now been stopped altogether. These facts are very different from any which the court had to deal with in *Erlanger's case*. Still, if this were a case of fraud the court would be justified in making an order for repayment of the purchase-money (including the amount realised by the sale of the shares) on the plaintiffs accounting for all their profits. The defendants could not effectually set up their own wrong as a reason for not giving such relief against them. But there being in this case no fraud, the reasoning which in a case of fraud would justify such an order is inapplicable. It must never be forgotten that the business of the nitrate company was a highly speculative one. The price of nitrate was liable to great fluctuation. The value of the Laguna property is not what it was. The original directors of the nitrate company were not fraudulently carrying on its business to screen the syndicate or themselves from the consequences of having issued the prospectus; they did not carry on the business as agents of the syndicate, but simply as agents of the nitrate company, and the nitrate company, first by them and afterwards by their successors, worked the Lagunas with a view to its own profit until the market price of nitrate and of its own shares had permanently fallen. Then, and not before, did the nitrate company determine to rescind if it could. Having regard to the absence of fraud and to the

impossibility of restoring the parties to their former position, the right to rescind cannot, in my judgment, now be enforced. Who the shareholders in the two companies now are is not matter for inquiry; but in considering what is right between two companies the fact that they consist of individual shareholders ought not to be forgotten, and I cannot see how the court can now set aside the contract on any terms which would be just between the two companies. Rescission, then, being impossible, and an action for damages on the ground of fraud being out of the question, the only point which remains for consideration is what pecuniary claim, if any, the nitrate company has either against the syndicate or against its own directors. As regards the syndicate, Romer, J., has given the nitrate company damages for the loss sustained by the nitrate company by reason of the short water supply and the incomplete state of the works. This, I think, was quite right. Mr. Swinfen Eady in his reply suggested that the inquiry should be somewhat wider; but the defendants were not heard on this point, which is comparatively of small importance, and no injustice will be done by leaving the inquiry as it is. I pass to the claim of the nitrate company against the other defendants. It will be convenient to speak of them all as if Colonel North were still alive and were a co-defendant. It must be borne in mind that they were first promoters and then directors of the nitrate company. This circumstance, though not material at law, is material in equity. Their duties as promoters and their failure to discharge those duties has been already considered. As promoters they might be liable to the nitrate company if rescission could be decreed; but they have not by their conduct in the matter of the prospectus become accountable to the nitrate company in respect of any property improperly come to their hands, and actions for damages are governed by legal and not by equitable principles. Their liability to pay damages will be examined presently. As directors I am not aware that there is any difference between their legal and their equitable duties. If directors act within their powers, if they act with such care as is reasonably to be expected from them having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company. In this case they clearly acted within their powers; they did nothing *ultra vires*. Fraud is not imputed. The inquiry, therefore, is reduced to want of care and *bona fides* with a view to the interests of the nitrate company. The amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them: see *Overend, Gurney, & Co.* v. *Gibb*. Their negligence must be not the omission to take all possible care; it must be much more blameable than that; it must be in a business sense culpable or gross. I do not know how better to describe it. What, then, was their conduct? I regard the burden of proof now unimportant, for the evidence is sufficiently full and complete to enable the court to arrive at a satisfactory conclusion. The directors of the nitrate company were also directors of the syndicate. Their position was, or at all events might be, difficult. The interests of the two companies might clash. But the shareholders of the nitrate company knew this perfectly well. Their knowledge did not relieve the directors from the due performance of their duties; but it rendered inapplicable to them many of the remarks made in *Erlanger's case*, where their position was concealed. Their position, though difficult, did not render the due discharge of their duties to either company impossible, and the first question is—Did they succeed in discharging them? If they did not, then a second question arises—viz., Is the loss sustained by the company attributable to such failure? Let us see, then, what they did. 1. As promoters they formed the company. 2. As directors they put the company's seal to the contract, and paid the purchase-money. 3. As promoters and directors they issued the prospectus. 4. They did not communicate all they ought as promoters to the shareholders. 5. They did not as directors repudiate the contract, but, on the contract, held the syndicate to it. Now, the cause of loss to the company is not attributable to what they did as promoters in forming the company or issuing a misleading prospectus. The loss to the company was occasioned by what the defendants did as directors—viz., sealing the contract, paying the purchase-money, and going on instead of repudiating the purchase. I take it to be clear that no action at law or in equity could be maintained against the defendants for forming the company with the memorandum and articles of association which were registered. As regards the issue of the prospectus, *Derry* v. *Peek*, 38 W. R. 33, 14 App. Cas. 337, far as it goes, would not, I think, protect the directors against an action by the company if the directors issued it without proper care, and if loss by the company attributable to the prospectus could be proved; for the directors owed duties to the company which the House of Lords held they did not owe to the plaintiff in *Derry* v. *Peek*. But, as already stated, the issue of the prospectus by the directors was not in this case the cause of any loss to the nitrate company. Similar observations apply to not consulting the shareholders. Even if the directors had consulted them it is impossible to say that the loss would not have been sustained. They might have resolved to go on. The omission to consult the shareholders did not cause the loss, and an action for damages for such omission cannot be supported. On this point *Walker* v. *Goe*, 7 W. R. 289, 4 H. & N. 350, is important. But the directors, though not liable for damages, may be liable in equity for misapplying the company's assets. Having acted throughout *intra vires*, and fraud being out of the question, whether a loss of a company's assets by directors imposes on them an equitable liability to make them good depends on the principles already explained. The legal liability for damages for the loss and the equitable liability to make good the loss both depend upon the same considerations—viz., carelessness and inattention to the interests of the nitrate company. This, then, is the last point to be determined. On this part of the case Romer, J., who saw the directors, has found everything in their favour; and I see no reason to differ from him. I go further; I agree in his conclusions. A great point was made of their recklessness in sealing the contract and paying the money without another survey and further inquiry. But, bearing in mind that it is plain that Colonel North had had a survey and that three of the directors knew the property well, they cannot be justly charged with any breach of duty in not waiting for another survey and in acting on their own knowledge and judgment in this and in other respects. They saw no necessity in the interest of the nitrate company for delay, nor for modifying the contract. It is only by imputing to them a want of *bona fides* as directors that a breach of duty in sealing the contract and paying the purchase-money can be established against them. Their conviction that water was in the district, and could and would be found (as it was in fact), appears to me to explain their conduct in entering into and not repudiating the contract; and I doubt whether any independent body of directors with their know-

ledge of the place and with their conviction as to the water would have acted differently. I have not the slightest doubt that the directors believed that, notwithstanding all drawbacks, large profits would be realized by the nitrate company, and that to throw the bargain up would be the reverse of beneficial, not to say disastrous, to its members. We have not to consider whether Colonel North's estate is liable to account to the company for the secret profits he made out of the Lockett agreement, and I say nothing on that subject. This action is brought for another purpose altogether, and I am of opinion that it is not sustainable.

RIGBY, L.J.—In the view which I take of this case it will not be necessary to go at length into the very complicated issues of fact, as to which an immense body of evidence has been taken. I will only say that if it were necessary I should not be inclined to differ from the conclusion of the Master of the Rolls as to the misrepresentations in respect of which he holds the plaintiffs to have been entitled originally to a rescission of the contract sought to be rescinded in the action.

In my judgment, however, the undisputed facts are sufficient to enable the court, on broad and salutary principles of equity, long established and never departed from, to determine the rights of the parties.

In the year 1889 the Lagunas Syndicate (Limited), hereinafter called the syndicate, was incorporated under the Companies Acts as a company with liability limited by shares. Its principal object was to acquire by agreement with Colonel North certain nitrate deposits and works, known as the Lagunas Nitrate Works, consisting of 548 estacas of land in Chili and the buildings, plant, and machinery in and about the same. An estaca is a Spanish measure equivalent to from 6 to 7 English acres.

They acquired this property in consideration of 1,093 fully paid-up shares of £100 each and £700 in cash, their whole share capital being £110,000 in 1,100 shares of £100 each. The capital was subsequently increased to £275,000.

In the early part of 1894 the syndicate acting through their board of directors determined to promote a company who should purchase from them 200 of the 548 estacas belonging to them, together with an oficina or factory, otherwise called a maquina, erected thereon and adapted to be used for the manufacture of nitrate of soda, with certain plant and stock and a certain supply of water. The price was to be £850,000, payable £550,000 in cash and £300,000 in fully-paid shares.

These shares having regard to the representations contained in the prospectus could not be treated by the syndicate as of less than par value, and, in fact, in February, 1895, they were all sold by the syndicate and realized £324,000 payable by instalments, making altogether £874,000 in cash ultimately received by the syndicate for the property sold by them. The total of the sums alleged by the syndicate to have been expended by them in respect of the 548 estacas down to the date of the sale of the 200 estacas, including at par the shares which went to make up the original purchase price of £110,000, fell considerably below £400,000, but taking it at that sum, and bearing in mind that the syndicate was to retain 348 estacas for its own benefit, it is plain that the profit of the syndicate out of the sale was so considerable that independent advisers of the contemplated company knowing nothing more than would be told to an independent purchaser might well have hesitated before recommending the purchase.

More than this it is not necessary at present to say, but this at least is clear.

It may well be that a contract in similar terms entered into by an independent board of directors would have been binding.

Unfortunately, however, the syndicate and its directors took deliberate and effectual steps for shutting out the possibility of the intervention of any independent advisers.

Before the incorporation of the company the board of directors of the syndicate settled the precise terms (*a*) of an agreement for the sale and purchase of 200 of the 548 estacas; (*b*) of the memorandum and articles of association of the projected company; and (*c*) of a prospectus which was to be issued by the company.

In the articles of association they had the courage to nominate every member of the syndicate's board (seven in number) to be also a member of the company's board of directors.

No other person was nominated as a director of the company, and the seven members so nominated, in their individual capacities, and with corresponding boldness, accepted the nomination.

They appear to have had no misgiving as to their own competency to perform the delicate task of holding an even balance between the vendor, the syndicate, and the purchaser, the company.

Probably their conviction, mistaken as it was, that the company would turn out to be a financial success made them somewhat indifferent to such considerations.

A main point of their scheme seems to have been the exclusion of any possible outside adviser of the company. This was not left to chance. The articles not only provided for the appointment of the seven first directors of the company, but enabled the directors for the time being at any time and from time to time to appoint any other person as a director, but so that the total number of directors should not exceed the maximum prescribed number. The directors were moreover empowered to fill up any casual vacancy in the office of director by the appointment of a successor who was to hold office for the remainder of the time for which his predecessor in ordinary course would have held office (article 57). By article 96 no member is to have any right of inspecting any account or book or document of the company except such as is actually conferred upon him by the statutes or shall be authorized by the directors or by the company in general meeting.

These common form provisions acquire a sinister importance when they complete a scheme of secrecy such as that disclosed by these articles.

I may observe in passing that on the result it was not until long after the syndicate had been paid the whole cash portion (£550,000) of the purchase price and had sold at a premium the £300,000 in shares that made up the total sum of £850,000 that any independent adviser obtained access to the board-room of the company. The exact date was the 3rd of December, 1895, when Mr. Porlitz first took his seat at the board.

To return to the narrative of facts not in dispute. The above-mentioned preliminaries having been arranged in the confidence and privacy of the syndicate board-room, the company was on Friday, the 15th of June, 1894, incorporated by registration of the memorandum and articles of association prepared for it, and on Monday, the 18th of June, the seal of the company was attached to the agreement already prepared, and the prospectus already prepared was approved, apparently without alteration in either case.

The prospectus was dated the same 18th of June and forthwith published.

The firm of solicitors who had for some time been

and continued to be solicitors of the syndicate were retained as solicitors of the company, and the gentleman who for some time past had been and continued to be the secretary of the syndicate was appointed secretary of the company.

In short, the company was treated throughout its promotion and down to the time of the execution of the purchase agreement and the issue of the prospectus in precisely the same way as it might have been if intended to be the private company of the syndicate and its board, in which they alone were to be concerned.

This, however, was very far from being the case. The draft prospectus showed from a time before the incorporation of the company that the public were to be invited to subscribe for the two-thirds of the capital (£600,000) which was not to be issued to the syndicate, and the purchase agreement (clause 18) provided in effect that if the company failed to satisfy the syndicate on or before the 24th of June that the whole £600,000 offered to the public had been subscribed for in cash and allotted to responsible people, the syndicate might, by notice at any time before the date fixed for completion, the end of September, annul the sale.

The case therefore is totally different from that dealt with by the House of Lords in *Salomon* v. *Salomon & Co.*, where there was no intention of adding at any time to the original number of corporators, each of whom knew of everything that was being done.

There the subscribers to the memorandum and articles and the owners of the business to be transferred only took advantage of the machinery of the Companies Acts for the purpose of carrying on a business in which no other person had or was intended to have an interest. In the present case the syndicate and its directors proposed out of the money of other people to make a great profit to themselves.

I proceed now to consider the exact legal position of the syndicate and its directors with reference to the company.

It is not now disputed that the syndicate in its corporate capacity and the directors individually were promoters of the company. They contended this in the court below, and had to pay the costs of their unsuccessful contention. It is difficult to see how such a contention came to be put forward. Each of the directors agreed in advance to become a director of the company from its incorporation. Each of them must, in my opinion, be taken to have agreed beforehand to all the terms of the purchase agreement and of the prospectus. Each of them was a signatory to the memorandum and articles. The syndicate is bound by the acts of its directors and is plainly a promoter. The fact, however, of the denial of responsibility as promoters in the court below is not without great importance, There could be no doubt that the syndicate and each director, both as director of the syndicate and in his individual private capacity, had a distinct and important interest adverse to that of the company. They, nevertheless, chose while acting as the sole agents for the vendor syndicate to constitute themselves also and throughout sole agents for the purchaser company.

The syndicate and its directors thus voluntarily placed themselves in a position in which the interest of the directors both as directors of the syndicate and as to each on his own private account must necessarily come into conflict with their duty as fiduciary agents for the company. This apparently made them all-powerful, but the position having regard to its consequences was in reality a most unenviable one, as it left them most properly to be judged by a standard which it is next to impossible that any body of men could satisfy. The rules which apply as between independent vendors and independent purchasers have no longer any application, but other rules must apply. It is an equitable rule which has always been guarded and enforced with the utmost jealousy, that no fiduciary agents shall under pain of consequences thoroughly well known and noticed below intentionally place himself in a position in which his interest may conflict with his duty. This rule was plainly violated in the present case and I can hardly imagine a case in which the violation would be more flagrant. This violation of the rule was a distinct misfeasance and breach of duty to the company on the part of each promoter, and I see no reason why each should not be liable for all the consequences of the misfeasance and breach. The rule is not a mere arbitrary or technical rule of equity, but is based upon high grounds of morality, and courts of equity have always held any departure from it to be a very serious wrongdoing.

The equitable rule referred to does not in any way depend upon fraud or any presumption of advantage actually taken; indeed it applies equally even though it be shown that no advantage has been taken. The rule is made general in order to prevent the danger arising from the difficulty of disproving in particular cases that duty has given way to interest: see *per* Lord Eldon in the leading case of *Ex parte Lacey*, 6 Ves. 625. The plaintiffs in this case are therefore under no obligation to allege or prove fraud. Honesty of purpose on the part of the fiduciary agents, together with a meaning to act for the benefit of the principal (in this case the company), would not avail them as a defence: see *Ex Parte Lacey*.

The plaintiffs have not argued the case on the ground of fraud, and have been within their right in declining to do so, and I say at once that we are bound in this state of things to assume that all the directors of the syndicate believed the terms of the agreement which they fastened upon the company to be fair, reasonable, and even advantageous to the company, and that there was an absence of all intention to overreach. We should also assume that the promoters were ignorant of the fact that they were committing a breach of trust so as to subject themselves to the operation of the equitable rule referred to, otherwise it would be impossible to understand how their conduct could be reconciled with good faith.

The doctrine above referred to has been so long and so firmly established that, but for the way in which it has been ignored both in action and in the argument for the defendants, I should have thought it unnecessary to do more than assert it. It may, however, be useful to go once more over well-beaten ground, and I will do so, without, however, attempting to refer to any of the numerous cases which have been decided, except in so far as appears necessary for the full understanding of the doctrine as applicable to the present case.

The case of *Ex parte Lacey* was one of a trustee for sale purchasing for himself. The doctrine has not, however, been confined to trustees for sale. It was long ago extended to the case of a sale to a principal by a person occupying a fiduciary position of the agent's own property, as in the present case. So, too, an attorney selling an annuity to his client: *Gibson* v. *Jeyes*, 6 Ves. 266. In that case Lord Eldon (p. 278) calls it "that great rule of the court that he who bargains in matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence, a rule applying to trustees, attorneys, or any one else." The rule has been from time to time stated in different language, but, whatever hesitation there may have been in the earlier cases, in the later ones no limit whatever has been

placed on the principle that no fiduciary agent can bind a principal by a sale of the agent's property where the principal has not had independent advice.

It is unnecessary further to deal with any case except that of promoters. We find James, L.J., in *In re The Ambrose Lake Tin and Copper Mining Co.*, 28 W. R. 783, 14 Ch. D. 390 at p. 394, stating the law applicable to a case like the present as follows: "Now what we have got here to consider is a sale in substance made by the vendors for themselves as beneficially interested to themselves as directors of the company, being in that sense in a fiduciary character towards the company, and the sale is a sale by themselves in the one character to themselves in the other character. Of course such a sale is a thing that cannot stand if it is questioned in time and proper offers made to restore the thing purchased." It is true that in the case cited it was not possible to give the relief asked for, which was relief going upon the ground not of rescinding but of upholding the bargain made, but the opinion of the lord justice with reference to such a case as he describes is in no way affected thereby. I now come to the case of *The New Sombrero Phosphate Co.* v. *Erlanger*. It is a case of great importance, not as I think because it lays down any new principle whatever, but because of the manner in which it applies well-established principles in the particular case of promoters of a company as between themselves and the company promoted by them. The whole case is worthy of careful attention, but I will cite such passages only from the judgments of the learned judges and the opinion of the noble and learned lords as seem to me to be of special importance and to be directly applicable to the present case. The late Master of the Rolls, Sir George Jessel, says with reference to the contract there set up: "It is nothing more than a mere sham contract, a thing entered into by one agent of the promoter to sell with another agent of the promoter to buy; there was really nothing more in it when it had been adopted than when it was entered into, and it was not a transaction which could in any sense bind the company." By this the learned judge did not mean that the contract was null and void at law, for the judgment recognized its validity at law by directing it to be set aside. James, L.J., says: "A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company it is quite open to him to do so, but upon him as upon any other person in a fiduciary position it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward, or agent." Now, it is clear that the full and fair disclosure which a trustee would have to make to his *cestui que trust* to whom he was selling would have to include not only the fact of his being the owner, but all material facts concerning his interest and position, including what it had cost him—or, in other words, the amount of profit that he was to get out of the transaction, and many other things which an independent vendor would be under no sort of obligation to disclose. Baggallay, L.J., says: "Therefore it is not a technical rule at all which requires that a vendor who in any respect is in a fiduciary position should tell the exact truth, should say he is the vendor, or state the interest that he has. Therefore upon that broad principle I think that this company whenever they discovered the fact that the full disclosure which the rules of equity require had not been made were entitled to have the contract set aside." It will be seen that the equitable doctrine is in all these passages laid down in the broadest possible terms without any reference to fraud on the part of the promoters. The noble and learned lords whose opinions were given in the House of Lords said nothing to throw any doubt on the principles enunciated by the learned judges in the Court of Appeal, but, on the contrary, seem to me to adopt their views to the fullest extent. The first opinion was that of Lord Penzance. [His lordship read the judgment from the words at 3 App. Cas., p. 1229: "Can a contract so obtained be allowed to stand?" to ". . . disclose the material facts."] Lord Cairns says at p. 1236: [His lordship read the judgment from "In the whole of this proceeding up to this time the syndicate, or the house of Erlanger as representing the syndicate, were the promoters of the company" to ". . . shall be competent and impartial judges as to whether the purchase ought or ought not to be made."] There is more in both the opinions quoted from to the same effect, but substantially the passages which I have quoted contain the ground on which the decision of the House as to the voidability of the contract was based. The other noble and learned lords give their adhesion to these views, but give no additional reasons which seem to me material, being mainly occupied with the important question of delay and acquiescence, on which Lord Cairns expressed grave doubts. I think, however, that it may be well to cite one passage from the opinion of Lord O'Hagan. [His lordship read the judgment at 3 App. Cas., p. 1256, from "The promoters who so forget their duty to the company they formed as to give it a directorate without independence, opposition, or vigilance, and caution in caring for its interest must take the consequences," to ". . . he is impeachable with indirect or improper motives."] I think that this passage is entirely in harmony with the opinion of the other noble and learned lords, and that the decision was not based on fraud, but on breach of duty, even though I consider the case a direct authority for the voidability in equity of the agreement of the 18th of June, 1894, at the pleasure of the company, within a reasonable time after the company was made aware of all material facts giving them a right to require rescission. It is said by way of defence that the existence of the fiduciary relation and of the acting in a double capacity is plainly disclosed in the memorandum and articles of association and the prospectus. But this circumstance, though it makes it possible to acquit the promoters of fraud, does not affect the application of the general equitable rule. The rule does not depend upon concealment any more than it does upon fraud or advantage actually taken, and in many cases in which the acting in a double capacity has been perfectly well known relief has been given.

The mere fact of the admission of the fiduciary relation and of the double character in which the fiduciary agents have acted cannot discharge the agents from the obligations of the rule. No doubt a perusal of the memorandum and articles would disclose the fact of the directors of the company being also directors, and the only directors, of the syndicate, and therefore occupying the ambiguous position which I have already commented upon, but I see no reason whatever why this disclosure should relieve the promoters from the obligations under which they came by reason of their misfeasance and breach of duty. It would be altogether against principle to say that a statement by fiduciary agents of the fact that they have chosen to place themselves in a position which they ought never to have occupied can set them right from the beginning and make

them cease to be wrongdoers, or free them from the consequences of their wrongdoing. So much for those shareholders who, whether they saw the memorandum and articles or not, are bound by them but by nothing else. Take next the case of the shareholders who read the prospectus. Probably ninety-nine out of every hundred persons who read the prospectus were no wiser than the promoters themselves, and would see in the statement contained as to the identity of the directors of the syndicate with the first directors of the company no ground for questioning the validity of the agreement for purchase and sale. The promoters at any rate cannot be allowed to say, as they have practically done, "We were not aware of any wrongdoing on our part, but your shareholders had notice of facts which ought to have let you to see that we were wrongdoers, and you must be deemed therefore to have released us." It is quite clear that mere notice of matters which might well lead to inquiry does not in this class of cases take the place of full disclosure, and it is mainly because Lord Cairns differed on this point from the rest of the noble and learned lords in the *Erlanger case* that he was disposed to arrive at a different conclusion from them. Even in the case of the very few readers of the prospectus who from their knowledge of the rule and its applicability to the facts would be made aware that in theory the rule would be applicable, there would be no ground for assuming from their taking of shares a binding assent to and release of the promoters from their obligations. Each of them would be entitled to say, "Here are promoters of high standing and reputation who have not hesitated to put themselves into an ambiguous position, and I must assume them to have satisfied themselves that the bargain which they seek to impose upon the company is so clearly advantageous that there can be no risk of its being called in question." The greater the confidence invited and reposed, the greater the responsibility. But, after all, the obligation of the promoters in respect of the breach of duty of which they were guilty is an obligation not to individual shareholders but to the incorporated company. We have no information as to the persons who were the original allottees, and it is quite possible that many of them never saw the prospectus. Even though all saw the prospectus, there can be no doubt that many of them speedily disposed of their shares to others who never read the prospectus, and as to these purchasers from original allottees the whole case would depend upon the memorandum and articles of association. I observe that it was part of the scheme to issue share warrants to bearer which would pass by delivery, and the holders of such share warrants from time to time would not be known. If the mere notice conveyed by the memorandum and articles to shareholders would suffice to exclude the operation of the equitable rule, there would be an end to it altogether whenever the victim of the scheme was an incorporated company. It seems to me that the case of a company brought into existence by promoters is as strong a case for the application of the rule as can be conceived. With reference to the argument that every applicant for shares has himself only to blame, as he need not have become a shareholder, there appears to me to be a complete answer. In a case between individual fiduciary agents and individual beneficiaries a purchaser from an original beneficiary, even with notice of what had taken place, would be equally entitled to any remedy which the original beneficiary would have had. This follows from the fact that an equitable interest is in general assignable with all the rights belonging to it. If it were not so there would in many of the worst cases, in which the beneficiary had by the misconduct of his fiduciary agent been reduced to poverty, be no practical possibility of his obtaining relief. I cannot see why a person taking shares in a company against which the scheme was planned should be in a different or worse position than an ordinary purchaser of an equitable interest. At any rate he ought not to be treated as having waived the breach of trust until he knew all material facts. I shall assume, therefore, that the notice to shareholders of the scheme so far as they had notice would not operate to relieve the promoters from the result of what they did. The conclusion which I have arrived at as to the application of the equitable rule involves the following results. Speaking of equity and law for convenience as the case would have stood before the Judicature Acts, the agreement would have been avoidable in equity but would not be void at law. The rule as to equitable interference was only necessary in order to get rid of some agreement at law (by actual contract or estoppel) and in cases within its operation the agreement at law so far as it bound the offending party was kept alive as against him if it were thought by the beneficiaries more advantageous that the wrongdoer should be bound. In *Ex parte Lacey*, for instance, and in numberless cases which have followed it, the subject-matter of the inequitable purchase was set up for sale again on the terms that if a larger bid were made the beneficiaries were to have the benefit, but that if no larger sum were bid the purchaser should be held to his bargain. It is indeed one of the just and salutary branches of the rule that the party subjecting himself by his misconduct to the rule cannot make any advantage to himself out of it, but is bound by what he does if it turn out to his disadvantage.

In the present case there can be no doubt that if there had been an independent board of directors their affixing the seal of the company to the purchase agreement of the 18th of June, 1894, would have been an act *intra vires*, for the very object of the incorporation of the company was that it should enter into the agreement if that were approved by the directors. It would follow therefore that the directors who actually caused the seal to be affixed had power at law to do so, and that the agreement was not void at law but voidable only in equity. A court of equity might not be absolutely bound in every conceivable case to set aside an agreement so obtained, but would be bound to do so if the beneficiary within a proper time brought an action setting up that it was disadvantageous.

There would be no need to prove that the sale was at an excessive or undue price. The question of value need never be gone into at all. In this case, however, it is by no means necessary to press the doctrine to its extreme limit, since it is plain from the result of working that the price fixed was greatly above the real value of the property. It is said that the property was of a highly speculative nature, and no doubt it was, but this did not give to the promoter the right to speculate at the expense of other persons; and the case of the promoters is not improved by the fact (and fact it is) that they carefully secured themselves against any risk except as to shares taken by them, and threw the whole risk upon the company. The syndicate, as I have already pointed out, reserved the power of annulling the agreement of the 18th of June, unless by the 24th of the same month the whole of the shares offered to the public were allotted to responsible applicants. The application for shares far exceeded the number to be allotted. The effect, so far as the syndicate was concerned, was described by Colonel North in a letter dated the 18th of July, 1894, in which he says: "You have no doubt heard of the successful floating of the Lagunas Nitrate

C . . . The capital was subscribed considerably more than twice over. The shares of the Lagunas (*i.e.*, the syndicate) have been divided into £5, and every £100 is therefore divided in twenty shares, and these £5 shares are now worth £22." No doubt that was eminently satisfactory to the syndicate. But there is another side to the business. The shares of the company were for a time kept at a premium, but by the date of the meeting of the 29th of July, 1896, their £5 shares stood at £2 only in the market. The contrast is instructive: £440 per £100 as to shares in the syndicate, compared with £40 per £100 as to shares in the company. The rule, moreover, specially applies where, as in this case, there was no full disclosure of all material facts. What facts the shareholders had notice of may be important when the question whether the right to rescind has been lost is being discussed. The directors of the company were appointed, not in order that they might disclose to the company what they knew as directors of the syndicate, but in order that there might be no such disclosure. They were parties to the scheme and the notice which they had in a different capacity should not be imputed to the company. I cannot, therefore, think that there is any doubt as to the original right of the company to rescind the agreement of the 18th of June on the ground of misfeasance and breach of duty quite independently of misrepresentation. The completion of the contract by assignment would not in any way affect this right since any deeds executed for the purposes of completion would be tainted with the same weakness as the original agreement. If it is suggested that the directors of the company because they were directors had the right of rescission in their hands and that the company is to be fixed with acquiescence and delay from the date of the agreement by reason of their taking no steps to rescind, the answer is that the original breach of duty in putting them in the position of directors was continued and repeated so long as they retained the position of fiduciary managers, and the act of the syndicate in wrongfully placing them there would render voidable not only the agreement itself but any confirmation of it direct or implied from their delay or want of action whilst occupying the position. Direct confirmation there was none and it would be absurd to hold that they could do by conduct what they could not do by contract—that is to say, convert against their principals a voidable contract into one not capable of avoidance. They committed themselves before the incorporation to supporting the agreement dictated by the syndicate, and the syndicate, their real principals, in relation to the agreement could have no right to treat them as invested by their improper appointment with the duty of denouncing the agreement which they were appointed to support. The obligation to make a complete and candid disclosure of all material facts existed throughout the whole time during which they had the control of the affairs of the company, and could only have been fulfilled by calling a general meeting, and laying before the shareholders at such meeting a full and complete disclosure of the material facts.

This was the last thing that the directors thought of, and their omission to take such a step was a misfeasance and continuing breach of trust as much as their original assumption of the two positions at one and the same time of vendors and purchasers. So long as they retained the control of the company's affairs they were and ought to be treated as wrongdoers, though for reasons similar to those already referred to it is not necessary to say that they acted fraudulently. If full disclosure had been made the shareholders might have been placed under the obligation of themselves moving in the matter. But whatever might be the conclusion as to misrepresentations contained in the prospectus there can, in my judgment, be no possible doubt that it contained no such fair and candid disclosure of material facts as would make it incumbent on the shareholders at once to take prompt steps to obtain rescission. I agree with the Master of the Rolls in his comments on the prospectus, and do not repeat them. I merely take note that such a disclosure would have to, but did not, include a fair statement of material facts under the following among other heads which are not touched by the prospectus—viz., (*a*) The amount of profit made out of the sale by the syndicate; (*b*) the fact that the syndicate knew that there could be no working to a profit without a combination of nitrate owners and no working of the amount of 300,000 quintals monthly with a combination, and that there was no intention or expectation of working at the rate of more than half of the 300,000 quintals per month. In fact, when a combination was formed it restricted the output of its members to 35 per cent. of full working capacity. The disclosure would also have to, but did not, include full information on the following heads, so imperfectly dealt with by the prospectus and agreement that Romer, J., gave directions, against which there is no appeal for inquiries, to ascertain the amount of damages occasioned to the company—that is to say, (*c*) the condition of the maquina at the time of the sale; (*d*) the state of the water supply. Then comes (*e*) the description of the property sold. The prospectus takes no notice of the fact that a considerable portion of the property had been worked out, and that a further large portion was not capable of being worked at a profit. Information on all these and other heads of perhaps less importance (as, for instance, the actual terms of the Lockett agreement) ought to have been set forth fully and candidly before the want of independent advice to which the company was entitled could be so far excused or supplied as to put the company (that is to say, the shareholders in general meeting) to their election whether to take to or repudiate the agreement. As, however, there was no sufficient disclosure of material facts, the time for applying for a rescission did not run during the period of the domination of what I will call the syndicate directors. Whether their domination should be treated as closing at the first appointment of an independent director, Mr. Porlitz (the 24th of September, 1895), or at the time when he first took his seat (the 3rd of December, 1895), or, as I am disposed to think, at the death of Colonel North (the 9th of May, 1896), when the voting power for the first time passed from the syndicate directors, is, I think, immaterial, as a reasonable—which in such a case as the present would be a very considerable—time must be allowed for investigation, obtaining advice, preparing the shareholders and other matters necessary in the case of a company. Having regard to this I am of opinion that whichever date is taken there was no unwarrantable delay before the commencement of the action on the 12th of June, 1896. The new directors took prompt measures for summoning a general meeting of the company for, among other things, obtaining the sanction of the company to a continuance of the action. The meeting took place on the 29th of July, 1896. This was the first general meeting at which anything like a disclosure on any of the matters above referred to took place, and the shareholders at that meeting by an overwhelming majority passed a resolution approving of the action for rescission and authorizing the directors to continue. The result of this meeting was that the remaining syndicate directors retired on the 7th or the 8th of August, 1896, leaving the new directors to manage the affairs of the company. After the resolution passed at the

meeting the directors had no power to discontinue the action until they obtained authority from the company: see article 82, which seems to follow the form as to directors' powers contained in Table A. This circumstance, in my mind, reduces to insignificance what the board are said to have done or proposed to do with reference to the declaration of a dividend of 4 per cent. On the mere question of delay, therefore, I can see no ground whatever for saying that the right to rescission has been lost.

A further question, however, arises—Whether the company is precluded from demanding rescission by alteration of the state of the property—that is to say, the removal, manufacture, and sale of the manufactured proceeds of large quantities of the nitrate contained in the form of caliche in the purchased grounds?

I will first deal with the facts so far as seem necessary, and then consider the law applicable to them. The syndicate directors (and by reason of their acts the syndicate itself whose nominees they were) were alone and directly responsible for the removal of all caliche removed during the period of their domination. With a view also to having an effectual three months' trial for the purposes of a combination of nitrate owners, thought necessary, they stopped the working of the oficina for the months of January, February, and March of the year 1896, and at considerable expense accumulated stock for the purposes of trial in April, May, and June of the same year. The trial was nearly half way through at the death of Colonel North, and no one, I suppose, would suggest that it was the duty of the new directors, who by that event obtained a majority on the board, to put a stop to the working at high pressure arranged for the rest of the period of trial. For all the working of the caliche grounds down to the end of June, 1896, the syndicate directors were therefore directly responsible. Now it was shown by counsel for the principal defendants that the amount of the working down to the end of June, 1896, was approximately three-fourths of the whole working from the end of June, 1894, down to the end of 1897. The company under its new board is shown to be responsible for one-fourth only of the whole of the working. The amounts of caliche taken in different months varied considerably, but the figures provided us by Mr. Carson show on a rough average that during a period of two years, when the workings were under the control of or arose from the disposition made by the syndicate directors, the monthly takings of caliche were more than twice the monthly average during about eighteen months when the new board were in power.

Now no doubt it is a general rule that in order to entitle beneficiaries to rescind a voidable contract of purchase against a vendor they must be in a position to offer back the subject-matter of the contract. But this rule has no application to the case of the subject-matter having been reduced by the mere fault of the vendors themselves, and the rule itself is in equity modified by another rule that where compensation can be made for any deterioration of the property such deterioration shall be no bar to rescission, but only a ground for compensation. I adopt the reasoning of Lord Blackburn in *Erlanger's case* as to allowance for depreciation and permanent improvement. The noble lord, after pointing out that a court of law had no machinery for taking accounts or estimating compensation, says: [His lordship read the judgment from "But a court of equity could not give damages . . ." to " . . . the state they were in before the contract."] This important passage is, in my judgment, fully supported by the allowances for deterioration and permanent improvements made by Lord Eldon and other great equity judges in similar cases. After some observation on the duty of parties seeking relief to exercise due diligence, he cites a passage from a judgment of the Judicial Committee in *Lindsay Petroleum Co.* v. *Hurst*, 22 W.R. 492, L. R. 5 P.C. 221 at 239 (a passage which has often been referred to as giving the best general rule applicable to such cases as the present), and part of which I quote to the following effect: "The doctrine of *laches* in a court of equity is not an arbitrary or technical doctrine where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as a waiver of it, or where by his conduct he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases lapse of time and delay are most material." The obligation of the vendors to take back the property in a deteriorate condition is not imposed by way of punishment for wrongdoing, whether fraudulent or not, but because on equitable principles it is thought more fair that they should be compelled to accept compensation than that they should go off with the full profit of their wrongdoing. Properly speaking it is not now in the discretion of the court to say whether compensation ought to be taken or not. If substantially compensation can be made, rescission with compensation is *ex debite justitiæ*.

Applying these principles to the present case and first with regard to the workings down to the end of June, 1896, I ask what is practically just and whether the purchasing company has by its conduct and neglect put the other party in a situation in which it would not be reasonable to place him if rescission were afterwards to be asserted? In my judgment there is no trace of conduct or neglect of the kind referred to. On the contrary the position of the promoters was voluntarily assumed by them as part of their original scheme and they were maintained in that position by a continuing breach of trust in keeping back from the company what they ought to have disclosed. What, then, does practical justice require? Not, certainly, that the promoter syndicate should keep intact the whole of the enormous sum of £874,000 which they have received, leaving their beneficiaries, in return for the payments made, a property of a value immensely below that sum. All that practical justice requires is that they be treated as having worked the property for themselves and should have full accounts of all profits made out of the working down at any rate to the end of June, 1896. This, as I have already pointed out, approaches to fully three-fourths of the whole working. There remains the case of the one-fourth worked by the new board during the pendency of the action. Here, again, it is of some importance to bear in mind that after the resolution of the meeting of the 29th of July, 1896, the board could not properly put an end to the pending action without getting the authority of the company in general meeting to do so. They never applied for this, and there has been no wavering on the part of the company whether the directors did or did not appreciate their position fully. The notice of the 28th of July was discussed at the meeting of the 29th, and Mr. Harvey, one of the syndicate directors who took the main part in defending the proceedings of himself and the other syndicate directors, showed that he clearly understood that if the action were successful the profits of the working were to be for the syndicate. It would be going too far perhaps to treat these remarks as a serious acceptance of the terms of the notice in the

alternative of the syndicate failing in the action. Yet I do not find that either from Mr. Harvey or from any other source there was any questioning on the part of the syndicate of the assumption made in the recital to the notice that it was necessary in the interest of all parties to the action that the undertaking should be maintained as a going concern. Both at the meeting and throughout the proceedings in the action the defence of the syndicate and of the promoters was an absolute denial of the company's case. The questions whether the syndicate or its directors were promoters or held any other fiduciary position, and whether there had been any breach of trust, were put in issue and strenuously contested, and thereby the proceedings in the action were delayed and the continued working occasioned. If these points had been admitted the action need have taken very little time. I think that the promoters have thus been responsible as truly though not as directly as they were for their own working, and ought not now to be allowed to fall upon it as a bar to a claim for rescission. The following additional considerations support that conclusion. The working was not a departure from but only a carrying out of the original scheme which involved the working of the caliche by the original board in the first place, and when they found it convenient to retire by their successors in office. The working out of another fourth in addition to the three-fourths worked down to the 30th of June, 1896, did not so materially alter the position of things at the commencement of the action as to bar the plaintiffs' claim to rescission. It was the fault of the promoters, and their fault only, that the company were placed in the very difficult position in which they found themselves. They could not prudently leave the works derelict. They could not dismiss the workmen who had been collected and allow them to disperse, and the only alternative was to keep the works going. The syndicate directors apparently had expended the whole working capital of £50,000, so that the new board could not be expected to accumulate the manufactured nitrate, and were practically obliged to sell it for what it would bring in the market. They could not foresee that the action would be pending for so long a period as it actually took before judgment was obtained. I think that the course taken was one which might be properly taken having regard to the interests of all parties without involving any loss of rights. If there had been any reckless or excessive working other considerations might arise, but as I have already pointed out the average rate of production and sale during the management of the new board was less than one-half of the average rate for which the syndicate were responsible. Under the circumstances so far from holding that the company were bound to discontinue working and selling nitrate I think they were practically bound to continue it for the best commercial advantage they might be able to obtain, and in my judgment the following words of Lord Selborne in *Erlanger's case* are fairly applicable: "That the company should until a settlement was arrived at (or a decree made in case of litigation) continue in possession and keep the concern going in a due course of management was an inevitable necessity under the circumstances. A different course (since the vendors did not offer to take back the property) would have given the vendors much more reason to complain of the conduct of the plaintiffs (so far, at least, as my opinion is concerned) than they now have." In the present case there is nothing approaching the difficulty in making equitable allowances that existed in *Erlanger's case*. Profits have been made which the promoters can have the benefit of. In *Erlanger's case* the operation of the purchasing company had only produced loss, yet the promoters were obliged to take back the property in its greatly deteriorated condition with an inquiry as to profits (if any), which seems to have been of no value. In *Erlanger's case*, by the want of knowledge of the company's agents, a comparatively valueless mineral (carbonate) had been mistakenly sold for or mixed with the valuable phosphate so as greatly to lower the value of the article sold and injure the reputation of the inland deposits. Here the somewhat feeble attempts which were made to impugn the conduct of the business during the action have, in my judgment, failed. Here, again, the promoters have spent large sums out of the company's funds on property which turns out to have been all along in equity their own, and if they get back their property it must be improved to a considerable extent by this expenditure though it has been deteriorated by the withdrawal of caliche. If the promoters could establish a claim for deterioration beyond the amount of profits made they would have to submit to a possible counterclaim for improvements made at the expense of the company.

In my opinion there ought to be judgment for the plaintiffs for rescission of the agreement of the 18th of June, 1894, and orders for repayment of the cash portion of the purchase-money with interest at 4 per cent. from the date or respective dates of payment and for the sums produced by selling the £300,000 in shares with interest from the date or respective dates of receipt of the purchase-money for the shares.

Then there should be inquiries as to the amount of profits made by the company from the sale of nitrate and directions as to bringing the amount into account. Perhaps it would be sufficient to stop here with a direction that the company should be entitled to a lien upon the property for the amount due to them. But if either side insist upon it on sufficient grounds, there might be cross inquiries as to deterioration of the property otherwise than by the extraction of caliche and as to the amount of expenditure of capital moneys of the company in lasting improvements with an order for payment of the balance to the company or the syndicate as the case might require. As inquiries might occupy a very considerable time, provision should be made for payment into court at once of so much of the money as would in all probability be in excess of any sums that could be due to the company as in *Dunne* v. *English*, L. R. 18 Eq. 524. The order for payment by the syndicate should extend also to the defendant directors and the personal representatives of deceased directors and the liability should be made joint and several.

Although my judgment is opposed by three of my brethen I have sketched out the general frame of an order to show what, in my opinion, the justice of the case requires. But even though my judgment had prevailed, it would, I think, have been impossible to frame an order correct in all its details without hearing the parties, and hearing them on any points of difference between them.

In conclusion I would say that I have found it difficult to state the case without appearing to raise against the promoters a presumption of misconduct amounting to fraud. But the Lord Chancellor's observations in *Adam* v. *Newbiggin* are applicable here. My explanation of the conduct of the promoters is that they were so confident of the company being a success as to be negligent with reference both to the prospectus and the agreement, feeling sure that no objection would ever be taken. The directors of the syndicate supposed themselves to know everything about nitrate, and to be able to

ensure success to the company. They turned out to be no more infallible than many other over-sanguine promoters who have preceded them. Their calculations failed, and they ought to bear the consequences of such failure, since they had no right to speculate at the risk, not of themselves, but of their beneficiaries.

COLLINS, L.J.—Fraud is not alleged or imputed in this case. The directors were under no legal incapacity to seal the contract of purchase by the company. The company came into existence for the purpose of taking over the property from the syndicate at a price already determined. By article 57 the directors of the syndicate were constituted directors of the company, and by article 5 they were charged with the duty of completing and carrying into effect the agreement, with such modification, if any, as they should think fit. *Salomon's case* is a clear authority that such an arrangement is not void or illegal. There is not here, any more than there was in that case, any representation, express or implied, as there was in *Erlanger's case*, that the board is independent. On the contrary, the true facts appear in the articles and are stated in the prospectus. Therefore no claim to relief can be based on the fact, *per se*, that the directors were not independent. Although not independent, they are legally-appointed directors, and are entitled to act as such. So far as a discretion is confided to them by the constitution of the company they are bound to exercise it honestly and with reasonable care.

These principles applied to the facts of this case will, I think, decide both the question of rescission as against the syndicate and the personal liability of the directors to the plaintiff company. I agree entirely in the conclusions of fact drawn by Romer, J., in this case. When the most important issue is one closely akin to one of *bona fides*, great weight is naturally given to the opinion of the judge who has himself seen the witnesses whose conduct is impugned. But even without this advantage, after the full examination to which the evidence has been subjected before us, I should unhesitatingly myself have arrived at the same conclusions. To the extent therefore to which he has found them, and no further, I agree that there were matters in respect of which the property contracted to be sold did not fully answer its description.

The first question is whether by reason of these defects the plaintiff company can claim rescission of the contract. I am clearly of opinion that they cannot. The plaintiffs have been in possession of, and working the property sold, from the 30th of June, 1894, until after the hearing before Romer, J., in 1898. The writ in this action was issued in June, 1896. Without considering for the moment what has been done by the plaintiffs since a change in the constitution of the court gave the dissatisfied shareholders a majority, it is clear that before that date the defects in question were remedied at considerable expense by the syndicate at the instance of the plaintiff company, represented by its properly-constituted board. Even assuming that the directors of the plaintiff company might have thrown up the contract on discovery of these defects, the result is that the syndicate, which is itself a limited company, and as such constitutes a different entity and embraces members other than the common directors, has expended large sums of money in making good the defects and cannot be restored to the position in which it would have been had the property been then thrown back on its hands. Under such circumstances I think it is clear that rescission could not have been claimed had the two boards been independent. How far are the rights of the parties affected by the fact that the boards were not independent? Though not independent they are the persons charged, as a term of the plaintiff company's existence, with the duty of carrying out the contract between the two parties. It seems to me to follow from the fact that both are properly-constituted companies and that fraud is excluded that they are bound *inter se* by the acts *intra vires* of their respective boards, and that the syndicate is therefore not debarred from insisting on its rights to *restitutio in integrum* because the directors of the company promoted by it are not independent. It is said that in the circumstances they could not act without laying the facts before the shareholders, even though they might honestly and reasonably believe that it would not be for the best interest of the shareholders to do so. But to hold that a discretion, however honestly and carefully exercised by its directors in the interest of the plaintiff company, could confer no rights on the syndicate who had changed their position in consequence, would be to withhold from the directors of the plaintiff company the powers conferred upon them as a term of its constitution, and I cannot think that such a limitation is to be implied where their dual capacity is avowed and underlies the scheme to which every member of the company has assented. In addition to this it seems to me that the acts done by the plaintiff company since the dissatisfied shareholders became aware of the actual facts have been far in excess of anything that has in any reported case been held not to be inconsistent with a right to rescission. There was not "inevitable necessity," as it seems to me, such as was stated by Lord Selborne to exist in *Erlanger's case*, obliging them to continue to work and exhaust the property as they have done in getting out and disposing of such large quantities of nitrate at the low prices then prevailing. This seems to me a very different thing from merely "keeping the concern going," which is all Lord Selborne refers to, and I agree with the observations which Romer, J., has made on this part of the case.

In my judgment the water difficulty has been greatly exaggerated by the plaintiffs. I think the defendants had in fact found a sufficient source of water for all possible needs of the oficina, and had connected it therewith by adequate system of pipes with the necessary pumps. I think the failure and intermittent character of the supply after the 30th of June was largely due to temporary causes and to bad management of the pumps and wells, and though a large sum was spent by the syndicate in remedying it, I think the greater part of this expense might have been saved had the management been more skilful. It is a remarkable fact that this ground of complaint was not even mentioned in the report of the dissentient directors, and first took shape after the case had got into the hands of counsel. The defect, such as it is, was capable of certain remedy, and was in fact completely remedied, and even if it formed an adequate ground of rescission, I do not think it created such an emergency as the directors were debarred from dealing with on their own responsibility without taking counsel with the shareholders. The like observations apply still more strongly to the case of the maquina.

For the reasons I have already given I think there was no incapacity in the directors by reason of their dual relations to guide their conduct by the plain rules of common sense as business men managing a commercial undertaking, and I think when the right of such companies to exist and carry out the purpose of their creation according to the conditions of their constitution is admitted, it would be unwise to lay down a standard of duty which would make it a practical impossibility to manage the under-

taking upon ordinary business lines. The fact that there are conflicting interests is, of course, a most important factor in forming a judgment whether they acted honestly and with due care in any given case, but it does not destroy their power of acting on their own responsibility without consulting the shareholders, or make their acts voidable at the instance of the company.

It being impossible, therefore, to grant rescission against the syndicate, it remains to consider the question of the liability of the directors.

Applying the principles above stated, we have to deal with a company legally constituted with a board who by the articles can bind the company by acts done within their powers although they are not independent. These are the directors by whose acts the company and every member thereof have agreed to be bound. It seems to me that such directors were fixed with the duty of exercising their discretion within the defined limits honestly and with reasonable care when they sealed the contract. It is said they ought to have made further investigations before doing so. I think the true question is, "Having regard to their knowledge and information did they act fairly and with reasonable care in not making further investigations?" Dishonesty, as I have said, is not suggested, and I am satisfied that they did reasonably believe they had quite sufficient information to justify them in the interest of the plaintiff company in sealing the contract.

But it is said: "Having signed the contract they ought to have rescinded as soon as they learnt the facts as to the water and the maquina." Here again I think their conduct is to be tried by the same standard, and the question to be answered is: "Did they honestly and exercising reasonable care come to the conclusion that it would be wise in the interest of the company to hold to the contract and insist upon the representations being made good?" I cannot doubt that they thought and had good grounds for thinking that they were acting in the best interests of the company in doing as they did. I do not refer to the facts, which are fully stated on this part of the case by Romer, J., with whose observations upon them I entirely agree. I think also that even if there was a breach of duty on their part in not consulting the shareholders, Mr. Farwell was right in contending that no damages other than nominal could be recovered. As regards the other points raised on the appeal I desire to adopt the conclusions and reasons of Romer, J., in whose opinion on the whole case I thoroughly concur.

Solicitors, *Slaughter & May; Budd, Johnson, & Jecks; Blunt & Co.*

---

From Q. B. Div.
(Lord Russell of Killowen, C.J., and A. L. Smith and Vaughan Williams, L.JJ.) — Nov. 2.

THOMAS *v.* CORPORATION OF DEVONPORT. (*a.*)

*Local government—Municipal corporation—Accounts—Elective auditor—Municipal accounts—Accounts of urban sanitary authority—Remuneration of auditor—Duty of auditor—Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *ss.* 25, 27 (1)—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 246.

*A elective auditor of a borough is not entitled, under the Municipal Corporations Act,* 1882, *to any remuneration for his services.*

*The duty of an auditor of the accounts of a corporation as urban sanitary authority, under section* 246 *of the Public Health Act,* 1875, *is not confined to a mere examination of vouchers, but extends to the consideration whether any of the payments which have been made, are illegal or improper.*

Appeal from the judgment of Phillimore, J., at the trial of an action without a jury.

The action was brought against the corporation of the borough of Devonport to recover the sum of £405 as remuneration for services rendered by the plaintiff in auditing the accounts of the corporation during several years. The plaintiff was one of the elective auditors of the borough, having been elected to the office by the burgesses under section 25, sub-section 1, of the Municipal Corporations Act, 1882. The plaintiff claimed remuneration for auditing two sets of accounts—viz., the municipal accounts, and the accounts of the corporation in its character as urban sanitary authority of the borough.

By section 27, sub-section 1, of the Municipal Corporations Act, 1882, "the treasurer" of the borough "shall within one month from the date to which he is required to make up his accounts in each half-year, submit them, with the necessary vouchers and papers, to the borough auditors, and they shall audit them."

By section 246 of the Public Health Act, 1875, "Where an urban authority are the council of a borough, the accounts of the receipts and expenditure under this Act of such authority shall be audited and examined by the auditors of the borough, and shall be published in like manner and at the same time as the municipal accounts, and the auditor shall proceed with the audit after like notice and in like manner, shall have like powers and authorities, and perform like duties as in the case of auditing the municipal accounts. Each of such auditors shall in respect of each audit be paid such reasonable remuneration, not being less than two guineas for every day in which they are employed in such audit, as such authority from time to time appoint."

The defendants denied that the plaintiff was entitled in the absence of express agreement to any remuneration for auditing the municipal accounts, and they paid into court the sum of £34, which they said was sufficient remuneration for auditing the urban sanitary authority accounts. This sum was calculated at the rate of two guineas a day, allowing four days for each half-yearly audit.

Phillimore, J., gave judgment for the defendants. He was of opinion that the plaintiff was not entitled to any payment as elective auditor under the Municipal Corporations Act, and that the sum paid into court was sufficient remuneration for auditing the accounts of the municipal corporation as urban sanitary authority. He thought that the audit of the urban sanitary authority accounts was a strictly limited one, and was not an audit of the doings of the various committees of the corporation, but was simply an audit of the accounts of the treasurer of the urban sanitary authority.

The plaintiff appealed.

*Macaskie,* for the plaintiff.—The Municipal Corporations Act does not expressly provide for any remuneration being paid to an elective auditor. But section 12, sub-section 1, which disqualifies any person for being a councillor, if "he is an elective auditor or a revising assessor, or holds any office or place of profit . . . in the gift or disposal of the council," seems to show that the Legislature contemplated that an elective auditor should be a salaried official. [He referred also to sections 15, 18, 25, 26, 27, 139, 140, 141, 142, and Schedule V.] With regard to the urban sanitary authority accounts

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the learned judge misconceived the nature of an audit under sections 246 and 247 of the Public Health Act, 1875. He thought that the duty of auditors was merely to take the treasurer's account and examine the vouchers. But it is the duty of an auditor to see that each item of expenditure has been legally expended. The plaintiff took this wider view of his duty, and it was impossible for him to get through the work in four days.

*Duke, Q.C.*, and *J. A. Hawke*, for the defendants.

Lord RUSSELL OF KILLOWEN, C.J.—With regard to the accounts of the corporation as such, there is no shadow of reason for suggesting that the plaintiff is entitled to any remuneration for his services as an elective auditor. The Municipal Corporations Act, 1882, by section 140, and Schedule V., provides what payments may be made out of the borough fund. But nothing is said as to any remuneration to be paid to an elective auditor. And the plaintiff is not in a position to claim, and in fact does not claim, any remuneration as a servant of the corporation.

With regard to the auditing of the accounts of the corporation as urban sanitary authority, the plaintiff is entitled, under section 246 of the Public Health Act, 1875, to remuneration at the rate of not less than two guineas a day during the time he is properly occupied in the work. I think the learned judge took too narrow a view of the duties of an auditor of such accounts. I do not assent to the proposition that the sole duty of an auditor is to take the accounts and see that there are vouchers in respect of each payment. That seems to me to be an incomplete and imperfect view of an auditor's duties. In my opinion an auditor is justified in going further than that. I think he is entitled to consider whether payments which have been made are authorized payments, or whether on the other hand they are illegal or in any way improper; and, if he shall discover any illegality or impropriety, I think it is his duty to report it to the burgesses. But even taking that wider view of an auditor's duties, I see no reason for thinking that eight days in the year was not a sufficiently long time for the plaintiff to take for the auditing of these accounts. I therefore think that the appeal must be dismissed.

A. L. SMITH and VAUGHAN WILLIAMS, L.JJ., concurred.

*Appeal dismissed.*

Solicitor for the plaintiff, *W. Lenn Walter.*

Solicitors for the defendants, *Cunliffes & Davenport*, for *J. J. E. Venning*, Devonport.

---

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — Aug. 2, 4, 1899.

SANTLEY *v.* WILDE. (*a.*)

*Mortgage—Redemption—Clogging the equity of redemption—Collateral advantage to mortgagee—Leaseholds—Covenant for payment to mortgagee of one-third of the profit rent until the end of the term, though principal and interest paid before—Validity.*

*A mortgagee may, provided the bargain is not unconscionable or oppressive, stipulate by the mortgage for a collateral advantage to himself; and if he does so, there is no presumption that the mortgagor entered into the contract under pressure.*

*A covenant in a mortgage of a lease that the mortgagor will, during the residue of the term (besides paying principal and interest), pay to the mortgagee one-third of the net profit rental received from under-tenants, and provisions that the relation of mortgagor and mortgagee shall continue, though all principal and interest may have been paid, do not amount to a clog or fetter upon the equity of redemption, and are therefore valid.*

*Decision of* Byrne, J. (47 *W. R.* 297), *reversed.*

Appeal from a decision of Byrne, J. (47 W. R. 297).

On the 23rd of October, 1895, the plaintiff, being then under-lessee of the Royalty Theatre, with an option to purchase her lessor's term, which did not expire until June, 1905, entered into an agreement with the defendant that he should lend her the sum of £2,000 to enable her to exercise the option, and that the repayment of the money should be secured by a legal mortgage of the lease so purchased, the mortgage deed containing a provision for payment to the defendants of one-third of the net profit rents received by the plaintiff from her under-tenants during the residue of the term.

The arrangement for the loan was carried out, and on the 13th of December, 1895, a deed was executed providing for the repayment of the £2,000 by twenty equal quarterly payments of £100 each, the first to be made on the 25th of December, 1895, so that the whole debt would be paid off in 1900; and also providing for the payment of interest at 6 per cent. on the amount from time to time due, and further that the plaintiff would during the residue of the term pay to the defendant one-third of the net profit rents, as and when received by her.

By the same deed the plaintiff demised the premises to the defendant for the residue of the term, except the last day, subject to subsisting tenancies.

The deed contained a proviso for redemption upon payment by the plaintiff of the £2,000 and interest, and all the other moneys thereinbefore covenanted by her to be paid, and a provision that the defendant would not call in the loan if the instalments and the interest were paid within thirty days after they became due, and if the covenants on the plaintiff's part were duly observed by the plaintiff.

The deed further contained divers other provisions.

On the 20th of August, 1897, there was owing to the defendant for instalments a sum of £350.

The defendant then served on the plaintiff a notice which required her to pay off within three calendar months the principal moneys and interest owing to him on the mortgage, and which stated that in default of such payment he intended to sell the premises. The notice also required the plaintiff to pay the instalments and interest then due to him, stating that in default he would go into possession and appoint a receiver.

On the same day the plaintiff paid the arrears of instalments and offered to pay the arrears of interest, which were in fact paid at a later date.

The defendant afterwards wished to withdraw the notice, but the plaintiff refused to allow this, and gave the defendant notice of her intention to pay off the balance of the £2,000 and the interest, which she alleged to be all that was legally due by her to the defendant. The defendant refused to accept this offer, and the plaintiff then commenced the present action against him for redemption on payment off of the £2,000 and interest. The defendant counterclaimed that for the residue of the term, notwithstanding payment by the plaintiff of the principal and interest, he was entitled to hold the mortgaged property as security for payment of one-third of the net profit rental until the end of the term.

Byrne, J., gave judgment for the plaintiff on both claim and counterclaim, and the defendant appealed.

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

*T. R. Hughes, Q.C.*, and *R. J. Parker*, for the appeal, cited *Biggs* v. *Hoddinott*, 47 W. R. 84, [1898] 2 Ch. 307.

*Eve, Q.C.*, and *A. & B. Terrell*, for the plaintiff, cited *James* v. *Kerr*, 37 W. R. 279, 40 Ch. D. 449; *Mainland* v. *Upjohn*, 37 W. R. 411, 41 Ch. D. 126; *Marquess of Northampton* v. *Pollock*, 39 W. R. 66, 45 Ch. D. 190; *Salt* v. *Marquess of Northampton*, 40 W. R. 529, [1892] A. C. 1; *Jennings* v. *Ward*, 2 Vern. 520; and *Fearnside* v. *Flint*, 31 W. R. 318, 22 Ch. D. 579.

No reply was called for.

Aug. 4.—LINDLEY, M.R.—The question raised on this appeal is a very important one, and I do not profess to be able to decide it on any principle which will be in harmony with all the cases. In fact, I do not believe that any principle can be enunciated which will be in harmony with them all; but the true principle running through them all is not very difficult to discover, and I think that it can be applied so as to do justice in this case, and in all other cases on the subject which are likely to arise. The principle is this, that a mortgage is a conveyance of land, or an assignment of chattels, as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage, and the security is redeemable on the payment or discharge of such debt or obligation, any provision which it may contain to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted in a mortgage for the purpose of preventing redemption on payment or performance of the debt or obligation for which the security was given, is what is meant by a clog or fetter upon the equity of redemption, and that is void. It follows from this that "once a mortgage, always a mortgage," but I do not understand that this principle involves the further principle that the debt or obligation, the payment or performance of which is to be secured, whatever may be its nature or its amount, is a clog or fetter within the meaning of the rule: see Powell on Mortgages (6th ed.), vol. 1, ch. 6, pp. 116 *et seq.* ("How a Mortgage is Considered in Equity"). The right to redeem is not a personal right, but an equitable estate or interest in the property mortgaged. A clog or fetter means something which is inconsistent with the idea of a security; something which would be a repugnant condition. If I convey land in fee simple, subject to a restraint on alienation, that is a repugnant condition. So if I give a mortgage with a condition that I am not to redeem, that is a repugnant condition, and that is a clog on the equity of redemption. The courts of equity have fought for years to maintain the doctrine that a security is redeemable on the performance of the obligation for which it was given. If that obligation is the payment of a debt, the security is redeemable on the payment of that debt. That, in my opinion, is the true principle applicable to all the cases on the subject, and that is what is meant when it is said that there must not be any clog or fetter upon the equity of redemption.

If that is the true principle, this mortgage does not infringe it at all, for this mortgage does not impose any such clog or fetter upon the equity of redemption. Of course, in any particular case, the debt or obligation itself may be impeachable on the ground of fraud, oppression, or over-reaching. If that were so the debt or obligation would to that extent be tainted and invalid; but, apart from that, the rule of equity on the subject is simply that directly you get a security for a debt or obligation, that security can be redeemed on the payment of the debt or the performance of the obligation. Let us, then, see what the contract here is. It is not suggested that there has been any fraud, undue influence, over-reaching, or hard bargaining. The plaintiff had a lease of a theatre, subject to the payment of a certain rent and to certain covenants. She wanted to carry on the theatre, and for that purpose to extend the term, and she also wanted to borrow a sum of £2,000 to enable her to do this. The security for the loan, it was arranged, was to be the lease, which was, in all probability, utterly insufficient. A security of that kind is always a shaky security. The lender took that view. He said that he would lend the money, and that the plaintiff might have five years to repay it. It was quite consistent with that provision that he should further stipulate that the plaintiff must pay him a sum equal to one-third part of the clear net profit rents which she should derive from the lease. What was the lender's real position? It is obvious that his security depended not only on the solvency of the plaintiff, but also on the success of the theatre. That was the kind of security which was offered by the plaintiff, and a sum of £2,000 was lent upon that security. [His lordship then referred to the covenants by the mortgagee in the mortgage, and to the proviso for redemption, and continued:] That means this, that this lease is assigned to the mortgagee by the mortgagor as security not only for the payment of the sum of £2,000 and interest, but also for the payment of the one-third of the net profit rents to the end of the term. If I am right in the principle which I have laid down, that does not clog the right of redemption on the performance of the obligation for which the security was given. It is said that that is not good law; but that is said because the true principle underlying the statement that there must be no clog or fetter on the equity of redemption has been lost sight of. The contract between the parties being this, the plaintiff says that she will pay off the balance of the £2,000 and interest, and she asks to have back the lease and to have the covenant to pay the defendant one-third of the profit rents put an end to. Having given that notice, she says that her obligation is at an end. The mortgagee declines to accept that proposal. He says that that is not the bargain which was made between the parties, and that the plaintiff cannot redeem on those terms. He admits that she may pay off the £2,000 and interest, but contends that even if she does that, she must still continue to pay the one-third of the profit rents. On principle I think that is right; it follows from what I have already said. That is the bargain which was made, and there has been no oppression, and there is no reasonable legal ground for relieving the plaintiff of the obligation which she undertook. As to the obligation or the right to pay off the balance of the £2,000, the defendant has by giving notice and calling it in given the petitioner a right which she would not otherwise have had. If she chooses to redeem and to pay off the £2,000 and interest, she can do so; but I understand that she does not wish to do that unless she can get rid of the whole thing.

The result is, that the notice of appeal is in substance right, but the order of this court should be prefaced with the statement that the plaintiff does not desire to pay off the £2,000 and interest. The action will be dismissed with costs, and on the counterclaim there will be the declaration which the defendant asks for. There must be an account of what is due on the security from the plaintiff to the defendant. On the whole, we have endeavoured to sweep away the fetters which are not imposed upon us by any equitable principle, but which, through forgetting the true nature of the principle that governs a case of this kind, have been thought to be imposed upon us.

JEUNE, P.—I am of the same opinion. The case comes within the decision in *Biggs* v. *Hoddinott*. There is no doubt, in my judgment, what the bargain was, and that it was a reasonable bargain. There is nothing more reasonable than that a person lending money on the security of a theatrical business should stipulate not only for the repayment of the sum lent and interest, but also for a share in the profits which may arise from the business. If the business be a success there will be a likelihood of his being repaid; if it fails he will probaby lose his money. Are we to say that such an arrangement is bad? We can only do so if we hold that in a mortgage transaction the mortgagee can have no collateral advantage. If we were to go so far as that, it would cover such a case as *Biggs* v. *Hoddinott*. In *Biggs* v. *Hoddinott* there was an additional or collateral advantage to the mortgagee outside the mortgage. The mortgagee of a public-house had stipulated for a collateral advantage to himself as regards the sale of malt liquors, and it was felt that it was necessary to press the case so far as to say that there could be no such bargain, and that was precisely the proposition which the court rejected. It was rejected not only by the Master of the Rolls, but also by Chitty, L.J., and Collins, L.J., who laid down that it was not good law to say that a mortgagee could get no collateral advantage from the mortgage as part of the security. Another decision to the same effect is *Potter* v. *Edwards*, 5 W. R. 407, which was referred to by Kay, J., in *Mainland* v. *Upjohn* as being the first decision, which broke into the series of cases which laid down the contrary principle. That case decided that though a mortgagee lent £700 only, he might bargain that the mortgage should stand as security for £1,000—that is, that the mortgagee might, notwithstanding the sum lent, insist on the payment of the larger sum as a condition of redemption. Such a stipulation is not really a clog or fetter on the equity of redemption, as the equity of redemption only arises upon the performance of the whole of what has been undertaken.

Therefore it comes back to this. What was the bargain? On what event was the equity of redemption to arise? It arises in this case when not only the money actually lent has been paid, but when the share of profit rents has been paid also? When we see that, we see that the case is covered by *Biggs* v. *Hoddinott* and *Potter* v. *Edwards*, for there is no hardship or oppression here.

ROMER, L.J.—I agree, and I will add a few words as the case is important. Before *Biggs* v. *Hoddinott* there was, no doubt, considerable obscurity as to the extent of the rule in equity with regard to contracts between mortgagors and mortgagees. It was pointed out in that case that certain observations of the judges in particular cases which had been previously more or less looked upon as laying down that a mortgagee could not stipulate for any collateral advantage went too far, and must be treated as no longer representing the law. I refer in particular to the observations of Trevor, J., in *Jennings* v. *Ward*, and of Hargreave, J., in *In re Edwards' Estate*, 11 Ir. Ch. Rep. 367, and to the observations of other judges in cases referred to by Kay, J., in *James* v. *Kerr* and *Mainland* v. *Upjohn*. I take it that it has now been clearly established, first, that there is no such principle as has been stated that a mortgagee shall not stipulate for any collateral advantage for himself. He may so stipulate, and if he does, nothing can be said against it; and he can obtain a collateral advantage and can enforce it, it always being understood that the bargain must not be unconscionable or oppressive. Secondly, I take it also to be clear that there is now no such principle as was suggested, that where the mortgagee has stipulated for a collateral advantage as a condition of the loan the presumption is that the advantage has been obtained or the contract made under pressure. There is no such presumption, but each case must be determined on its own circumstances, and the court must look into the circumstances of each case and see whether the bargain is unconscionable or oppressive.

These principles are now established by *Biggs* v. *Hoddinott*, and I agree with the other members of the court that the decision of Byrne, J., cannot be sustained, though I can well understand how he, as a judge of first instance, may have thought himself bound to come to the conclusion which he did.

*Appeal allowed.*

Solicitors, *Page & Scorer; Fladgate & Co,*

---

## High Court of Justice.

Chan. Div. } Nov. 1, 8.
Stirling, J. }

SALTON v. NEW BEESTON CYCLE CO. (a.)

*Solicitor—Principal and agent—Revocation of authority by dissolution of defendant company—Notice of revocation—Liability of solicitor to pay plaintiff's costs—Companies Act*, 1862, *s.* 143.

*A company had been dissolved by reason of the expiration of three months from the registration of the return made by the voluntary liquidator, to the Registrar of Joint-Stock Companies under section* 143 *of the Companies Act*, 1862.

*Subsequent to the dissolution of the company, an action against the company, which had been commenced before the dissolution, came on for trial. On the* 16*th of March, the day of the trial, the solicitor of the company was informed that the final meeting had taken place, but he did not use due diligence to ascertain whether the company was dissolved. Judgment was given against the company.*

*Held, that the solicitor of the company was liable to pay costs as from the* 16*th of March.*

Whiteley Exerciser (Limited) *v.* Gamage, 47 *W. R.* 296, [1898] 2 *Ch.* 405, *distinguished.*

Motion.

This was a motion on behalf of the plaintiff asking that the proceedings in the action might be set aside as from the 12th of November, 1898, the date of the dissolution of the defendant company, and that the solicitor for the defendant company might be ordered to pay the costs of those proceedings.

The writ in the action was issued on the 25th of February, 1898, and on the 4th of March an appearance was entered on behalf of the company. On the 17th of March the statement of claim was delivered, on the 13th of April the defence was put in, on the 18th of April the reply was delivered, and on the 20th of April the action was set down for trial. On the 18th of November the statement of claim was amended, and on the 9th of December the defence was amended; on the 1st of February, 1899, the defence was re-amended, and on the 14th of February an order for particulars was made. The action was tried on the 16th of March, and on the 23rd of March, 1899, judgment was given for the plaintiff against the defendant company for £566 13s. 4d. and costs: 47 W. R. 462, [1899] 1 Ch. 775.

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

When the plaintiff came to enforce his judgment it was discovered that the company had been dissolved on the 12th of November, 1898; hence the present motion.

At the extraordinary general meetings of the company held on the 14th of October and the 2nd of November, 1897, resolutions were passed for the voluntary winding-up of the company, and a Mr. George Henry Sharp was appointed liquidator, and was directed to carry into effect two contracts for the sale of the assets of the defendant company to two new companies proposed to be formed. One of these new companies was the Beeston Cycle Co., which took over certain assets and liabilities of the defendant company (including the liability to the plaintiff which is the subject of the present action), and by the agreement that company was authorized to defend in the name of the defendant company all actions brought against it with reference to the liabilities so taken over.

On the 26th of February, 1898, the writ in this action was left by the liquidator of the defendant company, or by his direction, with the solicitor of the Beeston Cycle Co., with instructions to attend to it. The solicitor thereupon brought the matter before the directors of the Beeston Cycle Co., and appeared to the writ and defended the action by their instructions.

The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 142, provides that the liquidator, on the conclusion of a winding up, shall make up an account and hold a general meeting of the company.

Section 143: "The liquidators shall make a return to the registrar of such meeting having been held, and of the date at which the same was held, and on the expiration of three months from the date of the registration of such return, the company shall be deemed to be dissolved."

*Jenkins, Q.C.*, and *T. L. Wilkinson*, for the motion, contended that the plaintiff was damnified by the solicitor having used the defendant's name without authority.

They referred to *Geiliger* v. *Gibbs*, 45 W. R. 315, [1897] 1 Ch. 479; *In re Gray, Gray* v. *Coles*, 65 L. T. Rep. 743.

*Upjohn, Q.C.*, and *Younger*, for the solicitor.—There was complete authority. The plaintiff had suffered no damage, and there had been no fruitless proceedings or waste of time. The plaintiff got a final judgment binding on the old company.

They referred to *Whiteley Exerciser (Limited)* v. *Gamage*, 47 W. R. 296, [1898] 2 Ch. 405; *Crookhaven Mining Co.*, 15 W. R. 28, L. R. 3 Eq. 69; *Cumber* v. *Wane*, Smith's L. C. (10th ed.), vol. 1, 325; R. S. C., ord. 17, r. 4; *Reynolds* v. *Howell*, 22 W. R. 18, L. R. 3 Q. B. 398; *Smout* v. *Ilbery*, 10 M. & W. 1; *Wade* v. *Keefe*, L. R. Ir. 22 Q. B. 154; *La Compagnie de Mayville* v. *Whitley*, 44 W. R. 568, [1896] 1 Ch. 788; *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 28 W. R. 217, 13 Ch. D. 310; *Nurse* v. *Durnford*, 28 W. R. 145, 13 Ch. D. 764.

*Jenkins, Q.C.*, referred to *In re London and Caledonian Marine Insurance Co.*, 27 W. R. 713, 11 Ch. D. 140.

STIRLING, J., after stating the facts, continued: It was not disputed that the solicitor had authority to appear and defend the action down to the 12th of November, 1898; but it is contended that his authority terminated on that day. It appears that on the 25th of July, 1898, the liquidator held a final meeting pursuant to section 142 of the Companies Act, 1862, and made a return of the meeting to the registrar on the 4th of August, and that such return was registered on the 12th of August, and consequently that the defendant company was dissolved by virtue of the provisions of section 143, on the 12th of November, 1898.

The solicitor swears that he did not know of the final meeting being called until the 16th of March, 1899, the day of the trial, when he was for the first time informed of it by the secretary of the Beeston Cycle Co. The learned junior counsel who appeared for the solicitor on this motion stated in court (and I implicitly accepted the statement) that the secretary gave this information at a conference held with him immediately before the trial, that he inquired whether the defendant company had been actually dissolved, but was informed by the secretary that he did not know, and that he advised that no advantage should be taken of the dissolution by way of defence, but that the action should be defended on the merits. The course was adopted and the action was tried without the learned judge, Cozens-Hardy, J., being informed of the position of the defendant company.

I do not quarrel with the advice given as to the defence of the action, but in my opinion there was a point to which sufficient attention was not paid—viz, whether either solicitor or counsel had authority to represent the defendant company at the trial. It would have been easy to send someone to examine the documents at the office of the registrar of joint-stock companies; an inspection of those documents would have shown that the company was dissolved, and I think that the fact of the dissolution ought to have been mentioned to the judge, and his opinion taken whether the trial ought to proceed.

It was contended, however, that the judgment was perfectly valid, mainly on the authority of *Whiteley Exerciser* v. *Gamage*. There on the 5th of August, 1897, the plaintiff's action was dismissed with costs. The defendant proceeded to tax his costs, and the taxing-master made his certificate on the 4th of February, 1898, the defendant took out a summons to vary the certificate, but owing to the state of business it did not come on until the 15th of July following. In the meantime on the 14th of April, the company was dissolved in the same way as in the present case. It was held by North, J., that the summons could proceed, and he made an order on it adverse to the company. This decision rested, as I understand it, on the ground that the delay was entirely due to the state of business in the court, and consequently that the maxim *actus curiæ nemini facit injuriam* applied: see *Cumber* v. *Wane*.

In my opinion, however, that reasoning does not apply to the present case, for the simple reason that the delay is not shown to have been entirely due to the state of business of the court. The action was, no doubt, set down for trial on the 20th of April, 1898, and would have been ripe for trial so far as the court was concerned early in May, but long after that it was found necessary to amend the pleadings and to amend the defence. The delay, therefore, was partly attributable to the parties themselves.

It was further contended that the solicitor was n t liable because he had originally authority to defend the action and had no knowledge that the authority had been revoked by the dissolution of the defendant company. [His lordship referred to *Smout* v. *Ilbery* 10 M. & W., pp. 10, 11.] This decision is approved of in Story on Agency, s. 265. It seems to me that the principle there laid down applies to a solicitor appearing for a party in an action who is an agent of a special kind and known to the opposite party to be such and that it applies just as much to the dissolution of a legal entity or corporation, as to the death of a living person. In my opinion the solicitor ought not to be held liable for any costs down to the

16th of March, 1899. I think, however, that on that day he did not use due diligence to ascertain whether the defendant company was dissolved or not and that any costs incurred by the plaintiff after that day ought to be borne by him.

There will be no costs of the present application.

Solicitors, *Robert Greening; Sharpe, Parker & Co.*, for *Hughes & Masser*, Coventry.

---

## IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — Oct. 30.

*In re* CHRISTIE.

*Ex parte* CHRISTIE *v.* ENGEL. (*a.*)

*Bankruptcy—Scheme of arrangement—Remuneration of trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 72, *sub-section* 1—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-section* 16; *s.* 15, *sub-section* 1—*Bankruptcy Rules*, 1886 *and* 1890, *rr.* 305, 306—*Scale of Fees, Table B.*

*Where a relative of the bankrupt provides a sum to pay a composition on the debts proved in the bankruptcy, the trustee cannot claim a commission on such sum as on an amount realized by him.*

Application by the bankrupt and his father for a reduction of the amount of remuneration claimed by the trustee. The bankrupt was adjudicated in January, 1898, and the respondent Engel was appointed trustee. After adjudication the bankrupt proposed a scheme of arrangement by which his creditors were to receive eight shillings in the pound, and on the 30th of August, 1898, the bankrupt's father paid £5,200 into a bank to the joint account of his solicitor Ridsdale, and Engel who was reappointed as trustee under the scheme.

On the 2nd of September the scheme was approved, and on the 7th of October the creditors held a meeting at which they voted remuneration to the trustee at the rate of 5 per cent. on all moneys "brought to the credit" of the estate, and 5 per cent. on the amount distributed in dividends.

When the trustee sent in his accounts he claimed 5 per cent. on the sum paid by the bankrupt's father to provide for the composition. The bankrupt and his father objected to the claim and made the present application.

*Younger*, for the applicants.—The resolution of the creditors was *ultra vires*, for the scheme had already been approved and the money paid to provide for the composition; they were voting remuneration not out of the estate but out of the father's money. They used the words "brought to credit" because they could not say that the amount provided by the father had been "realized by the trustee," but the only remuneration allowed by section 72, sub-section 1, of the Bankruptcy Act, 1883, and section 15, sub-section 1, of the Bankruptcy, Act, 1890, is on the "amount realized by the trustee."

*Muir Mackenzie*, for the trustee.—The creditors had power to grant this remuneration. The amount in question was practically "realized by the trustee," for the estate was to vest in the father after payment of the composition, thus the transaction was equivalent to a sale of the estate by the trustee: see *Ex parte The Board of Trade, In re Marsden*, 9 Morrell 70. Further, the words "brought to credit" are those used in the Board of Trade order as to fees and percentages chargeable by the official receiver: Scale of Fees, Table B.

*Younger*, in reply, referred to rules 305, 306, as showing that commission is only payable on the amount "realized by the trustee."

WRIGHT, J.—It seems to me, looking at the language of section 72, sub-section 1, of the Bankruptcy Act, 1883, which enacts that the remuneration of the trustee as to one part shall be payable "on the amount realized," that it is clear that the trustee cannot be voted remuneration on any amount which he has not actually earned, and this section is not in any way weakened by section 15, sub-section 1, of the Bankruptcy Act, 1890.

I do not agree that the transaction in this case was equivalent to a sale of the estate. It is true that the estate was to vest in the father on his paying the composition, but the estate was only worth about £400, and the father had to provide £5,200.

The amount on which the trustee is claiming commission was not realized by him at all, but was a fund provided by the father, and I am of opinion that the trustee is not entitled to any percentage upon it, and that this application must be allowed.

Solicitors for the applicants, *Ridsdale & Co.*

Solicitor for the respondent, *J. H. Solomon.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

---

Q. B. Div. (Wright, J.) — Aug. 10, 1899.

*In re* NEWMAN.

*Ex parte* OFFICIAL RECEIVER *v.* HURT. (*a.*)

*Bankruptcy—Office of trustee vacated on receiving order being made against him—Rescission of receiving order—Restoration of trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 85.

*By section* 85 *of the Bankruptcy Act*, 1883, "*If a receiving order is made against a trustee, he shall thereby vacate his office of trustee.*"

*A receiving order had been made against a trustee, and soon afterwards rescinded on the ground that it ought never to have been made.*

*Held, that the receiving order should be treated as if it never had been made, and the trustee deemed not to have vacated his office.*

Motion by the official receiver for an order that the respondent do hand over to him the estate of one Newman, a bankrupt.

On the 10th of July, 1894, Newman was adjudicated bankrupt, and on the 12th of July the respondent Hurt was appointed trustee in the bankruptcy.

On the 4th of March, 1899, a receiving order was made against Hurt, and on the 6th of April the Inspector-General in Bankruptcy ordered him to hand over the books and other assets of the bankrupt's estate to the official receiver.

Shortly afterwards the receiving order against Hurt was rescinded on the ground that it ought never to have been made, there being no petitioning creditor's debt, and he refused to hand over the estate. The official receiver thereupon launched the present motion.

*Muir Mackenzie*, for the official receiver.—I submit that this case depends entirely on the words of section 85 of the Bankruptcy Act, 1883: "If a receiving order is made against a trustee he shall thereby vacate his office of trustee." The respondent vacated

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

his office when the receiving order was made against him on the 4th of March, and should be ordered to hand over the estate to the official receiver.

*Hansell*, for the respondent.—Where a receiving order has been rescinded on the ground that it ought never to have been made, the person against whom it was made ought to be fully restored to his former position: see *Bailey* v. *Johnson*, 20 W. R. 1013, L. R. 7 Ex. 263, and *Crewe* v. *Terry*, 2 C. P. D. 403, 25 W. R. Dig. 13. The respondent here ought to be treated as if no receiving order had ever been made against him, and continued in his office as trustee.

*Muir Mackenzie* replied.

WRIGHT, J.—It seems to me that this particular case is free from difficulty. It is true that a receiving order was made against the respondent, but it was speedily rescinded on the ground that there was no debt to support the petition, and therefore the receiving order ought never to have been made. I think that common sense requires that the respondent should be restored to his office of trustee subject to any new rights which may have arisen in the meanwhile. If any new rights arise they would have to be taken into consideration. If no new rights arise, which seems to be the case here, then I think that I ought to hold that the receiving order was rescinded *ab initio* and should be treated as though it never had been made. I think, therefore, that the trustee was restored to his original position, and that this application must be dismissed.

Solicitor for the official receiver, *The Solicitor to Board of Trade.*

Solicitor to the respondent, *H. H. Fanshawe.*

---

Q. B. Div. (Phillimore, J.) } Aug. 1, 1899.

KING v. HUTTON. (a.)

*Bankruptcy—Stock Exchange transactions—Bankruptcy of broker—Debt for differences due to client—Collection of assets by official assignee of Stock Exchange—Surplus after payment of Stock Exchange creditors—Claim by trustee in bankruptcy.*

*A sum of money due from a stockbroker to a customer for differences is not impressed with any trust in favour of the customer, but, on the bankruptcy of the broker, passes to the trustee in bankruptcy for the benefit of the general body of creditors.*

Interpleader issue to determine whether the sum of £286 8s. 9d. paid into court by the official assignee of the Stock Exchange was the property of the plaintiff or the defendant.

In 1898 Woodd, a stockbroker, now bankrupt, had open a speculative account in certain blocks of shares for the defendant Hutton.

On the 13th of December, 1898, Woodd bought certain stocks for the defendant which he sold on the 19th of December for the account at the end of December.

On the 28th of December, which was contango day, the account showed a balance of profit in favour of the defendant amounting to £286 8s. 9d.

On the 29th of December Woodd closed the contracts by passing on the ticket of the stocks he had sold to the jobbers, and on the same day he absconded, being largely in debt.

On the 30th of December, which was pay day, Woodd was declared a defaulter on the Stock Exchange.

On the 30th of December the official assignee of the Stock Exchange closed all Woodd's contracts on the Stock Exchange, and collected about £2,000 due to Woodd. After discharging all Woodd's liabilities on the Stock Exchange the official assignee had in hand a balance of about £600.

On the 14th of January, 1899, a receiving order was made against Woodd, he was adjudicated bankrupt on the 28th of January, and King, the plaintiff, was appointed trustee in the bankruptcy.

On the 9th of February the defendant claimed the sum of £286 8s. 9d., representing the balance due to him from Woodd, from the official assignee of the Stock Exchange.

On the 17th of February the plaintiff claimed the same sum, whereupon the official assignee took out an interpleader summons and the present issue was directed.

*Herbert Reed, Q.C.*, and *Muir Mackenzie*, for the plaintiff.—The trustee should have this money for the benefit of the general body of creditors. It does not represent specific stock sold for the defendant, and therefore is not impressed with any trust in his favour. It only represents differences on an account, including various securities. No rules of the Stock Exchange can prejudice creditors outside that body: *Tomkins* v. *Saffery*, 26 W. R. 62, 3 App. Cas. 213.

*Rufus Isaacs, Q.C.*, and *Widnell*, for the defendant.—If Woodd had remained solvent he would have been trustee of this money for the defendant, and his trustee can have no higher rights than he had.

They cited *Ex parte Grant, In re Plumbly*, 28 W. R. 775, 13 Ch. D. 667; *Ex parte Cooke, In re Strachan*, 25 W. R. 171, 4 Ch. D. 123; *Taylor* v. *Plumer*, 3 M. & S. 562; *Harris* v. *Truman & Co.*, 30 W. R. 533, 9 Q. B. D. 264; *Ex parte Boden, In re Wood*, 28 L. T. Rep. 174, 21 W. R. Dig. 29; *May* v. *Angeli*, 13 T. L. R. 568; *Robinson* v. *Mollett*, L. R. 7 H. L. 802, 24 W. R. Dig. 222.

*Reed, Q.C.*, was not called upon to reply.

PHILLIMORE, J.—This case has presented several difficulties, and upon the best consideration I can come to I think there must be judgment for the plaintiff on the issue. The form of the issue in this case prevents there being any question of parties or form of action to consider. It might very well be that if the official assignee had not intervened the true remedy of the trustee in bankruptcy would have been to apply to the various dealers who owed money to the defaulting stockbroker Woodd, and to request them to pay him, the trustee in bankruptcy, and to sue them if they did not do so. That would have been a most inconvenient course, and it is very much better that the official assignee of the Stock Exchange, whatever other view might be taken, should collect all these moneys, and that they should be considered as paid to him for whomsoever they might concern. But, as I have said, the form of the issue and the fact that the money is in court, render it unimportant to consider what might have been the necessary forms if there had been some other arrangement of litigation.

The real and sole question here is, whether a sum of £286 8s. 9d. less, I suppose, some costs of paying it in, is part of the assets of the defaulting debtor Woodd, or whether it is impressed with a trust in favour of the claimant Hutton, the defendant in this issue. Now, this fund was not really collected by the action of the official assignee under the operation of the rules of the Stock Exchange, by which, when a man becomes a defaulter, his actual transactions are put an end to. This particular sum of money simply represents the balance due from Woodd to Hutton on the settling day, the 28th of December, Woodd not having become a defaulter until the 30th. We have

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

nothing to do here with any moneys which might have accrued under current transactions between the 28th of December and the settling day in the middle of January. This sum of £286 8s. 9d. represents simply differences due at the last settling day, which could have been recovered there and then, if they had so chosen, by the clients, or at any rate on the 30th of December, which was pay day. It is not an artificial fund created by the rules of the Stock Exchange, and therefore I have not to consider the questions which were raised in the case of *Ex parte Grant, In re Plumbly*, 28 W. R. 775, 13 Ch. D. 667. Nor again is this a case in which a broker has been directed to sell one particular parcel of stock, in which case some of the language in *Ex parte Cook, In re Strachan*, 25 W. R. 171, 4 Ch. D. 123, and possibly in *Taylor* v. *Plumer*, 3 M. & S. 562, might apply. Here Hutton has made Woodd his agent to buy and sell various stocks on the Stock Exchange, and the arrangement between them, as I find it, was this: not that in respect of each security the value of it when sold came to Hutton, nor even that in respect of each security the difference of profit or loss between buying and selling came to or was paid by Hutton; but that the only thing Hutton expected to get from Woodd was the balance of account, the margin of profit, if there was one, between profit and loss on the various securities dealt, as each account came through. Now, in respect of that balance, can it be said that Woodd was a trustee for Hutton? I think certainly not. I think it was a general debt due from Woodd to Hutton, and therefore a debt for which Hutton, under the circumstances, must prove for in the bankruptcy in the ordinary way. I have not here to deal, as I have said, with cases where the default occurs in the middle of a bargain. In that case I have no doubt the customer can step in, either by himself or by another broker, and complete the transaction, receive the stock or the purchase-money of the stock, as the case may be. But in this case the differences were well ascertained and fixed. There was no stock to receive, no stock to sell, on the account between broker and customer—there was merely a balance. I have considered all the cases to which I have been referred, and I come to the conclusion that it is not right to say that this balance is the specific money of the customer. It is a debt due from the broker to the customer, and the fund in question is part of the ordinary assets of the broker, and must be paid over to the trustee in bankruptcy, and Hutton must prove against the bankrupt's estate in the usual way.

*Judgment for the plaintiff.*

Solicitors for the plaintiff, *Ellis, Bickersteth, & Ellis.*
Solicitors for the defendant, *Cheston & Sons.*

---

Q. B. Div. (Wright, J.) July 24, 1899.

*In re* VAUTIN.
*Ex parte* SAFFERY. (*a.*)

*Bankruptcy — Petitioning creditor's debt — Security— Valuation—Redemption by trustee at assessed value— Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Schedule II., rr.* 11, 12.

*Where a secured creditor has assessed the value of his security in his petition, but has not yet proved in the bankruptcy, the trustee cannot call upon him to surrender his security upon payment of the value at which it has been assessed in the petition.*

Ex parte Taylor, In re Lacey, 13 *Q. B. D.* 128, 32 *W. R. Dig.* 21, *distinguished.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Motion by the trustee in bankruptcy for an order on the respondent W. H. Hart for delivery up of certain valuable securities upon payment of £3,200, being the value at which the respondent had assessed them in his petition.

The respondent in the case was the creditor on whose petition the receiving order had been made. In his petition he set forth that he held certain railway shares as security for his debt, and assessed their value at £3,200. The shares having since risen in value to £3,973, the trustee claimed to be entitled to redeem them at the value assessed in the petition, and formally tendered the sum of £3,200 in cash and demanded delivery of the shares. The respondent refused to part with them, whereupon the trustee instituted the present proceedings.

*Rufus Isaacs, Q.C.*, and *Muir Mackenzie*, for the trustee.—A creditor can never get any more for his security than the amount at which he originally values it. He is bound by the estimate which he makes, and must surrender it to the trustee on payment of the assessed value: see *Couldery* v. *Bartrum*, 30 W. R. 141, 19 Ch. D. 394; *Ex parte Taylor, In re Lacey*, 13 Q. B. D. 128, 32 W. R. Dig. 21.

*Herbert Reed, Q.C.*, and *H. Kisch*, for the respondent.—The trustee's power to redeem securities depends now upon rules 11 and 12 of the second schedule to the Bankruptcy Act, and they do not apply until the creditor has valued his security in his proof. Here the creditor has not as yet sent in a proof at all, and the trustee is not yet in a position to redeem his securities. *Ex parte Taylor, In re Lacey*, has no application to the question of redeeming a security.

*Muir Mackenzie* replied.

WRIGHT, J.—I think the claim of the trustee fails on the ground that there is nothing in the Bankruptcy Act, 1883, or the rules, which gives him the right to redeem a security except in cases where a creditor has proved, either under Schedule I. for the purpose of voting, or under Schedule II. for the purpose of ranking for dividend. Rule 2 in Schedule II. provides that a secured creditor shall, before ranking for dividend, state in his proof the value at which he assesses his security. Then rule 12 says that where a security is "so valued" the trustee may at any time redeem it on payment to the creditor of the assessed value, and the same words "so valued" occur again in rule 13. I think that those words "so valued" in those rules expressly refer to rule 2, and mean, as that rule says, the assessed value in the proof. Here the creditor has not proved for his debt, and therefore those rules do not apply, and whatever may have been the intention of the Legislature, there is nothing in the Act or the rules which goes further or applies to a petitioning creditor. But then I have to deal with the case of *Ex parte Taylor, In re Lacey*. At first I thought that it expressly applied to the present case, but, when it is looked at, it is only a case turning on the sufficiency of the petitioning creditor's debt. I do not think it is an authority on the question of redemption, because the attention of the court there was not called to the point raised in the present case.

I think, therefore, that it is not an authority for the proposition for which it is cited in the text-books —namely, that where a debtor is adjudicated bankrupt on the petition of a secured creditor, the trustee in bankruptcy is entitled to redeem the security at the amount at which it is valued in the petition.

*Application dismissed.*

Solicitors for the applicant, *Halse & Trustram.*
Solicitors for the respondent, *Beyfus & Beyfus.*

## Court of Appeal.

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — Nov. 2.

*In re* TURNEY.
TURNEY *v.* TURNEY. (*a.*)

*Will — Construction — Vesting — Remoteness — Maintenance.*

*A testator bequeathed £12,000, to be invested within ten years after his decease, upon trust for his daughter for life, then, as to £1,000, part thereof, for her husband for life, and subject thereto for all the children of the daughter, when they should attain twenty-five, but not before, in equal shares; and until the £12,000 should be invested, the testator directed the trustees to pay to his said daughter, or, in the event of her decease, to her said husband and children, interest on "their respective portions." In default of children the fund to form part of the residue. He bequeathed another sum of £12,000 upon similar trusts for another daughter, her husband, and children. The residue he devised and bequeathed to his two sons absolutely in equal shares. The testator empowered his trustees to raise any part (not exceeding one moiety) of the expectant share of any grandchild of his under his will, and apply it for the advancement of such grandchild. He also empowered them to apply all or any part of the income arising from the expectant share of such grandchild, after the death of the tenant for life, for the maintenance and education of such grandchild.*

*By a codicil the testator revoked the gift of one moiety of his residuary estate to one of his sons, and directed that such moiety should be held on trust for his said son during his life, and after his death for the child or children of his said son absolutely on attaining twenty-five. In the event of a child dying before attaining twenty-five, such child's share was to go to the testator's other son absolutely.*

*Held, that the children of the son and of the two daughters took under the will vested interests in their shares, and that, therefore, the gifts to them were not void for remoteness.*

FOX *v.* FOX, 23 *W. R.* 314, *L. R.* 19 *Eq.* 286, *approved.*

This was an appeal from a decision of Kekewich, J. A testator by his will bequeathed £12,000 to trustees upon trust to invest the same within ten years after his decease, and to pay the income thereof to his daughter Jessie during her life for her separate use without power of anticipation, and after her death to pay £1,000 to her husband, if then living, and subject as aforesaid as to capital and income upon trust for all the children of his said daughter when they should attain the age of twenty-five years, but not before, in equal shares, and in case there should not be "any such child" the fund was to form part of the residue; and until the £12,000 should be invested the trustees were directed to pay to his said daughter, or, in the event of her decease, to her said husband and children, interest at £3 per cent. on "their respective portions." Then came another bequest of £12,000 upon similar trusts in favour of another daughter of the testator, her husband, and children, with a similar trust in default of children. The testator devised and bequeathed his residuary estate, real and personal, to his sons James Neave Turney and Horace Turney absolutely. Then came a gift over in the event of either son dying in the testator's lifetime and leaving children who should attain the age of twenty-five years.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The testator declared that his trustees might, at their discretion, raise any part or parts (not exceeding altogether one moiety) of the expectant share of any grandchild under his will, and apply the same for his or her advancement. And he empowered his trustees to apply all or any part of the income arising from the expectant share of any grandchild under his will after the death of the preceding owner for life thereof, for the maintenance and education of each such grandchild, and he directed his trustees to invest and accumulate the unapplied income in augmentation of the capital of such share.

By a codicil to his will the testator explained that his son James Neave Turney was in bad health, and continued: "I revoke the absolute gift of one moiety of my residuary estate to my son James Neave contained in my will, and instead thereof I direct my trustees to hold the said moiety of my residuary real and personal estate in trust to pay the income thereof to my son James Neave during his life, and after his death upon trust for his child or children absolutely upon their attaining the age of twenty-five years, and in the event of the death of either or all of the children of my said son James Neave before attaining the age of twenty-five, then upon trust to pay the share of the child or children so dying to my said son Horace George absolutely." In other respects the testator confirmed his will.

The testator's four children survived him, and they were his sole statutory next-of-kin, his son James Neave Turney being his heir-at-law. James Neave Turney subsequently died, leaving a widow and two children. He left a will by which he appointed executors and trustees, and devised and bequeathed his residuary estate upon certain trusts. Each of the testator's daughters had children.

An originating summons was issued by the testator's trustees to determine the construction of his will. Kekewich, J., held that the trusts of the moiety of the residuary estate after the death of James Neave Turney were void for remoteness, and that there was an intestacy as to that moiety. He also held that the trusts declared of the two sums of £12,000 respectively after the respective deaths of the two daughters (except the trusts for their respective husbands) were respectively void for remoteness.

James Neave Turney's children appealed against the decision so far as the moiety of the residuary estate was concerned, and the children of the daughters appealed against the decision as regarded the two sums of £12,000.

*Renshaw, Q.C.*, and *G. Henderson*, for James Neave Turney's children.

*Warrington, Q.C.*, and *Bassett Hopkins*, for James Neave Turney's widow.

*Theobald, Q.C.*, and *Solomon*, for the testator's two daughters.

*Hughes, Q.C.*, and *Broomfield*, for the children of the daughters.

*Bramwell Davis, Q.C.*, and *P. S. Stokes*, for the trustees of the testator's will.

*A. Beddall*, for the trustees of James Neave Turney's will.

The argument principally turned on the language used by the testator, but on behalf of the appellants the case of *Fox* v. *Fox*, 23 W. R. 314, L. R. 19 Eq. 286, was relied on as an authority that a gift to legatees to be paid on their attaining a certain age followed by a gift of the income for their maintenance was a vested gift. On the other side it was argued that since the decision of North, J., in *In re Wintle, Tucker* v. *Wintle*, 45 W. R 91, [1896] 2 Ch. 711, *Fox* v. *Fox* must be taken to be overruled.

LINDLEY, M.R.—In this case I do not think we shall gain any advantage by taking time to consider it. This case turns, of course, upon the language of these two documents, the will and codicil, and I confess that the impression upon my mind is that the learned judge is wrong in saying that there is an intestacy either as to the residue or as to the £12,000. The intestacy which the learned judge has arrived at is not an intestacy created by any ambiguity in the language of the will. It is an intestacy created by the application to the will of the doctrine of perpetuities. Of course we are not at liberty to misconstrue the will in order to avoid an intestacy brought about by the application of the doctrine of perpetuities, any more than we are in those cases where gifts are bad under the Charitable Trusts Act. We must construe the will and see what it means, and the question we have to consider is whether these gifts were vested subject to being divested or only vested on attaining twenty-five years.

Now, neither the will nor the codicil are well drawn; the language is by no means clear. It is not accurate, and, if I may venture upon a guess, I may say I do not believe the draftsman knew anything about the doctrine of perpetuities. If he had, he would not have drawn the will in the language which he has done. He has run his clients on to a shoal and the question is whether they can get off or not.

Now I will take the first appeal first. By the will the testator left the residue in substance to trustees—his two sons, as I understand. The testator had two sons and two daughters, those are the folks he provided for and their children. One of them appears to have been in ill-health; and by his will he leaves the residue to his two sons, because the word "or" obviously means "and in equal shares." Then there is a limitation that "if the sons or either of them should die in my lifetime leaving children who should survive me and attain the age of twenty-five years, then the last-mentioned child or children should take, and if more than one equally," and so on.

Now, by his codicil in which he gives his reasons, he revokes the gift of the whole of that residue so far as James Neave Turney is concerned. [His lordship read the codicil, and continued:] Now, the first observation I make upon that is this, that the expression "in trust to pay the income to my said son during his life and after his death upon trust for his child or children absolutely upon their attaining the age of twenty-five years" suggests this question, What does he mean by "absolutely"? Does he mean anything more than this, that it is to be paid to them at twenty-five? I think the language is ambiguous, but it is put in for some purpose, to make something clearer than it would be without it, and my impression is that it refers rather to payment. I do not say it is clear; it is not clear at all. But what to my mind removes the difficulty about holding this to be a vested interest is this, that he treats the children of his son James Neave as having shares although they may die before twenty-five. That is seen plainly in the clause which follows. It says "upon trust for his child or children absolutely upon their attaining twenty-five, and in the event of the death of either or all the children of my son James Neave before attaining twenty-five then upon trust to pay the share of the child or children so dying to my son Horace." Now, he treats the children of James dying under twenty-five as having shares which he bequeaths. Of course it is possible to construe it as Mr. Theobald construes it, but I doubt whether the meaning which he has suggested is the meaning of the will. Obscure as the will is, I think the preferable meaning, and that which is most in accordance with the testator's wish, is to say that there is a vested interest in this moiety given to the children of James Neave to be paid at twenty-five. Then there is a provision that if they die under twenty-five it is subject to being divested. I think that is a preferable view of that provision. Of course, if that is so, then the doctrine of remoteness goes. Quite apart from the doctrine of remoteness, I should say that that is rather the true meaning. I do not see how otherwise you can give full effect to that clause "upon trust to pay the share of the child or children so dying." Well, so much for the residue.

Now I turn to the £12,000 given to the daughters. The trustees within ten years from the date of his decease are to invest £12,000 in securities which he mentions, and then he says: "Upon trust to pay the income arising therefrom to my daughter Jessie Annie Arnold for life, and after her death to pay £1,000" (that is, £1,000 out of the £12,000) "to her husband if he shall be alive, and subject as aforesaid as to as well the capital as the annual income of the said trust fund" (that will be £12,000 if there is no husband alive, and £11,000 if there is) "upon trust for all the children of my daughter when they shall attain the age of twenty-five years, but not before," (I do not think anything turns upon the "not before" it emphasises it, that is all) "whether a son or daughter, and if more than one in equal shares."

Now, who are the legatees? Are the legatees all the children of the daughter, or are they the children who shall live to attain twenty-five? The expression "when" is not equivalent to the expression "who." It might work out so, but the language is, "the children of the daughter," and the "when" is the time. The importance of that will be seen presently because the next clause is, "and in case there shall not be any such child." I take it "such" means child of the daughter; it does not mean child of the daughter who shall attain twenty-five years. If it had been "who," I do not say it would not have been more difficult. "In case there shall not be any such child, then I direct that the fund shall form part of the residue." Then he says, "And I declare that until the sum of £12,000 shall be invested or otherwise provided for, my trustees shall pay to Jessie, or in the event of her decease then to the said husband and children interest on their respective portions." Now, what does that mean? How can you work that out unless you hold that the children take a vested interest subject to being divested. There is great difficulty in coming to any other conclusion if you attend to the words "children and their respective portions." I attach great importance to that phrase, "respective portions."

Then in addition to that there is the clause relating to maintenance which points in the same direction. I do not attach very much importance to it; but putting all these things together it appears to me that the conclusion as to the £12,000 is that it is vested in the children subject to its being divested, just as the residue is vested in them subject to the divesting. I think that is not straining the will; I think the will is badly drawn. I do not say that it is as capable of one construction as the other, but it is pretty nearly so, and if one construction leads to carrying out the intention and the other defeats it I think we ought to adopt a construction which carries it out. That is not at all misconstruing the will in order to avoid an intestacy, which we have no business to do, and which I protest against.

As regards the authorities, I say very little about them. I do not think much is gained by their consideration, but I am not at all satisfied that *Fox* v. *Fox* is wrong. My impression is that *Fox* v. *Fox* is very good sense and very good law.

JEUNE, P.—I agree especially with the view that where it is possible, having regard to the language of the will, to put upon it a construction which has not the effect of rendering a material part of it void by the application of the doctrine of perpetuities, it is desirable to do so. Of course, as the Master of the Rolls says, you have no right to misconstrue a will with that object, but if the will is ambiguous it is proper to lean rather to a construction which undoubtedly carries out the intention of the testator in the sense that it makes his will effectual and does not allow it to be rendered void by a doctrine which, if he had known it, he would certainly have desired to steer clear of.

Looking at this will it appears to me that almost every indication, which can be picked up in various parts of the will points to this gift being vested in the children.

With regard to the authorities, after reading the case of *Fox* v. *Fox*, what I should say about it is, it appears to me to be a very careful consideration of the authorities, and I confess, so far as I am able to express an opinion, I agree with the view taken by Sir George Jessel, M.R., that there is to be gathered from the earlier cases a general rule. That general rule appears to be founded on good sense. So far from thinking, therefore, that the case of *Fox* v. *Fox* ought to be considered as overruled, I confess I should be glad to think that the case of *Fox* v. *Fox* is established as law.

ROMER, L.J., delivered judgment to the same effect. His lordship based his reasons entirely on the peculiar language used in the will.

Solicitors, *Morris, Coote, & Co.; Hubbard, Son, & Eve; Marsden & Son.*

---

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — June 21, 22, 23, 24; July 10, 11, 12; Aug. 2, 1899.

*In re* NATIONAL BANK OF WALES. CORY'S CASE. (*a.*)

*Company—Director—Dividends—Loss of capital—*Ultra vires*—Negligence—Fraud—Reliance of director on officers of company—Statements honestly made—Damage—Statute of Limitations.*

*If the annual receipts of a company exceed the annual outgoings, dividends may be declared out of such excess of receipts, notwithstanding that there has been a loss of paid-up capital of the company. Even a limited banking company is not prohibited by law from paying dividends unless its paid-up capital is intact.*

*If a director make misstatements to his shareholders, he is liable for the consequences unless he can show that he made them honestly believing them to be true, and took such care to ascertain the truth as was reasonable at the time.*

*What constitutes reasonable care, and how far a director is justified in trusting his subordinates, are questions of degree in each case. The fact that if a director had made inquiries he might have discovered that he was being deceived is not in itself sufficient to prove that he did not act with reasonable care.*

*Articles of a company gave the company a lien on the shares of any shareholders who were indebted to the company. The directors were empowered to make advances to shareholders with or without security, but no advance was to be made to a director without security. Advances were made to directors, the only security being the lien on their shares conferred on the company by the articles.*

*Held, that, in point of law, the shares might be accepted as security if the board of directors considered them sufficient as regarded value.*

*A liquidator of a company, representing shareholders, is not debarred from recovering moneys which have been improperly paid by way of dividend by the fact that the claims of all creditors of the company have been satisfied.*

This was an appeal from a decision of Wright, J. The material facts were as follows: The National Bank of Wales was incorporated as a limited company in 1879 for the purpose of carrying on the business of bankers. Its capital was £2,000,000 divided into 100,000 shares of £20 each. The shares issued were never paid up in full, £10 being paid up and the remaining £10 being uncalled. The paid-up capital amounted in 1884 to £125,000, and it so remained till 1890, when it was increased to £225,000. The articles of association which were material were the following:

(15) Gave the company a lien on all the shares held by any shareholder indebted to the company and gave the directors a power to sell the shares of any such shareholder; (78) enabled any director to resign, and on the acceptance of his resignation by a board his office was vacated; (82) made audited accounts approved by a general meeting conclusive, except as regards errors discovered within three months; (82, 83) entitled the directors and officers to indemnity, except against their own wilful acts and defaults; (86) entrusted the management of the business of the company to the board of directors. Article (98*b*) empowered the board to appoint and dismiss branch managers and the general manager; (98 *e* and *h*) empowered the board to lend money or give credit with or without security. But there was (in 98*c*) a proviso "that no advance without security shall be made or credit given" to any director; (105) required the directors to cause proper accounts to be kept, so as to show the true state and condition of the company; (108) required them to lay before every ordinary meeting a proper balance-sheet, accompanied by a report as to the state and condition of the company, and as to the amount, if any, which they recommended to be paid out of the profits by way of dividend; (109 to 118) provided for auditing the accounts. The auditors were to have access to the company's books and accounts. By (116 and 117) they were to have copies of the statements proposed to be laid before the general meetings, and it was declared to be their duty to examine the same, with the accounts and vouchers relating to them, and to make a report thereon, and also to examine and report on the assets of the company. The auditors were also to report errors and irregularities to the board; (119) empowered the directors, with the sanction of a general meeting, to declare dividends in proportion to the amounts paid up on the shares, and also authorized the payment by the directors of *interim* dividends out of the profits of the bank accrued in any half-year ending the 30th of June; (120) empowered the directors to set aside out of the profits a reserve fund, and no dividend exceeding 6 per cent. per annum was to be paid until the reserve fund amounted to one-fifth of the paid-up capital; (121) provided that the reserve fund might be applied to meet contingencies, equalize dividends, repairs, or any other purpose of the company which the board may think fit.

The company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks, each with its own manager.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

and moreover that part of such interest and dividends were retained by the said John Cory and converted to his own use as a shareholder of the company."

The appeal and cross-appeal thus require th court to examine into Mr. John Cory's conduct as a director of the company from the time when he became a director in 1884 until he ceased to be so in December, 1890, or even later if the liquidator is correct.

The order, under review, was made on a summons issued under section 10 of the Companies (Winding-up) Act, 1890, on the 14th of June, 1895, a date which is material, having regard to the Statute of Limitations, on which Mr. Cory relies as a defence to the greater part of the demands made against him.

It will be convenient to consider his appeal first. This raises the question whether the funds of the company have been misapplied in payment of dividends. Before examining the controverted facts and discussing the legal questions which arise, it is desirable to state shortly the history of the company and how the present contr versy has arisen. [His lordship then stated the facts set out above as to the incorporation of the company and the conduct of its business, and continued:] The minutes of the directors' meetings show that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board either by the chairman or by the general manager. Mr. John Cory stated in his affidavit the general course of business at board meetings, and his cross-examination does not substantially differ from the account he there gives.

Wright, J., has regarded this evidence as an admission by Mr. John Cory of a total abnegation of the use of his faculties, and of an entire neglect of his duties. We cannot go so far as this. His evidence does, however, show that he only attended, when present, to whatever his attention was called to; and that, having no suspicion that anything was wrong, he made no special inquiries in order to ascertain that all was right. [His lordship then referred to the circumstances of the agreement with the Metropolitan Bank, and continued:] There can be no doubt that the shareholders were grievously deceived by the reports and balance-sheets laid before them, and no one can be surprised at their anger with their directors, and especially with the chairman and general manager, both of whom have been criminally prosecuted and convicted for their fraudulent conduct. Mr. John Cory's answer, however, to the attempt to make him liable for the losses sustained, and dividends paid, whilst he was a director, is that he was himself as much deceived as the shareholders by the chairman and manager, and that he was not guilty of any breach of his duty in not making special investigation when he had no reason to suppose that anything was wrong.

Wright, J., has come to the conclusion that Mr. John Cory was not only negligent but fraudulent; or, at all events, guilty of misconduct equivalent to fraud as regards its legal consequences. The learned judge has arrived at this conclusion from the fact that in their reports the directors unjustifiably stated that they had made provision for all bad and doubtful debts, whereas they had not. That the chairman and manager knew this, is very likely true, but that Mr. John Cory knew it is quite another matter. The table of bad debts shows that sums were constantly written off for bad debts, and there is nothing to justify the inference that Mr. John Cory knew that those sums were insufficient or that he did not honestly believe them to be sufficient. It may be that he ought to have been more vigilant than he was, and that he should not have trusted his brother and Collins so much as he did. But negligence is one thing, fraud is another, and we are quite unable to adopt Wright, J.'s, view that Mr. John Cory acted fraudulently in making reports to the shareholders and laying the balance-sheets before them. At the close of the argument for the liquidator we intimated that, in our opinion, the charge of fraud against Mr. John Cory failed, and further study of the evidence has strengthened this conviction. This is not only a very important matter to him as regards character, but to a great extent it relieves him from responsibility for anything done or omitted before the 14th of June, 1889.

Another part of the case on which we are unable to agree with Wright, J., relates to the date of Mr. John Cory's retirement from the board. There can be no doubt that he sent in a letter of resignation (although it was not produced), and that his resignation was accepted at a meeting of directors held in London on the 18th of December, 1890, and that he was informed of its acceptance on the 22nd of December, 1890. There can also be no doubt that his resignation was concealed from the shareholders until after their meeting on the 21st of January, 1891, and that, in the report then laid before the shareholders, the name of Mr. John Cory appeared as a director. The evidence is conflicting upon the question whether his resignation was or was not mentioned at the meeting. On the other hand, he was not present at it, and he swears he did not know that his name still appeared as a director. The learned judge says he is unable to believe that Mr. John Cory did not know that his name so appeared, and in the view of the court below Mr. John Cory improperly allowed his retirement to be concealed and allowed himself to be held out as a continuing director and as concurring in the report of January, 1891, which the learned judge holds to be as fraudulent on Mr. John Cory's part as those which preceded it. We cannot adopt the learned judge's view of this part of the case. We are satisfied that Mr. John Cory's resignation was *bonâ fide* and a fact, not a sham. He was not in fact a director after his resignation was accepted. He took no part in drawing up the report nor in recommending the dividend declared in January, 1891. Even if he received the report before the meeting and saw his name as a director and did not insist that his name should be struck out or that his resignation should be mentioned to the meeting (and the case against him cannot be put more strongly than this), even then we fail to see how such knowledge and omission can, without more, make him liable for misapplying the funds of the company, when in truth he took no part in their misapplication.

With these preliminary observations we pass to consider Mr. John Cory's liability in respect of the dividends declared in July and December, 1889, and July, 1890. The liquidator has taken the view that the dividends declared and paid by the company when Mr. John Cory was a director were all paid out of the capital of the company, and the evidence adduced by the liquidator is directed to prove that such was the case. But when this evidence is examined it seems quite plain that the dividends were not in fact paid out of any part of the money forming the paid-up nominal capital of the company, but were paid notwithstanding the loss of that capital and without making it good. What was done was this. The accounts were made up annually. Such losses incurred during the year as the directors recognized as losses were written off or provided for by carrying sums of money over to a reserve fund, and the balance of the receipts in each year over the outgoings in the same year (after making some allowance for bad debts and deductions for sums carried over to the reserve fund) were treated as the profits of that year, and

were divided as dividends. Losses written off in one year were not brought forward the next year so as to diminish the profits of that year, but were simply ignored, a fresh start being made every year and dividends being divided out of the excess of the annual receipts over the annual expenses. The effect of this was to throw all bad debts written off, and not provided for by an increase of reserve fund, on the capital and to diminish the paid-up capital year by year, and nevertheless to keep paying dividends out of the excess of the annual receipts over the annual expenses. It is obvious that this method of procedure, if long continued, would ultimately exhaust the paid-up capital of the company, and the first disastrous year in which the current outgoings exceeded the current incomings would produce great embarrassments Such a mode of dealing with the company's assets, however reprehensible, must nevertheless not be confounded with paying dividends out of the paid-up capital of the company. The paid-up capital of a limited company cannot be lawfully returned to the shareholders under the guise of dividends or otherwise. Even an article of association authorizing the payment of interest to shareholders on the amounts paid up on their shares cannot authorize a payment of such interest out of capital: see *In re Sharpe*. But paid-up capital which is lost can no more be applied in paying dividends than in paying debts. Its loss renders any subsequent application of it impossible. There was no such dealing with the paid-up capital of the company in this case as to amount to an illegal application of it. Further, it is not possible for the court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid-up capital is intact. Suppose a heavy unexpected loss is sustained. It must be met if there are assets to meet it with. The capital, even uncalled capital, must, if necessary, be applied to meet it. Such an application of capital is a perfectly legimate use of it. There is no law which in the case supposed prevents the payment of all future dividends until all the capital so expended is made good. Many honest and prudent men of business would replace a large loss of capital by degrees and reduce the dividends, but not stop them entirely, until the whole loss was made good. No law compels them to pay none at all. There are cases in which no honest competent man of business would think of charging particular debts or expenses to capital. We are certainly not prepared to sanction the notion that all debts incurred in carrying on a business can be properly permanently charged to capital, and that the excess of receipts over the other outgoings can be afterwards properly divided as profit, as if there had been no previous loss. No honest competent man engaged in trade or commerce would carry on business on such a principle. But, excluding cases in which everyone can see that a particular debt or outlay cannot be reasonably charged to capital, it may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine, and is often a matter on which opinions of honest and competent men differ: see *Gregory* v. *Patchett*, 13 W. R 34, 33 Beav. 595. There is no hard-and-fast legal rule on the subject. There can, however, be no doubt that if expenses or payments are obviously improperly charged to capital, and are so charged simply to swell the apparent profits and to make it appear that dividends may be properly declared, dividends declared and paid under such circumstances cannot be treated as legitimately paid out of profits, and can no more be justified than if they were paid out of capital. This was determined in *Bloxam* v. *The Metropolitan Railway Co.*, 16 W. R. 490, L. R. 3 Ch. App. 337, and has been acted upon in many other cases—*e.g.*, *Rance's case*, *In re The Oxford Benefit Building Society*, *The Leeds Estate Co.* v. *Shepherd*, *In re The London and General Bank*, 44 W. R. 80, [1895] 2 Ch. 673. It would seem that Sir G. Jessel inclined to the opinion that a limited company could not pay dividends unless its paid-up capital was kept up: see *In re The Ebbw Vale, &c., Co.*, 4 Ch. D. 827, 25 W. R. Dig. 48. But no decision has yet gone this length, and it has since been decided that dividends may be paid, even by a limited company, although its nominal capital is not kept up: see *Verner* v. *General and Commercial Investment Trust*, and the earlier case *Lee* v. *Neuchatel Asphalte Co.* What was lost there was fixed capital, and it is obvious that circulating capital or any other money employed in earning returns must be deducted from them in order to ascertain how much of them can be regarded as profit. If the returns do not exceed the money spent in procuring them (whether that money be called circulating capital or any other name) there can be no profits, and no ingenious process of book-keeping can alter the fact. It is not denied in this case that the annual receipts did exceed the annual outgoings, and the dividends having been paid out of the excess, the allegation that they were paid out of capital is not accurate. But, as already pointed out, it does not at all follow that the course adopted by the directors, in declaring dividends year after year as they did, was legally justifiable. It cannot be denied that the balance-sheets and profit and loss accounts concealed the truth (as now known) from the shareholders, and were, as it now turns out, grievously misleading. The shareholders were never told that the paid-up capital was being constantly diminished by bad debts, as now appears to have been the case. The shareholders were told every year that proper provision was made for those debts, and now that the case has been thoroughly investigated it is really reduced to the question whether Mr. John Cory was justified in making the statements he did and in dealing as he did with debts which have now been ascertained to be bad. It is easy to be wise after the event, and there is danger in treating a director as knowing years ago what now appears to be the fact. But it is the duty of the court to examine the state of things as they appeared to him when the dividends were declared, and to determine whether he was justified in what he did by what he knew and ought to have known. What he ought to have known is as important as what he knew. It was stated in a judgment delivered in this court a few weeks ago in the *Lagunas case*, *ante* p. 74, that if directors act within their powers, if they act with such care as is reasonably to be expected from them having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to that company. We believe this statement of the law to be correct, and we adopt it as our guide. It has been shown that in this case the dividends did not, in fact, come out of the paid-up capital of the company. Fraud is not established against Mr. John Cory, nor is there any proof that he was acting in the interests of his own friends or of himself and not *bonâ fide* with a view to the interest of the National Bank. The inquiry, therefore, so far as he is concerned, is reduced to the representations he made as to the position of the company and of his alleged want of care and attention to the affairs of the bank, and more particularly to his omission to find out that the manager was misleading the directors. In the *Lagunas case* it was said, and we repeat it, that the amount of care to be taken is

difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them: see *Overend, Gurney, & Co.* v. *Gibb*, L. R. 5 H. L. 480. Their negligence must be not the omission to take all possible care; it must be much more blameable than that; it must be in a business sense culpable or gross. We do not know how better to describe it. Some useful observations justifying the expression gross negligence will be found in Lord Chelmsford's judgment in *Giblin* v. *McMullen*, 17 W. R. 445, L. R. 2 P. C. 336. It is not, however, necessary to enlarge on this subject. The care, which in any case can be reasonably expected to be taken is, speaking generally, the measure of the care which the law requires to be taken where there is no contract affecting the question. What we have to determine is whether Mr. John Cory was justified in making the statements he made, and whether he could be reasonably expected to find out more than he in fact knew. Bad and doubtful debts were constantly considered and provided for; some being written off; some by setting aside reserve capital; £12,000 odd were written off before 1890, and £13,600, or thereabouts, were written off in that year, and £70 000 was set aside for reserve capital. Such matters were considered by the directors. The accusation is that they did not do enough in this way. But here again, even if some debts known to the manager to be bad were treated as good, it is not proved that Mr. John Cory knew this or had reason to suspect that what was done was inadequate. His evidence is clear that he neither knew nor suspected that such was the case, and that he really believed that the provision was ample. The same question arises, Was it his duty to test the accuracy or completeness of what he was told by the general manager and managing director? This is a question on which opinions may differ, but we are not prepared to say that he failed in his legal duty. Business cannot be carried on, on principles of distrust. Men in responsible positions must be trusted by those above them as well as by those below them until there is reason to distrust them. We agree that care and prudence do not involve distrust, but for a director acting honestly himself to be held legally liable for negligence in trusting the officers under him not to conceal from him what they ought to report to him appears to us to be laying too heavy a burden on honest business men. But this is the whole of Mr. John Cory's shortcomings as proved by the evidence. Even his letter of the 19th of January, 1888, on which Wright, J., placed so much stress, ceases to turn the case against him if he honestly believed it to be true, and if he was justified as a reasonably careful man in so believing; and we cannot say that he was not. Cases such as these are always cases of degree. In *Leeds Estate Co.* v. *Shepherd* the directors trusted their manager and were held liable. They did not take the trouble to see that what he did was even apparently what he ought to have done. They delegated their functions to him. The case of *In re Denham & Co.* is more like the present, and there the director was held not liable. It must be now conceded that if Mr. John Cory had himself studied the weekly statements and quarterly returns and had compared those for one period with those for another, and more especially if he had seen the letters addressed by the auditors to the directors, he would have been put upon inquiry, and would have found out, if he had not neglected his duty, that the affairs of the bank were not in the flourishing condition which he believed them to be in. The existence of the letters written by the auditors and accompanying their certificates were very much relied on against Mr. John Cory. Those letters are not produced. They were never found by the liquidator. His knowledge of them is derived from copies furnished by the auditors. These letters warned the directors annually, in and after 1884, and especially in January, 1890, that there were matters which required investigation, and if Mr. John Cory had known or suspected that there were such letters, and he had omitted to make inquiries into the matters to which attention was drawn, he would plainly have neglected his duty as a director and have been guilty of negligence to the degree justifying the epithet gross. But he had no reason to suppose there were any such letters, and apart from them the auditors' reports justified him in supposing that all was right. The letter from the auditors of the 13th of January, 1890, to the secretary of the bank was answered by the secretary on the 13th of February, 1890; it had been laid before the board, and this was done on the 10th. But Mr. John Cory was not there. He was apparently present at a subsequent meeting at which the minutes of the meeting on the 10th were confirmed, but the matter did not attract his attention; and, considering the terms of the minutes, this was very natural. We are satisfied that these letters from the auditors were fraudulently concealed from Mr. John Cory, and that he never knew of, or suspected, their existence. His ignorance of them was not attributable to negligence on his part. Mr. John Cory's omission to examine the weekly statements and quarterly returns is also, we think, excusable, although not on the same grounds, for they were known by him to exist, and were in the board room for inspection. We have had the advantage of an exhaustive examination of them, and of a comparison of long series of them, and we know the result and their full significance. But without a comparison of those for one period with those of an earlier period a director would derive little information that was really useful. No suspicion being aroused, Mr. John Cory's reasons for not examining them are natural, and his omission to examine them does not show want of reasonable care and attention on his part to the affairs of the bank. He had no reason to suppose that there were unsatisfactory debts beyond those written off and provided for. The evidence when carefully sifted unquestionably shows that Mr. John Cory might have found out that he was deceived by the general manager, and that the dividends declared were not in a business sense warranted by the profit made. On the other hand, the evidence shows that although he was deceived he neither knew nor suspected it. We are not prepared to say that he is guilty of any breach of duty in not discovering that those whom he trusted were misleading him; nor that in point of law he was guilty of any breach of duty in recommending the payment of dividends as and when he did. A director does not warrant the truth of his statements; he is not an insurer. But if he makes misstatements to his shareholders he is liable for the consequences unless he can show that he made them honestly, believing them to be true, and took such care to ascertain the truth as was reasonable at the time. This, we think, Mr. John Cory did. It follows that Mr. John Cory is not only not liable to make good the dividends declared, but also that he is not liable to refund those which he himself received as a shareholder, whether before or after the 14th of June, 1889, for there was no breach of trust in this matter by him. His conduct before that date was not more remiss than it was afterwards.

As regards the advances made to directors without security between the 14th of June, 1889, and the 18th of December, 1890. The lien given by article 15 came into existence automatically and gave the company an equit-

able charge on the shares with a power of sale, which is very important. It certainly constituted a security: *In re General Exchange Bank*, 19 W. R. 791, L. R. 6 Ch. App. 818. Article 98 enumerates what the board may do, and presupposes consideration and attention by them; and we are of opinion that no credit was to be given and no advance was to be made to a director without deliberation by the board nor without security, and if so made it would be difficult to justify the advance by falling back on the lien conferred by article 15. But we cannot go the length of saying that shares in the bank might not be accepted as security on reasonable deliberation if of adequate value. We do not overlook the fact that their value depends on the value of the assets of the company lending its money on them. This renders care and deliberation all the more necessary whenever the borrower was a shareholder or a director. But in either case we are of opinion that shares in the bank might be accepted as security if the board considered them sufficient as regards value. Suppose the board considered a proposed advanced, and, being satisfied that the shares would sell for considerably more than the sum advanced, authorized an advance and obtained a deposit of the share certificates of the borrower as security. We do not think they would have failed in their duty, even if the borrower were a director. This being so, we cannot hold the board liable in point of law for omitting to obtain the certificates: for their lien and power of sale under article 15 would not be defeated by the absence of the certificates, and we do not understand that any loss has been sustained by the bank by reason of the absence of certificates. In substance, therefore, we agree with the view of Wright, J., on this point.

Now let us see what was done by Mr. John Cory. Large advances were made to some directors in 1889 and 1890. We leave out of account the advances made in 1891, as Mr. John Cory was not then a director. We also pass over the errors in figures which Mr. Norris has pointed out. It is proved that in 1889 and 1890 Mr. Crawshay, one of the directors, was constantly allowed to overdraw. The branch manager at Bridgend perpetually drew attention to this and wrote for instructions, but apparently got none. Crawshay was a large shareholder in the company, and the market value of his shares exceeded his advances and overdrafts. Other deeds and documents were apparently also held by the board as a security. Other similar cases are given by the liquidator where these advances and overdrafts have resulted in large losses. The directors clearly regarded the lien as a security, and a "stop-share" book was accordingly ordered to be kept in 1884, in which all shareholders' overdrafts were to be entered. There is no proof that if the shares could in point of law be taken as security they were insufficient at the time they were taken. The securities were never reported to the board as insufficient; nor did Mr. John Cory know or suspect they were so. His cross-examination on these matters shows that many very material facts were concealed from him—*e.g.*, the fact that a director was a partner in a borrowing firm; the amounts to which some of the directors obtained advances or were indebted to the bank; the insufficiency of the securities. Moreover, several of the advances which have resulted in loss were not sanctioned by him, and were made without his knowledge. The question, of course, again arises whether Mr. John Cory ought not to have been more vigilant. The observations already made on this head need not be repeated. Nor is it necessary to examine in detail his liability for other improper advances. Here, again, his answer is the same, and his liability depends on his omission to find out the facts. His liability for such omission has been already considered and negatived.

Having arrived at the above conclusions, it is unnecessary to decide whether Mr. J. Cory's counsel were right in their contention that, assuming Mr. J. Cory to be liable to make good the dividends declared whilst he was a director, the liquidator, as representing the shareholders in the bank, could not have recovered such dividends from him. The argument was that all moneys recovered by the liquidator would have to be distributed amongst the shareholders, who had already had the benefit of the dividends improperly declared, so that they would in effect be paid twice over. In the course of the argument it was pointed out that the money sought to be recovered was, if recoverable, an asset of the company, and that the liquidator was the person to get it in, and that *Turquand* v. *Marshall* had no application to claims by incorporated companies. We pointed out that the money which had been divided in years gone by had been paid and received as profits, and not as capital, and Mr. J. Cory could not treat the shareholders, whom on the present assumption he would have misled, as having received the dividends as capital. We said that we agreed with Cotton, L.J.'s, observations in *Flitcroft's case* as we understood them —viz., the court could and would prevent the liquidator from taking any proceedings which were useless and vexatious, but that this proceeding in the case supposed would be neither the one nor the other. On this part of the case we agreed with Wright, J. Lastly, we think it only due to the liquidator to add that, although Mr. J. Cory has succeeded in his appeal, his conduct justified the closest scrutiny. But the order appealed from ought to be reversed, and, having regard to the serious charges made against him, the liquidator must pay Mr. J. Cory his costs, both of the summons and of his appeal.

Solicitors, *Michael Abrahams, Sons, & Co.; Riddell, Vaizey, & Smith*, for *Thos. Williams*, Neath; *Burton, Yeates, & Hart*, for *Johnsons, Barclay, & Rogers*, Birmingham.

---

## High Court of Justice.

Chan. Div. Kekewich, J. — Nov. 4.

ASHBY v. WILSON. (a.)

*Landlord and tenant—Covenant—Breach by lessee of covenant with lessor — Right of adjoining lessee to enforce the covenant.*

*A. let one of a row of houses to B., covenanting not to let any other house in the row for the trade of a greengrocer. A. subsequently let another house in the row to C., taking a covenant from him to use it for an Italian warehouse only. Action by B.'s assignee to restrain A. from letting, and C. from using, his premises for the trade of a greengrocer.*

*Held, that C. had broken his covenant with A.; that A. had observed his covenant with B.; that the plaintiff could neither sue C. directly for breach of his covenant with A. nor compel A. to sue him; and that the action must be dismissed.*

Kemp v. Bird, 25 *W. R.* 838, 5 *Ch. D.* 974, *followed.*
Fitz v. Iles, [1893] 1 Ch. 77, *discussed.*

By an indenture of lease dated the 27th of November, 1893, G. W. Wilson let to H. T. Bigglestone, his

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

executors, administrators, and assigns, a house called No. 3, The Broadway, Church End, Finchley, one of a terrace of six shops, for twenty-one years, at the rents therein mentioned, and the lessee, for himself, his executors, administrators, and assigns, covenanted with the lessor, his executors, administrators, and assigns, that he would use the premises as and for the business of a fruiterer, greengrocer, and corn chandler only. And the lessor covenanted with the lessee that he would not, during the continuance of the demise, let any of the other houses, Nos. 1, 2, 4, 5, and 6 in the Broadway, for the purposes of the trades of a fruiterer, greengrocer, or corn chandler.

On the 2nd of August, 1898, Bigglestone assigned his interest in the premises to William Ashby.

By an indenture of lease dated the 29th of January, 1897, G. W. Wilson let to J. H. Bebb another house in the Broadway, No. 1, for thirty-three years at the rents therein mentioned. And the lessee covenanted with the lessor that he would use the premises as and for an oil, colour, and Italian warehouse only.

This was an action by William Ashby against Wilson and Bebb. The plaintiff by his statement of claim alleged that Bebb was carrying on the trade of a fruiterer, greengrocer, and corn chandler at No. 1, The Broadway, and thereby causing him loss and damage, and he claimed an injunction to restrain Wilson from letting or permitting to be used No. 1, The Broadway for the purposes of the said trades in contravention of the covenant by Wilson in the lease of the 27th of November, 1893, and also an injunction to restrain Bebb and his agents from using No. 1, The Broadway for the purposes of the said trades. Bebb by his defence denied that he was carrying on the said trades in breach of the covenant by Wilson in the lease of the 27th of November, 1893, or thereby causing the plaintiff loss or damage, and he also alleged that he had no notice or knowledge of that covenant, and further that as a matter of law that covenant did not, according to the express terms of it, affect him. Wilson by his defence also denied that the said trades were being carried on as alleged by the plaintiff, and submitted that as against him the statement of claim disclosed no cause of action.

*P. O. Lawrence, Q.C.*, and *Gerald Wheeler*, for the plaintiff.—The defendant Bebb is carrying on the trade of a greengrocer, &c., to the injury of the plaintiff, and has broken his covenant with Wilson, which covenant the plaintiff is entitled to have enforced for his benefit: *Fitz* v. *Iles*, [1893] 1 Ch. 77, 68 L. T. Rep. 108, 41 W. R. Dig. 208; *Buckle* v. *Fredericks*, 38 W. R. 742, 44 Ch. D. 244; *Tulk* v. *Moxhay*, 2 Phillips 774.

*Warrington, Q.C.*, and *G. Cave*, for the defendant Bebb.—This defendant has not broken his covenant with Wilson; but if he has the plaintiff cannot enforce it against him. Wilson has not broken his covenant with the plaintiff. This case is covered by *Kemp* v. *Bird*, 25 W. R. 838, 5 Ch. D. 974; *Stuart* v. *Diplock*, 38 W. R. 223, 43 Ch. D. 343. *Fitz* v. *Iles* is not in point in this case.

*R. J. Parker*, for the defendant Wilson.

*P. O. Lawrence, Q.C.*, in reply.—*Fitz* v. *Iles*, appears to be in conflict with *Kemp* v. *Bird*. The court should follow *Fitz* v. *Iles*, which is the later case.

KEKEWICH, J.—It is certainly easier, and I think more convenient, in this case to deal with the question of fact first. Now, the real question of fact is whether the defendant Bebb is carrying on the business of a fruiterer, greengrocer, and corn chandler, either one or the other of them; he is restricted to the business of an oil, colour, and Italian warehouseman, by the covenant in his lease; he is only to use the premises as and for an oil, colour, and Italian warehouse. If he is carrying on the business of a fruiterer, greengrocer, and corn chandler he is infringing that covenant, which is of a restrictive character; and moreover, beyond that, he is carrying on the business which the plaintiff is at liberty to carry on, and is thereby entering into competition with him and probably doing him some harm. Now on that question, notwithstanding the conflict of evidence, I confess I have no hesitation in holding that the defendant Bebb is carrying on the business of a fruiterer, greengrocer, and corn chandler, all three. It is enough if he is only carrying on one of them. [His lordship then examined the evidence on the point, and continued:] I think therefore that the covenant into which the defendant Bebb entered with his landlord, the defendant Wilson, has been broken by Bebb and broken to the harm of the plaintiff.

But having put the facts out of the way—that is to say, having done my duty as far as I can as a judge of fact, now comes the question of law, which is a extremely interesting on. That question is this, putting it broadly: Can the plaintiff sue Bebb? There is no covenant between the plaintiff and Bebb. There is no evidence to show that there is any contract between them resting upon a building scheme or anything of that kind. There does not seem to me to have been any general scheme which would bind them both. The doctrine of *Tulk* v. *Moxhay* has been referred to, but the question in this case really depends upon the covenant made with the lessor Wilson. The question is, Can the plaintiff sue Bebb? After what I have said it seems that the answer is, the plaintiff cannot sue Bebb directly. Then can he sue Bebb through Wilson? Certainly he can, if he is entitled to make Wilson sue Bebb. If he is entitled to call upon Wilson, his lessor, to sue Bebb, who, I have held, has broken his covenant with Wilson, then it would be convenient for the plaintiff simply to make Wilson a party here, and though his action against Bebb would remain his action against Bebb, still he would sue Bebb through Wilson. That would be right enough. It is only fair to notice that Wilson has never been remiss. He has endeavoured to do his duty as lessor. He has not sued Bebb, but he has not made the slightest difficulty over this action. He was willing to see justice done between his tenants. Now why is not the plaintiff entitled to sue Wilson? Wilson has entered into a covenant with the plaintiff to a certain effect, and if the plaintiff is entitled in this court to insist upon Wilson suing Bebb on that covenant, he can, as a short cut, sue Bebb with Wilson made a party. It then becomes necessary to see what that covenant is into which Wilson has entered with the plaintiff. It is contained in the lease of the 27th of November, 1893, of which the plaintiff is the assignee. Thereby the lessee covenants not to carry on or permit to be carried on any noisome trade, &c., and to use the premises as and for the business of a fruiterer, greengrocer, and corn chandler only. Then there is a covenant by the lessor Wilson, not during the continuance of the demise to let any of the other houses in the Broadway for the purposes of the trades of a fruiterer, greengrocer, or corn chandler. Now we have got to the contract between the two. The plaintiff is bound to use the premises as and for the trades of a fruiterer, greengrocer, and corn chandler, and as the consideration for that Wilson the lessor binds himself not during the continuance of the demise to let any of the other houses for the purposes of those trades. That covenant has not been broken by Wilson because in the lease from him to Bebb there is inserted a special covenant, that Bebb is to use his premises as and for an oil, colour, and Italian

warehouse only. Wilson has therefore done his duty. He covenanted with the plaintiff that he would not let for any of those trades and so far as Bebb is concerned he has let to him on the terms that he only carries on an oil, colour, and Italian warehouse business. Wilson having, then, done his duty, what claim has the plaintiff against him? I can see none at all. What Mr. Lawrence asks me to do is to construe this covenant of Wilson's with the plaintiff so as to mean something quite different—how much, I do not know. I do not think any words would justify his argument except these: "and that during the continuance of this demise the other houses shall not be used, &c." And even if those words were in the covenant there would be some difficulty; but nothing less than those words I think would justify his argument. I am then asked to say under those circumstances, Wilson not having broken his contract with the plaintiff, that the plaintiff is entitled to call upon Wilson to sue Bebb, because unless he is so entitled the plaintiff cannot himself sue Bebb in this action. The answer to that is to be found in a few words of Cotton, L.J., in *Kemp* v. *Bird*, which I do not propose to go through in detail. The words are, "I know of no authority for saying that under such circumstances as these" — of course he puts in "under such circumstances as these," and for my purpose I think the circumstances here are sufficiently similar—"a landlord is a trustee for his tenant in the sense that he must at the request of the lessee enforce a covenant against another lessee." That is what I am asked to do, to say that Wilson is bound to enforce against Bebb the covenant into which Bebb has entered with him because he has himself entered into another covenant with the plaintiff, which covenant he has faithfully observed. It seems to me that to hold that, would be to contradict *Kemp* v. *Bird*, which has been cited very properly at considerable length, and which negatives the wider construction of Wilson's covenant with the plaintiff, which I am asked to put on it, and negatives also, I think, the right of the plaintiff to sue here. But then it is said I am restrained by the decision in the case of *Fitz* v. *Iles*. Mr. Lawrence says, if the two cases are inconsistent—they are both decisions of the Court of Appeal—I ought to follow the later decision. I do not know that it is a very safe guide, although it is one which has been often adopted, to say that what is last is necessarily best. Nor do I wish to say too broadly that when there are two cases in the Court of Appeal which one finds a difficulty in reconciling that it must be left to the Court of Appeal to do the reconciliation. I confess to having great difficulty in saying that this point of law never occurred to the learned counsel and judges in the case of *Fitz* v. *Iles*, but with respect, I feel that it is possible nevertheless, because it is obvious from the report of the case, both in the Law Reports and also in the Law Times Reports, to which Mr. Cave has been good enough to refer me, and which is more correct than the other report, that the whole contest was devoted to the question whether there was an infringement of the covenant, and not to the question of the right to sue on the covenant. Lindley, M.R., in giving judgment, seems to put that beyond question. He says that the right of the plaintiff lessee to sue the defendant lessor and lessee if they were breaking the covenant was not in controversy, that the lessor was a party, and that there was no difficulty about it. I do not see in Mr. Swinfen Eady's argument, as reported, that he said that, but it is quite possible he did. It is possible that in opening his case he said: "We have not come here on a question of right to sue or anything of that kind; the pleadings are all right; we are not discussing any technicality of that kind; we have come here on a question whether the covenant was broken or not." At any rate the case of *Fitz* v. *Iles* is not consistent with the case of *Kemp* v. *Bird*. That inconsistency must be got rid of in some other way. *Kemp* v. *Bird* was not cited in *Fitz* v. *Iles*, and I think *Kemp* v. *Bird* is binding upon me. Perhaps I ought not to say that if I were to choose between *Kemp* v. *Bird* and *Fitz* v. *Iles*, *Kemp* v. *Bird* seems to me to be sounder with regard to the law, but certainly it does seem so to my mind, on the ground I have mentioned. Therefore I think the plaintiff's case fails. I do not think the defendant Bebb has been in the right—I think he has been doing wrong. But, on the other hand, when the plaintiff comes here and the court is compelled to hold that he has no case at all, no right to sue, I do not think in that case I ought to deprive Bebb of his costs (I certainly shall not deprive Wilson of his—he has done no wrong) simply because I think there has been some want of propriety on his part. I therefore give judgment for the defendants with costs.

Solicitors, *Joseph Gibson; Julius & Thomas; Alfred George Dinn.*

---

Chan. Div. }
Kekewich, J. } Oct. 28; Nov. 3.

*In re* PAWLEY AND THE LONDON AND PROVINCIAL BANK'S CONTRACT. (*a.*)

*Vendor and purchaser—Freeholds—Sale by executors—Executor named but not proving—Concurrence—Disclaimer—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *Part I.*

*Real estate under section* 1, *sub-section* 1, *of the Land Transfer Act*, 1897, *devolves to and becomes vested in all the executors named in the will who survive the testator, and in order that the legal estate may pass on a conveyance by the executors who have obtained probate, it is necessary for those executors to whom power to prove the will has been reserved, either to expressly disclaim or to concur in such conveyance.*

Vendor and purchaser summons.

This was a summons by the vendors under a contract of the 9th of June, 1899, for the sale of certain freehold land at Sydenham, Kent.

The vendors were two of the executors named in the will of Charles Pawley, who died on the 7th of July, 1898. A third executor was named in the said will, but the vendors alone proved the will, power to prove being reserved to the third executor, who was resident in India, but he had neither proved the will nor disclaimed the trusts thereof.

The will contained the following provision: "If any of them (*i.e.*, the executors) shall be absent from England at the time of my death, he or she shall be at liberty to prove my will on his or her return to this country, and all the powers and trusts hereby given to my trustees may be exercised by such of them as for the time being may have proved my will."

The respondents were the purchasers under the said contract, and they required either the concurrence in the deed of conveyance of the third executor named in the will, or a disclaimer of the trusts thereof by him.

The vendors refused to comply with the request, and accordingly took out this summons asking for a

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

declaration that they had power to convey the property without obtaining any such concurrence or disclaimer.

*P. O. Lawrence, Q.C.*, and *Percy Wheeler*, for the vendors.—The vendors rely upon the Land Transfer Act, 1897, s. 1, sub-section 1, s 2, sub-sections 1 and 2, and s. 3, sub-sections 1 and 2. By section 24, sub-section 2. personal representative means executor or administrator, and an executor is one who has proved the will or acted as such, for until he has done one or the other he cannot be sued. This contention is borne out by the Probate Act, 1858, s. 16, which provides that the legal estate shall be in the proving executors: see Williams on Executors (9th ed.), vol. 1, p. 226, note (i). That being so, the vendors can pass the legal estate under section 3, sub-section 1, of the Land Transfer Act, 1897. Section 23 of the National Debt Act, 1870, provides that only the executors who have proved are necessary parties to a transfer of stock. Moreover the will itself in this case empowers the executors who have proved to convey.

*Warrington, Q.C.*, and *R. M. Pattisson*, for the purchaser.—The term "executors" means executors named in the will, not merely those who prove, and consequently the personal representatives for the purposes of the Act will comprize all those named as executors in the will. Under the Act the real estate on the testator's death devolved to and became vested in his personal representatives, who will be all those named as executors, for executors derive their title from the will and not from probate: *Watkins* v. *Brent*, 1 Myl. & Cr. 97; *Brazier* v. *Hudson*, 8 Sim. 67. Rules 128 and 129 under the Act bear out this contention.

*P. O. Lawrence, Q.C.*, replied.

*Cur. adv. vult.*

Nov. 3.—KEKEWICH, J.—To allow the objection of the purchaser is to give a limited and perhaps a narrow construction to those sections of the Land Transfer Act, 1897, which constitute a real representative. Nevertheless, it is right to construe an Act of Parliament strictly, and in dealing with real property especially to stand on the old ways. The absence of one of two or more executors, or his inability from illness or other cause to immediately prove the will, is an event of common occurrence, and the difficulties and delays caused thereby are familiar to practitioners. The Act of 1897 might, therefore, have conveniently provided, as was provided by the National Debt Act, 1870, that the executors who had proved the will should be the only necessary parties to a transfer. But the omission to thus expressly provide, supports the proposition that by the term "his personal representatives," used in the first and other sections of the Act, those filling that character were intended to be described irrespectively of the question whether they had obtained a grant of probate or not. It is common knowledge that an executor derives his title from the will, and not from the grant of probate, and that he can, in his representative character, do many things, including the transfer of chattels real, notwithstanding that he has not proved the will. According to the first section of the Act real estate becomes, on the death of a testator and notwithstanding his testamentary disposition, vested in his personal representatives as if it were a chattel real vested in them; and, having regard to what has just been said, there is, to my mind, insuperable difficulty in holding that it vests only in the executors who have proved to the exclusion of those who have not proved, unless, of course, the latter have by renunciation or otherwise made it impossible for them to obtain a grant of probate. If this view be sound, the proviso to section 2, sub-section 2, occasions no difficulty. Indeed, that sub-section is in entire harmony with the others on the above construction. Observe that it repeats the phrase "as if it were a chattel real vesting in them" used in section 1, and therefore, of course, treats all the powers of personal representatives over chattels real as applicable without more to freeholds vested in them under the Act. This makes perfectly intelligible the proviso prohibiting the sale by some or one only of several joint personal representatives which otherwise would have been possible, notwithstanding lack of probate by him or them. There is no need to examine any subsequent provisions of the Act. Reference was also made to rules 128 and 129, about which I will only say that, though apparently framed in accordance with the views already expressed, they cannot, in my opinion, be looked at on the point of construction.

The vendor makes a second point in support of his title. He says that the express direction at the end of the will empowers the proving executors to sell. This, in my judgment, is so, the words being perfectly plain. But that does not get over the difficulty, the question being whether they can pass the legal estate, and if that be under the Act vested in the three, it cannot by virtue of this direction be transferred by two only. I suggested during the argument that this power might be used by the application of the Trustee Act, and although the suggestion was not further pursued I do not at present see the answer to it in point of law. On the other hand, it would not be possible to perfect the conveyance by this method without service of process on the non-proving executor in India, and if that be necessary, no time or expense would be saved, and it would be better at once to obtain his execution of the conveyance. I must therefore uphold the purchasers' objection to the title.

Solicitors for the vendors, *Sandom, Kersey, & Knight.*

Solicitors for the purchasers, *Newton, Lewin, & Levett.*

---

Chan. Div.
Byrne, J. } July 20, 21, 22, 1899.

TRANSVAAL EXPLORING CO. (LIMITED) v. ALBION (TRANSVAAL) GOLD MINES (LIMITED). (a.)

*Company — Reconstruction — Filing of reconstruction agreement—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

*An agreement effecting the reconstruction of a company, by which it is provided that, in consideration of the transfer of the assets of the old company, the liquidator of the old company should be entitled to have allotted to him or his nominees* 200,000 10*s. shares of the new company, on which* 7*s.* 6*d. was to be deemed paid up on applying within two months from the date of the agreement and making a small additional payment, was filed with the Registrar of Joint-Stock Companies. Application was made for* 6,500 *of these* 200,000 *shares under such option.*

*Held, that, by the filing of the reconstruction agreement, section* 25 *of the Companies Act,* 1867, *had been sufficiently complied with.*

Elsner and Macarthur's case, 44 W. R. 361, [1895] 2 *Ch.* 759, *followed.*

---

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Action.

A company, of the same name as the defendant company, and which may be called the old company, had been incorporated in May, 1895, with a nominal capital of £125,000, divided into 250,000 shares of 10s., of which 200,000 had been issued. Of these in January, 1897, the plaintiff company held 6,500 fully paid up.

It was resolved to reconstruct this old company and transfer its assets and business to a new company, and this, the defendant company, was duly incorporated on the 27th of February, 1897, with a nominal capital of £125,000 divided into 250,000 shares of 10s. each.

The reconstruction agreement, dated the 2nd of March, 1897, by which the old company and its liquidator were to transfer all its property to the defendant company, by clause 6 provided that as part of the consideration for such transfer the liquidator of the old company should be entitled to have allotted to him or his nominees 200,000 shares of 10s. each in the defendant company with the sum of 7s. 6d. per share credited thereon as paid up, to the intent that as many as might be required of such shares might be distributed among the members of the old company or their assigns in manner following—that was to say, holders of fully-paid shares in the old company should be entitled to have one share of 10s. (credited with 7s. 6d. paid up) of the defendant company for every fully-paid share in the old company. Provided that the defendant company should not be bound to allot to the liquidator or to any such nominee unless the liquidator within two months from the date thereof or such nominee within seven days after the giving by the liquidator of the notice thereafter referred to, as the case might be, claimed by writing addressed to the defendant company on the prescribed form his allotment, and paid up therewith 6d. per share, and agreed at the same time, on the prescribed form, to pay up the unpaid balance of 2s. per share on the shares he was entitled to as might be required by the defendant company in calls not exceeding 6d. per share at intervals of not less than two months, and it was provided that the liquidator should forthwith give to each member of the old company notice of the provisions of the said clause; but if any member of the old company failed or omitted to claim in manner aforesaid his allotment of shares in the defendant company within seven days from the giving by the liquidator of the said notice, then such member's right to such allotment should absolutely cease, and as regards all shares of the defendant company which the shareholders of the old company being entitled thereto failed or omitted to claim within the period and on the terms aforesaid (thereinafter called unclaimed shares) the liquidator should use his best endeavours to sell the same and should deal with the net proceeds arising from such sale as therein mentioned, and when any such sale was made the defendant company should, on the nomination of the liquidator of the old company, allot to the purchaser or purchasers the shares sold credited as paid up to the extent aforesaid on such purchaser or purchasers applying for such shares in the manner and on the terms as to payment or otherwise thereinbefore prescribed in the case of the liquidator or his nominees applying for shares forming part of the said 200,000 shares.

On the 26th of March, 1897, the plaintiff company, after receiving a notice from the liquidator of the old company, applied for 6,500 shares from the defendant company with 7s. 6d. paid up, making at the same time an extra payment of £162 10s., being 6d. in respect of each share. These shares were duly allotted. Prior to such allotment the agreement of the 2nd of March, 1897, had been filed with the registrar, and the question for decision was whether this was a "sufficient contract in writing" within the meaning of section 25 of the Companies Act, 1867.

*Farwell, Q.C.*, and *Manning*, for the plaintiffs.—Section 25 of the Companies Act, 1867, has not been complied with. The reconstruction agreement only showed an option of no avail to obtain shares unless properly exercised. This might never be done, and the object of section 25, to let the public know how many shares have been issued in accordance with the terms of the contract filed, has not been attained. *Elsner and Macarthur's case*, 44 W. R. 361, [1895] 2 Ch. 759, is inconsistent with *In re Coolgardie Consolidated Gold Mines*, 14 T. L. R. 277, and *In re Jackson*, [1899] 1 Ch. 348, 47 W. R. Dig. 27, as to whether filing a contract merely giving an option is sufficient.

*Rowden, Q.C.*, and *Hamilton*, for the defendants.—The effect of the agreement filed is that there is an obligation on the new company to allot if the option be exercised, and shows the mode of payment. This is sufficient compliance with section 25: *Elsner and Macarthur's case.*

*Farwell, Q.C.*, in reply.

BYRNE, J., after reading clause 6 of the agreement, continued: The point raised in the present case is this. The agreement was duly registered; but it is said that, inasmuch as there was not an agreement to issue a specified number of shares in any event, it does not amount to such an agreement as ought to be valid under section 25 of the Companies Act, 1867—that in point of fact it was nothing more than a contract for an option, and that until the option should be exercised there was no contract capable of being registered, so as to come within the meaning of section 25 of the Companies Act, 1867. The point in question has undoubtedly been the subject of decision in *Elsner and Macarthur's case.* Romer, J., there had a case before him which, in my opinion, governs this case so far as the decision is concerned; but it is suggested that the particular point was not fully argued, and that the decision is inconsistent with two other cases to which I have been referred. I do not want to go at any length into the circumstances of *Elsner and Macarthur's case*, but Romer, J., says: "By the agreement this company were bound to allot to each shareholder of Spiel's company his proportion of shares if he applied for them; and the fact that each shareholder had an option and was not bound to apply did not the less render the agreement a contract and one binding on this company. This company had no option in the matter, and, moreover, notwithstanding the curious wording of the agreement, and the form of the assignment made in pursuance of it, dated the 30th of March, 1892, I think the option given formed part of the consideration for the sale of the property the subject of the agreement." Now I go back to section 25 of the Act of 1867, which provides: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same"—there is no dispute now, after the decisions we have had under this section, that the words "the same" may be read as "the terms of payment," and, therefore, I will read it in that way—"unless the terms of payment shall have been otherwise determined by a contract duly made in writing and filed." The section does not say that the contract referred to must be a contract for the issue of the shares. No question can arise under section 25 whether a share is fully paid up or not until after issue; but it appears to me that the terms of the section permit of a contract, not

being a contract for the issue of the shares, being one determining that the whole amount of shares to be issued shall be taken to be paid for otherwise than in cash. If that be the true reading of the section, it seems to be perfectly consistent with the decision in *Elsner and Macarthur's case*, and I propose to follow that decision.

The case has been so fully and so well argued before me that I feel bound to go a little more into the case than I should otherwise have done; I should probably have contented myself with saying that I think, under the circumstances, I ought to follow the decision in *Elsner and Macarthur's case* inasmuch as the other cases to which I have been referred do not purport, and were not intended, to be judgments differing from that of Romer, J., in *Elsner and Macarthur's case;* and, moreover, they differ in the circumstances, and, as I think, in the principles to be applied. In the case that I have before me the company is bound to issue these shares, if at all, as paid up to the extent of 7s. 6l.; that is to say, the contract, if acted upon, binds the company to issue partly paid-up shares, and the company is not thereby empowered to pay otherwise than by means of partly paid-up shares. On the other hand, I have been referred to the case of *In re Coolgardie Consolidated Gold Mines* before Wright, J. There the contract provided that the directors of the purchasing company might discharge their obligations either wholly in cash, or partly in cash and partly in fully paid up shares, or wholly in fully paid-up shares; so that it appears that there was no final determination that the shares to be given as the purchase price were to be issued otherwise than for cash. So also in the case before Kekewich, J., *In re Jackson & Co.*, the determination was left to the directors whether they should pay wholly, or partly in cash, shares, or debentures. I think that there is a clear distinction between these two cases and *Elsner and Macarthur's case*, which I propose to follow; and I see no reason to differ from the reasons which Romer, J., gave for that decision.

There is one other thing I ought to mention, as it was strongly urged upon me. That is with regard to the true object of the 25th section. Undoubtedly the object of that section was permissive, and what I have to see is whether the terms have been complied with. I may point out that the present contract does give information which is not given by the registration of the contracts in the cases before Wright, J., and Kekewich, J., although not all the information which some persons might desire. I will therefore make the declaration asked for—namely, that the contract of the 2nd of March, 1897, was a sufficient contract within section 25 of the Companies Act, 1867, and all further proceedings in the action will be stayed as arranged.

Solicitors, *Wetherfield, Son, & Baines; Lindsay, Greenfield, & Masons.*

---

Chan. Div.
Cozens-Hardy, J. } Nov. 13, 16.

RICE *v.* NOAKES & CO. (LIMITED). (*a.*)

*Mortgage—Public-house—Leasehold—House "tied" to mortgagees—Clogging redemption—Once a mortgage always a mortgage.*

*All property comprised in a mortgage security must, upon payment, after the period fixed for redemption of all sums due upon the security, be reconveyed or reassigned to the mortgagor, and the mortgagee cannot retain any estate or interest in the premises, or any right to interfere with the mortgagor in his enjoyment or user of them.*

*Consequently, where there is a covenant in the mortgage of a public-house, collateral to the proviso for redemption, that the mortgagor should not purchase his liquors of anyone except the mortgagees, when, in conformity with the proviso for redemption, the mortgagor pays off the moneys secured by the mortgage, he is entitled to an assignment of the premises free from the covenant.*

Santley *v.* Wilde, ante *p.* 90, [1899] 2 *Ch.* 474, *distinguished.*

Previously to the mortgage of the 7th of October, 1897, hereafter mentioned, the plaintiff, a licensed victualler, purchased the lease of the public-house called the Kings Arms of the second mortgagees for £6,800. The term created by the lease would expire at Christmas, 1923.

The defendants, who were brewers, were the first mortgagees, and they released their security to enable the sale to be made. Their mortgage had contained provisions almost identical with those of the mortgage next mentioned.

Upon the sale the plaintiff borrowed £4,850 of the purchase-money from the defendants, upon the security of a first mortgage of the premises, dated the 7th of October, 1897.

By the mortgage deed, in consideration of the sum lent and further sums thereinafter mentioned, the plaintiff demised the leasehold premises and fixtures and the goodwill of the business and benefit of the licences to the defendants, subject to the proviso for redemption. This proviso declared that if the plaintiff should pay to the defendants the principal sum and interest to be then due on the security, then the defendants would, at the request of the plaintiff, surrender or reconvey the premises to the plaintiff, or as he should direct; and the plaintiff covenanted to pay the principal sum and interest, and all further sums due for money advanced, or for goods sold and delivered by the defendants to the plaintiff. After some other provisions, the deed continued as follows: "And for the considerations aforesaid, the mortgagor, so as to charge the premises hereby demised into whosever possession the same may come, whether by act of the party or by operation of law or by any other ways or means howsoever, and to the further intent that the obligation of this covenant may run with the land, doth hereby covenant with the company that the mortgagor shall not, nor will at any time during the continuance of the term aforesaid, and whether any principal moneys or interest shall or shall not be owing upon the security of these presents, use or sell, or permit to be used or sold, in, upon, or about the said demised premises any malt liquors, except such as shall be *bonâ fide* purchased by the mortgagor of the company. And, further, that, if and whenever there shall be a breach of the said covenant, he, the mortgagor, shall and will pay to the company the sum of £1,000 as and for ascertained liquidated damages for each such breach, and will sell all such malt liquors pure, unadulterated, and unmixed, and of the like strength, character, and quality in all respects as the same shall be supplied to him." It was also declared that the words "the mortgagor" and "the company," except when otherwise controlled by the context, should, throughout the deed, include all persons deriving title under them respectively.

The plaintiff was willing to pay off all money due to the defendants under the mortgage, and required them, on payment being made, to reconvey the leasehold property to him, and to release him from the covenant by which the house purported to be "tied" to the defendants during the whole currency of the

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

lease, or to transfer the mortgage to him and assign the benefit of the covenant to his nominee. The defendants were willing to reconvey or transfer the property, but not to release or assign the covenant, and the present action was brought to obtain a declaration that the plaintiff was entitled to a reconveyance or transfer of the premises, and, at the same time, to a release or assignment of the covenant.

*Astbury, Q.C.*, and *Edward Beaumont*, for the plaintiff.—Notwithstanding recent decisions, the rule that upon payment of all sums due under the mortgage the property must be reassigned in its entirety to the mortgagor still remains good, and any fetter upon the equity of redemption will be disregarded: *Salt* v. *Marquis of Northampton*, 40 W. R. 529, [1892] A. C. 1. Here the covenant sought to be retained by the mortgagees must come to the notice of any purchaser from the mortgagor: *Tulk* v. *Moxhay*, 2 Phillips 774; *London and South-Western Railway Co.* v. *Gomm*, 30 W. R. 620, 20 Ch. D. 562, at p. 583; and it therefore becomes a charge upon the land. In *Santley* v. *Wilde*, *ante*, p. 90, [1899] 2 Ch. 474, the proviso for redemption was entirely different from that in this mortgage, and the covenant complained of was held a reasonable one. In *Biggs* v. *Hoddinott*, 47 W. R. 84, [1898] 2 Ch. 307, the covenant to buy from the mortgagees was only operative during the existence of the security.

They also referred to *Willett* v. *Winnell*, 1 Vern. 488; *Howard* v. *Harris*, 1 Vern. 191; and *Haywood* v. *Brunswick Building Society*, 30 W. R. 299, 8 Q. B. D. 403.

*Eve, Q.C.*, and *Stanley Fisher*, for the defendants.—A mortgagee may stipulate for a collateral advantage (*Biggs* v. *Hoddinott*), and may refuse to convey so long as there are obligations under the covenant unfulfilled: *Santley* v. *Wilde*. The covenant is not a fetter upon the equity of redemption, but a collateral matter. If it is, however, a fetter, then it is valid within the decision of *Santley* v. *Wilde*.

They also cited *King* v. *Dickeson*, 37 W. R. 563, 40 Ch. D. 596.

*Astbury* replied.

Nov. 16.—COZENS-HARDY, J.—The question which I have to decide is whether the "tie" can be retained by the defendants. If this case had arisen for decision a few years ago, I think no judge of first instance would have hesitated to hold that the "tie" could not be enforced after the discharge of the security. It would have been regarded as a plain case of "clogging" the equity of redemption. But the supposed ancient doctrine of the courts has been so trenched upon in recent years that it is very difficult to say what part (if any) of it still remains. It has been held that a mortgagor may be precluded from redeeming for a fixed period, such as five or seven years: *Teevan* v. *Smith*, 30 W. R. 716, 20 Ch. D. 724, at p. 729. It has been held that, during the full period in which a mortgagor is precluded from redeeming, he may be bound by covenant to buy his beer only from the mortgagee: *Biggs* v. *Hoddinott*. In that case the "tie" was objected to, not on the ground of its being a clog on the equity of redemption, but on the ground that it conferred on the mortgagee a collateral advantage which he was not entitled to retain. The objection, however, did not prevail. It has been held that a mortgagee of a leasehold theatre may, in consideration of a cash advance, take a covenant to repay the sum advanced with interest by quarterly instalments extending over five years and to pay a share of the net profits of the theatre during the whole residue of the lease extending beyond the five years, and that a proviso for redemption on payment of all moneys covenanted to be paid, including the share of profits, is not invalid: *Santley* v. *Wilde*. It will be observed that in that case the proviso for redemption was nugatory, because it only came into operation on the expiration of the lease, at which date, *ex hypothesi*, there would be nothing upon which the proviso could operate. If I rightly understand the judgment of the Court of Appeal in that case, it established that a mortgage of leasehold property expressed to be a security for the due discharge of future recurring obligations cannot be redeemed before those obligations have matured, even though the period covered by the obligations may or must exceed the duration of the lease. I do not think any other or larger principle can be extracted from that case. On the other hand, "once a mortgage, always a mortgage," is still a sound legal maxim. Anything which is comprised in a mortgage security must, when the debt is paid or the obligation is discharged, be returned to the mortgagor. It must be returned in its entirety. No part of it can be retained by the mortgagee. A remarkable instance of this doctrine is to be found in *Salt* v. *Marquis of Northampton*. This doctrine is not questioned, and indeed is expressly admitted by the Court of Appeal in *Santley* v. *Wilde*. It remains to apply to the present case, as best I can, the principles to be gathered from the authorities both ancient and modern. In the first place, the mortgage is in terms a security only for the moneys covenanted to be paid—*i.e.*, principal and interest, and the price of goods sold and delivered. All these moneys the plaintiff offers to pay. It does not profess to be a security for the performance of the negative covenant which is commonly called a "tie." In the second place, on payment of that which the plaintiff offers to pay, the event will happen upon which, by the terms of the deed, the defendants are bound to "surrender or reconvey the premises." In the third place, such a surrender or reconveyance is inconsistent with the retention of any charge on or interest in the premises. In the fourth place, the negative covenant or "tie" is expressed to be a "charge" on the premises. I doubt whether this phrase is strictly accurate. The precise operation of such a covenant has been described in different ways. Lord Cottenham in *Tulk* v. *Moxhay* calls it "an equity attached to the property by the owner." Sir George Jessel in *London and South-Western Railway Co.* v. *Gomm*, 20 Ch. D., p. 583, calls it an "equitable burden." This much at least is clear, that, in the hands of the plaintiff and of any person taking with notice, this covenant imposes a fetter upon the enjoyment of the property and materially lessens its value. And in the present case no purchaser of the lease could escape being effected with notice. Upon the whole I think the "tie," though perfectly valid during the continuance of the security, cannot be maintained when all moneys due upon the security have been paid off. It seems to me to be involved in the very idea of a mortgage that a mortgagee, when paid off, shall have no estate or interest in the mortgaged premises, and no right to interfere with the mortgagor in his enjoyment or user of the premises. I must therefore declare that, on payment off of all moneys due, the plaintiff is entitled to have a reconveyance of the property, or at his option a transfer of the security, free in either case from the tie.

*Judgment for the plaintiff.*

Solicitors for the plaintiff, *Sandilands & Co.*

Solicitors for the defendants, *Fishers.*

## Court of Appeal.

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) Aug. 10, 1899.

REG. v. COUNTY COUNCIL OF GLAMORGAN. (a.)

*Local government—County fund—County rate—Military aid for suppression of riots—Maintenance of troops* —Mandamus.

*The justices of a county, having applied to the military authorities to send soldiers into the county for the purpose of suppressing riots, made arrangements with tradesmen for the housing and lodging of the soldiers at certain agreed rates of payment, and pledged the credit of the county for such payment.*

*Held, that the tradesmen were not entitled to a writ of* mandamus *to the county council to make such payment out of the county fund.*

Appeal from the judgment of a Divisional Court (Wills, Darling, and Channell, JJ.) discharging an order *nisi* for a writ of *mandamus*, [1899] 2 Q. B. 26, 47 W. R. Dig. 106.

The order *nisi* was granted at the instance of certain persons who had supplied food and lodging to soldiers who had been brought into the county of Glamorgan for the purpose of suppressing riots in connection with a strike of miners in South Wales. It called upon the county council of Glamorgan to show cause why a writ of *mandamus* should not issue commanding the county council to pay to the prosecutors out of the county rate the expenses incurred by them in supplying food and lodgings to the soldiers.

The facts of the case are fully set forth in the judgment of A. L. Smith, L.J.

The Divisional Court discharged the order *nisi*.

The prosecutors appealed.

*Sir R. B. Finlay, S.G., C. A. Russell, Q.C., H. Sutton,* and *S. G. Lushington,* for the prosecutors.

*Asquith, Q.C.,* and *H. L. Stephen,* for the defendants.

Aug. 10.—A. L. SMITH, L.J., read the following judgment: In this case the Queen's Bench Division has refused to make absolute a rule *nisi* for a *mandamus* calling upon the county council of Glamorganshire to show cause why it should not make an order for the payment to the relators out of the county funds of the amounts expended by them for housing and feeding troops in their county, or, in the alternative, why the county council should not levy a county rate whereby to make these payments, which were incurred in the circumstances hereafter mentioned.

The point is whether, when the justices of the peace call in troops to aid the civil power in quelling riots in a county, there is or is not a legal duty upon the ratepayers of the county to pay for the housing and feeding of the troops so called in. Although by section 3 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the making, assessing, and levying of county rates, and the application and expenditure thereof, is transferred to the county councils, and by section 9 the powers of quarter sessions and justices out of sessions with respect to county police are vested in quarter sessions and the county councils jointly, this case should be dealt with as if the powers and jurisdiction of justices of the peace for counties theretofore existing had not been affected by this Act, for in reality it has no bearing upon the case.

In the month of June, 1898, in consequence of serious riots in Glamorganshire, it became necessary for the public safety and the preservation of the peace that troops should be imported into and kept at Aberdare, Aberavon, and Mountain Ash in that county, and the military authorities were applied to by the justices of the peace for that county for the necessary troops, which were thus obtained. These troops had to be housed and fed in the districts into which they were imported, and it therefore became necessary that arrangements should be made in that behalf, and accordingly the justices of the peace for the county in meeting assembled sanctioned these arrangements and agreed that certain ascertained payments should be made to tradesmen for housing and feeding the troops during the time they were in these districts, and the credit of the county for these agreed payments was pledged by the agents of the justices to the tradesmen who undertook to render the desired services. These tradesmen are the relators in the present application, and the law officers of the Crown appear on their behalf.

Upon the 31st of July, 1898, the tradesmen sent in their accounts for the services rendered up to that date, made out upon the agreed prices, and these were certified as being correct by two of the justices of the peace, and there was then no dispute as to these charges. Upon the 13th of September, 1898, the accounts of further expenditure from the 31st of July, 1898, were sent in by the tradesmen amounting to £2,500; but these accounts were disputed, and the county council offered to pay £1,350 of this amount. This the tradesmen refused to accept; and thereupon the county council took up the position that, if the tradesmen would not take what was offered, the county council would pay nothing, and would deny its liability to pay anything, and hence the application for the rule *nisi* by the tradesmen, which rule was obtained, and which, as before stated, the Queen's Bench Division (consisting of my brothers Wills, Darling, and Channell) has discharged, holding that no duty is imposed upon those who administer the county funds to pay out of those funds the expenses of the maintenance of troops brought into their district for the purpose of suppressing riots.

It seems to me that the circumstances of this case are such as to induce the court to be astute to find, if possible, a duty imposed by law upon the ratepayers of the county to pay that which is now demanded; but the question remains, can such a duty be found? In considering this application for a rule *nisi*, it matters not, in my judgment, whether the credit of the county has or has not been pledged by the justices to the tradesmen, for the same point arises in either case. If the justices had the power to pledge the credit of the county ratepayers to the payment of the sums now demanded by the tradesmen, it is because there is a duty upon the ratepayers to pay them; but if there be no such duty, the pledging of the credit, which the Solicitor-General much insisted upon, comes to nothing, for the point is—whether the credit was pledged or not—can the law officers of the Crown appearing for the relators show that there is a legal duty on the part of the ratepayers of the county to pay what is now demanded by the tradesmen?

Justices of the peace for the counties are appointed by Special Commission under the Great Seal, which, as appears from Blackstone's Commentaries, vol. 1, p. 351, was settled by all the judges as long ago as the year 1590. By this commission they are appointed to keep the peace in the particular counties named—viz., "to keep and cause to be kept all ordinances and statutes for the good of the peace." By 13 Hen. 4,

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

c. 7, s. 1: "If any riot . . . against the law be made in any part of the realm, that the justices of peace, three or two of them at the least, and the sheriff or under-sheriff . . . shall come with the power of the county, if need be, to arrest them and shall arrest them"; and by 2 Hen. 5, c. 8, the King's liege people being sufficient to travel shall be assistant to them upon reasonable warning to ride with them in aid to resist such riots upon pain of imprisonment and to make fine and ransom to the King; and by this Act it is further enacted that "the said justices, and other officers, aforesaid, shall execute their offices aforesaid, at the King's costs, in going, continuing, and returning in the doing their said offices, by payment thereof to be made by the sheriff of the same county for the time being, by indentures betwixt the sheriff and justices and other officers aforesaid to be made of the payment aforesaid, whereof the sheriff upon his account in the Exchequer may have due allowance." From this statute it would seem that the Crown rather than the county is liable for expenses incident to the quelling of riots; but I have not to decide as to the Crown, and the subsequent Police Acts play an important part in this matter.

I do not doubt that it is the duty of justices of the peace in counties to quell riots within their respective counties, and, indeed, if they neglected to do so, they might be proceeded against by information (see *Rex* v. *Pinney*, 5 C. & P. 254, and *Rex* v. *Kennett*, 5 *ib.* 282), but the question is, Who is to pay for the performance of this duty? The argument on the part of the county council is that if justices are willing to undertake duties which they are bound to perform, and expense is thereby incurred, the justices who undertake the duties must pay the expense incurred in their performance, unless they can show that they are relieved therefrom, or that the obligation to pay is cast upon some other person or persons, which is the same thing. Upon the present rule *nisi* I have not to determine whether the justices who pledged the credit of the county can or cannot be sued personally for having represented to the tradesmen that they had the authority of the county to pledge its credit, whereas they had not, and I say nothing as to this one way or the other, nor have I to determine whether the Crown is the paymaster, for the sole question I have to solve is whether there is a legal duty upon the ratepayers of the county to pay to the tradesmen their accounts for housing and feeding the troops in the present case. I do not doubt that in cases of necessity justices of the peace have power to call in troops, and it is clear that, when called in to quell a riot, they can only be called in to act either as civilians or as soldiers. In my judgment they are called in to act as soldiers, for their services are asked for as being soldiers, they come as soldiers under arms and military command, they remain under arms and military command, and depart under arms and military command; but, as this is not conceded, I will first assume that they are called in to act as civilians, and see how the matter then stands.

In Burn's Justice of the Peace (30th ed.), vol. 1, p. 1340, I find it stated that "the expenses to which counties are liable, and which are to be levied by county rates, are provided for by various Acts of Parliament, which will be found under their respective titles throughout this work." In 1739 the statute 12 Geo. 2, c. 29, was passed, which was the first County Rate Act. Prior to this Act there had been in counties particular rates for particular purposes levied under particular Acts, and the county rate created by the Act of 12 Geo. 2, c. 29, which recites these Acts, represented the aggregate of the small rates previously levied, and it is enacted by sections 1 and 6 that a county rate should thereafter be levied "for the uses and purposes of the said recited Acts, and for any other uses and purposes to which the public stock of any county . . . is or shall be applicable by law." I can find no trace of the public stock of any county being liable for the housing of troops called in to quell riots either before or after the passing of this Act of 12 Geo. 2. I have looked through the Acts which relate to the county rates, both those cited in Burn's Justice of the Peace, at p. 1340, and others cited at the bar, and there is not a single Act which casts the housing and maintenance of troops when called into a county upon the county rate, and the Act of 41 Geo. 3, c. 78, s. 2, to which I shall refer hereafter, is the only Act I can find which can by any possibility be pointed to as having any semblance of a reference to the matter. The Acts which deal with the public peace deal with chief constables, high constables, special constables, and police, the charges of which are by the different Acts placed upon the county rate, and it is by means of these Acts that justices of the peace, as it appears to me, are released from the charges of keeping the peace in their counties, which I apprehend they would otherwise have to pay as incident to the performance of their duty. But the maintenance of troops, assuming them to be acting as civilians, is not to be found mentioned in these statutes. Soldiers are not *per se* "chief constables," "high constables," "special constables," or "police," even assuming that they happen to act as civilians.

I will now take it that the troops are what they really are—namely, acting as and being soldiers—and, as this is so, it seems to me, if possible, to be an *a fortiori* case, for the cost of housing and feeding soldiers is clearly not cast upon the county rate in terms by any statute whatever.

It was next argued by the Solicitor-General that, even if so, and if the obligation of the county ratepayers to defray these expenses cannot be found in any statute, yet this court should hold that by the common law of England the justices were entitled to be recouped by the county that for which they had pledged the credit of the county to the tradesmen in the performance of their duty. As to this suggested common law obligation, there is no evidence that it has ever been the practice of the county to bear these expenses. The Solicitor-General, with all the research at his command, has only been able to produce one case upon the subject, and that he cited out of the *Times* newspaper of the 21st of February, 1879, and the question there raised was whether an order by the county treasurer for the payment of money to the high constable in respect of the lodging and feeding of troops brought in to quell riots at Blackburn was a valid order. The order was sought to be upheld, not at common law, be it noticed, but by reason of section 2 of 41 Geo. 3, c. 78, which enacted that it should be lawful for any two justices to order and direct such reasonable and necessary allowances to be made to any high constable for extraordinary expenses incurred by him in the execution of his duties in any case of tumult, riot, or felony. The rule *nisi* for a *mandamus* which had been obtained was made absolute by Cockburn, L.C.J., and Mellor, J., the Lord Chief Justice saying, "there being a serious question raised they would leave it to be raised on the record and carried if necessary to the House of Lords." This is the sole case the Solicitor-General has been able to bring to our attention—a poor authority indeed upon which to infer a common law obligation. I must point out that the present rule *nisi* is not moved under the Act above mentioned; and whether if it had been, it would have been successful I give no opinion, for it is not before me, and I

may add that, if it had been, the facts of the case do not seem to me to fit in with the section. The present rule is to pay out of the county fund, or to levy a county rate to pay the tradesmen who are the relators, and not to pay a high constable for any extraordinary expenses he may have incurred, and indeed none, as it appears to me upon the affidavits, have been incurred by any high constable.

I will now turn to the work of a man who had peculiar knowledge on the matters now in question—I mean the late Mr. Charles Clode of the War Office. I find in his work, Military Forces of the Crown, vol. 2, s. 47, p. 142, and a note thereon, that which shows how erroneous it would be for the court to declare the existence of an obligation upon the ratepayers of counties at common law to pay the cost of soldiers imported into their districts to quell riots as suggested by the Solicitor-General. At section 47 Mr. Clode says, with regard to the employment of military in lieu of the police, there is this apparent defect in the present law—namely, that the military are sent to and remain in the particular town, not at the expense of the local, but of the general community, giving thereby a present instead of inflicting a pecuniary mulct upon the inhabitants of the town or place for their insufficient ordinary police arrangements, and the example he gives in the note is peculiarly pertinent to the common law point, now for the first time, I believe, suggested by the Solicitor-General. The note is this: "For example, if the Manchester magistrates request 500 men of the Metropolitan Police to be sent down to aid in maintaining the peace and order of the town, the magistrates provide for the men and the ratepayers of Manchester bear their expenses; but if the same magistrates request 500 soldiers to be sent for the same purpose, the taxpayers of the kingdom have to bear all the expenses of the 500 soldiers and the ratepayers of Manchester nothing." Where is there any ground for holding a duty imposed at common law upon the ratepayers to pay for the housing and feeding of soldiers? There is none, for no such obligation at common law in fact exists, and if this obligation is to be imposed it must be by statute. The case of *Rex* v. *Inhabitants of Essex*, 4 T. R. 591, was pressed into the service of the Solicitor-General in order to show that the county rate might be liable for expenses not cast upon it by statute. That case was whether the justices of a county might pay the expense of litigating as to a fine which they thought had been illegally imposed upon the county, and it was held (see specially by Buller, J.) that on the true construction of the Act 12 Geo. 2, c. 29, the necessary expenses of everything relating to the subjects therein mentioned must be borne by the county and paid out of the county stock; but as this Act in no way relates to the payment of the maintenance of soldiers in a county, the case, in my judgment, has no application to the case in hand. For the above reasons I think that the tradesmen make out no duty in the county ratepayers to pay the expenses in question, and I agree with the Divisional Court that the rule *nisi* should be discharged. This appeal must, therefore, be dismissed.

VAUGHAN WILLIAMS, L.J., read the following judgment: In my opinion the judgment of the Divisional Court must be affirmed.

The key to the whole question is to be found in the judgment of the Court of Queen's Bench in *Rex* v. *Inhabitants of Essex*. Lord Kenyon, C.J., says: "If the contest in this case had been whether the justices of the county could arbitrarily impose taxes on the county, the only answer that could have been given would have been in the negative. But the question here is whether by any express law or by precedent and long usage that which has been done was not lawfully done. And if it be warranted by precedent and long usage and by many analogous cases in the law, the order may be supported, though there may be no precise Act of Parliament to direct it." Now, in the present case it is not suggested that there is any statute authorizing the levy of a rate for the payment of the expenses incurred in the maintenance of the soldiers called in to maintain order, or that there is any statute that authorizes the payment of such expenses out of the county fund, neither is it suggested that these expenses are the necessary expenses of things relating to subjects mentioned in such Acts, within the principle laid down by Buller, J., in the same case, who says: "In my opinion the true construction of this Act is that the necessary expenses of everything relating to the subjects therein mentioned must be borne by the county and paid out of the county stock."

The *mandamus* asked for in the present case is a *mandamus* to the county council of the administrative county of Glamorgan, ordering them to pay certain sums to certain tradesmen who had provided food and other things for the maintenance of the soldiers. This distinguishes the present case from the case which was before Cockburn, C.J., and Mellor, J., on the 21st of February, 1879, in which case the application was for a *mandamus* directing the treasurer of the county fund to obey an order of two justices, confirmed at quarter sessions, to pay to the chief constable the extraordinary expenditure incurred for the maintenance of a military force called in by the justices on the occasion of riots at Blackburn. It was contended that such an order could be justified by 41 Geo. 3, c. 78, s. 2, which provides that it shall be lawful for two justices to order such reasonable and necessary allowances to be made to any high constable for any county for any extraordinary expenses incurred by him in the execution of his duty in any case of tumult, riot, or felony. The section goes on to provide for the confirmation of the order at quarter sessions. The writ of *mandamus* was granted, the court saying that the question could then be raised on the record and carried to the House of Lords if necessary, but suggesting that it might answer the purpose to appeal against the decision before incurring the expense of issing the writ. The rule was made absolute for the issue of the writ, but there does not seem to have been any appeal. In that case there was an affidavit by the chief constable, saying that in his opinion the expenses were necessarily incurred in providing lodgings, rations, and otherwise maintaining the military force, and that in his opinion such military force was necessary to aid and assist the civil authority in maintaining peace and good order, and that without such military force it would not have been possible for him to have maintained peace and good order in the division. As the Lord Chief Justice pointed out, the affidavit did not state that the force was obtained by the chief constable, although when the soldiers were there he availed himself of their assistance. Indeed, it did not appear that the lodging and rations were ordered by him.

I have dealt with that case at some length because the facts are uncommonly like the facts in the present case, and I wish to guard myself against being supposed to decide that, if the application had been for a *mandamus* to order payment to the chief constable of expenses incurred by him, instead of being, as it is, an application for an order to make payments to certain tradesmen who provided food, &c., for the soldiers, a *mandamus* might not have issued. I note, however, that there is no

affidavit in the present case by Captain Lindsay, the chief constable, and that the affidavits as to his approval are very vague.

A. L. SMITH, L.J.—Rigby, L.J., agrees with the judgments which have been delivered.

*Appeal dismissed.*

Solicitors for the prosecutors, *Bell, Brodrick, & Gray*, for *Linton & C. & W. Kenshole*, Aberdare.

Solicitors for the defendants, *Cheston & Sons.*

---

## House of Lords.

From C. A. (England). } Aug. 3, 1899.

SMITH *v.* RICHMOND. (*a.*)

*Poor law—Rating—Market garden—Land covered with greenhouses—"Agricultural land"—"Buildings or other hereditaments"—Agricultural Rates Act,* 1896 (59 *&* 60 *Vict. c.* 16), *ss.* 1, 5, 9.

*Glasshouses within a market garden used solely for purposes connected therewith, are not "agricultural land" within the meaning of the Agricultural Rates Act,* 1896, *so as to entitle the occupier to the partial exemption given by that Act.*

*Decision of the* Court of Appeal (46 *W. R.* 401, [1898] 1 *Q. B.* 683, *affirmed.*

This was an appeal from an order of the Court of Appeal (Lindley, M.R., and Rigby, L.J., Vaughan Williams, L.J., dissenting), reported 46 W. R. 401, [1898] 1 Q. B. 683, reversing that of the Queen's Bench Division.

The question was whether buildings within a market garden were to have the benefit of the partial exemption from rates provided for by the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16).

The Court of Appeal held that land covered with glasshouses for the purpose of its cultivation was, though used solely as a market garden, "a building or other hereditament" and the occupier was therefore not entitled to the partial exemption from rates granted to "agricultural land" by the Act of 1896.

The special case as stated by the Lord Chancellor was as follows:

The question arises under the Agricultural Rates Act, 1896, and was whether the ground covered by glasshouses or greenhouses in a market garden is entitled to the benefit of the Act, section 1 of which makes the occupier of Agricultural land in England liable, in the case of every rate to which the Act applies, to pay one-half only of the rate in the pound payable in respect of buildings or other hereditaments. By section 9 of the Act, "The expression 'agricultural land' means any land used as arable, meadow, or pasture ground only, cottage gardens exceeding one quarter of an acre, market gardens, nursery grounds, orchards, or allotments, but does not include land occupied together with a house as a park, gardens other than as aforesaid, pleasure grounds, or any land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse." The same definition was incorporated with and set out in article 1 of the Agricultural Rates Order, 1896, issued by the Local Government Board, and having statutory effect.

The appellants had, in the case of certain hereditaments consisting of land partly covered by glasshouses, inserted the gross estimated rental and rateable value of the whole of such hereditaments under the description of agricultural land. The assessment committee, on the objection of the surveyor of taxes (respondent in the House of Lords), decided that land so covered was not entitled to the exemption. The appellants appealed to quarter sessions, and on the hearing of the appeal it was agreed, inasmuch as the hereditaments included in the notice of appeal were practically identical in character, to take the hereditament of Robert Piper, numbered 140 in the said notice, as a test case for the purposes of the appeal.

With regard to this hereditament the following were the agreed facts: "The said Robert Piper was a grower of fruit, vegetables, and flowers at Worthing, and described himself, and was commonly known, as a market gardener and nurseryman. He was the owner and occupier of a piece of land rather more than four acres in extent on which fifty-seven glasshouses or greenhouses of various sizes were erected; the houses were used by the appellant for the purpose of growing tomatoes, cucumbers, and grapes, and to a smaller extent other vegetables for the purpose of sale. The plants and crops grown therein were watered and heated by artificial means, and grown upon soil placed upon prepared beds inside the houses, and matured much earlier than in the open ground. The vines are planted inside the houses and the roots run partly in the soil under the houses and partly pass through the apertures in the walls into the soil outside. Fifty-one of the glasshouses are thus used for growing vines. In the cucumber-houses (which are six out of the fifty-seven houses) there are, inside the houses, dwarf brick walls supporting corrugated iron sheets, upon which sheets, earth taken from the other parts of the nursery ground is placed. In this earth, so placed upon the iron sheets, the cucumber plants are planted. Beneath the iron sheets, and between them and the ground, there are hot-water pipes. The area actually occupied by the fifty-seven houses is rather more than two acres. The rest (rather more than two acres) consists merely of vine borders, paths, and the stokeholes. The whole of the houses were built upon dwarf brick walls like an ordinary greenhouse." In the overseers' statement the property was described as "market gardens and nursery grounds," of the gross estimated rental of £662 19s. 6d., and of the rateable value of £431 5s. It was entered under "agricultural land," and no separate estimate was given of the buildings and other hereditaments.

*Asquith, Q.C.*, and *Clavell Salter*, for appellants.—Market gardens are expressly mentioned in definition of "agricultural land," in section 9, and all market gardens have glasshouses.

They referred to *Purser* v. *Worthing Local Board*, 35 W. R. 682, 18 Q. B. D. 818.

*Sir R. E. Webster, A. G.*, and *S. H. Day* (*Arthur H. Trevor* with them).—Under the Act no buildings are included. The greenhouses are alone assessed.

*Clavell Salter* replied.

The House took time for consideration.

Earl of HALSBURY, L.C.—This appeal raises the question what is meant by the words "occupier of agricultural land" in the statute 59 & 60 Vict. c. 16. Apart from the provisions of the statute in question, the word "land" would be variously understood by different persons. To a farmer the word "land" would not mean his farm buildings; to a lawyer the word would include everything that was upon the land, fixed immovably upon it; but the statute has given an interpretation clause, and has also in the

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

enacting clause itself pointed out not obscurely with what subject-matter it was dealing. The very enacting part of it gives the antithesis between land and buildings, since the relief the occupier is to get is that he is to be liable in the case of every rate to which the Act applies "to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments." Now the special case here finds that "the land" sought to be treated as agricultural land is of the character described in the 14th paragraph of the case as agreed to. [His lordship stated the agreed facts.] I have emphasized some parts of this description; and it is extraordinary that any claim should be made that what is there described, is agricultural land. It would be quite as reasonable to claim that any building, however solid and substantial, used for agricultural purposes was agricultural land, because to a lawyer land would include it, and as its use was agricultural, it therefore became agricultural land within the meaning of the Act. I agree with the Master of the Rolls that the term "land and buildings" in this Act are mutually exclusive of each other. I must say I feel no difficulty in applying the interpretation clause to the construction of the Act, which seems so plain. A market-garden or a nursery-ground may, as part of it, have agricultural land, and if such part is used as arable, meadow, or pasture-ground only, it will not forfeit its claim to relief because it forms part of such an industry; but in what sense can these buildings be described as arable, meadow, or pasture? They are buildings, and not agricultural land at all. I am very clearly of opinion that this appeal ought to be dismissed with costs, and I move your lordships accordingly.

Lord WATSON.—I have done my best to examine the statute in question, and I have been quite unable to arrive at any result other than that which is embodied in the judgment appealed from. I agree with all the observations of the Master of the Rolls, and with the brief but cogent reasoning of my noble and learned friend on the woolsack.

Lords MACNAGHTEN and MORRIS concurred.

*Appeal dismissed.*

Solicitor for the appellants, *Herbert B. Bell.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

## Privy Council.

(*From the Supreme Court of Trinidad.*)

July 8, 1899.

TRINIDAD ASPHALT CO. v. AMBARD. (a.)

*Easement—Right of support—Adjacent land—Asphaltum or pitch.*

*The right of support from adjacent land which will keep the surface from subsidence still exists, though the land supported consists of asphaltum, for the nature of the strata is an immaterial consideration.*

Appeal from the Supreme Court of Trinidad.

The facts are set out in their lordships' judgment.

*Haldane, Q.C., G. Lawrence,* and *Previté,* for the appellants.

*Moulton, Q.C., Alcazar,* and *P. D. Abraham,* for the respondents.

(a.) Reported by C. H GRAFTON, Esq., Barrister-at-Law.

The judgment of their lordships (Earl of HALSBURY, L.C., Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, and DAVEY) was delivered by

Lord MACNAGHTEN.—At La Brea, in the Island of Trinidad, where the land slopes down from the Pitch Lake to the sea, a distance of about a mile, there is found near the surface a stratum of asphalt or pitch. Pitch lands, as lands within this district are called, are not cultivated, nor are they apparently suitable for cultivation. Their whole value depends on the pitch they contain. Of late years there has sprung up a great and increasing demand for this substance. It is now worth 20s. a ton. With the increase in the value of pitch there has been a corresponding rise in the value of pitch land. A lot which might have been bought for 40 dols. a few years ago would now, it seems, probably fetch not less than 4,000 dols.

In some few places the pitch crops out on the surface of the ground. For the most part it lies at a depth varying from 4 to 7 feet. So long as it is undisturbed it is stable and firm enough to support the soil above in its natural state. But if an excavation is made, and the stratum of pitch cut through, the consequence is that the edge exposed to the influence of the heated atmosphere begins to melt and the pitch oozes out. It may then be collected at the bottom of the excavation or caught as it is exuding. "Pitch," as one witness said in answer to a question by the court, "bulges out, and they shave it off each morning. That," he added, "is the plan adopted when you want to dig your neighbour's pitch."

The original plaintiffs, the Trinidad Asphalt Co., to whose rights the new company lately added as appellants have succeeded, were the owners of a lot of pitch land containing about a quarter of an acre and known as Lot 15A. The lot immediately adjoining it on the side towards the sea and lying at a somewhat lower level belonged to the defendant Ambard. It was known as Lot 15. In January, 1896, the Defendants began digging for pitch on Lot 15. They dug right up to Lot 15A to a depth of 12 feet, and so close to the boundary that some of the boundary posts fell in. The excavation was continued the whole length of the boundary line except for the space of about 10 feet on one side, which was left as a loading place.

The usual results followed. The section of the stratum of pitch thus exposed to the atmosphere began to melt. The pitch oozed out and the excavation yielded abundantly. Between 200 and 300 tons of pitch were "won," as the phrase goes. The surface of the plaintiffs' land began to sink and crack. A depression was formed, in shape like half a saucer, about 5 feet deep in the centre at the boundary line, and going back in a semi-circle with a radius of about 60 feet. A series of cracks appeared on the surface from 8 to 10 feet long by 6 to 18 inches wide, and some buildings or sheds of no great value were more or less wrecked.

For this injury to their property the plaintiffs sued the defendants, asking for an injunction and damages.

The action came on for trial before the Chief Justice, Sir John Tankerville Goldney. His honour granted an injunction restraining the defendants from digging and winning or otherwise removing asphaltum from the parcel of land known as Lot 15 in such a way as to destroy or seriously injure the surface of the plaintiffs' Lot 15A, and the sum of £100 was awarded by way of damages.

From this judgment there was an appeal to the full court. The appeal was heard by the Chief Justice and Nathan and Lewis, JJ. The learned Chief Justice adhered to the opinion he expressed at

the trial. The other two learned judges differed from him and differed from each other. Nathan, J., was for dismissing the plaintiffs' action altogether with costs. Lewis, J., was of opinion that as a matter of law the plaintiffs were entitled to support for their lands, but his conclusion was that no injunction ought to have been granted and that the damages should be reduced to £10. He thought £10 "would amply compensate the plaintiffs for damage through mere subsidence." He considered that the injury caused to the plaintiffs' land by the withdrawal of pitch from it ought not to have been taken into account at all. In the result the order of the court was that the judgment of his honour the Chief Justice be set aside so far as regards the injunction, that the sum of £100 allowed as damages be reduced to £10, that the Chief Justice's order as to costs be set aside, that each party do bear their own costs of the hearing before the Chief Justice, and that the plaintiffs do pay to the defendants the costs of the appeal.

From this order both parties have appealed to Her Majesty in Council.

Their lordships have to determine between the conflicting views of the Chief Justice and Nathan, J. The judgment of Lewis, J., who agreed to a certain extent with each of his colleagues, may be laid on one side. If Lewis, J., is right in his premises it is plain that his conclusion is opposed to the principles and practice of the court. Assuming that the plaintiffs were entitled to have their land in its natural state supported by the adjacent land belonging to Ambard, it would seem to follow as a matter of course that this right which the defendants have invaded should now be protected by injunction, and not the less so because, in his honour's view, the damages that could be recovered at law would be only trifling. Certainly the decision of the learned judge, if it were to prevail here as it did in the full court, would leave the plaintiffs in a very unfortunate position. The defendants were not to be restrained from digging. They might, therefore, drain as much pitch as they could from the plaintiffs' land and sell it and pocket the price. They would only be liable for consequential injury to the surface of the plaintiffs' land overlying the stratum of pitch and for injury to the plaintiffs' buildings. The buildings all told are only worth a few pounds. The surface without the buildings is of such a sort that it would be little or none the worse for cracks and depressions. Even if the plaintiffs cared to bring actions in which they could recover no substantial damages and would not be wholly indemnified against costs, the defendants at the outside would only have to pay in each case damages all but nominal and the costs of an undefended action. Of course the defendants would go on with their digging as long as there was any pitch to be got. The pitch won from the plaintiffs' land would pay the costs and damages over and over again. And in the meantime the plaintiffs would have to look on and see the value of their land destroyed for the time, if not for ever, by the withdrawal of the one valuable element in its composition. A conclusion so lame and impotent seems hardly in accordance with the principles of equity or common sense.

The judgment of Nathan, J., is not inconsistent with itself. But it appears to be founded on a mistaken analogy. Water dropping from the clouds on the face of the earth and percolating the ground in no definite channel is not the property of any man until it has been appropriated. The pitch which is the peculiar product of this strip of land in the Island of Trinidad resembles water in one respect. At a certain temperature it becomes liquid. When it is liquid its behaviour is more or less like the behaviour of water or any other fluid. It has no angle of repose. From these premises Nathan, J., infers that this underground stratum of pitch is no man's property until it has been appropriated, and his conclusion is that, just as no action will lie for collecting or pumping up underground water percolating the earth in no defined channel, though the supply may be withdrawn from a neighbour's property, and the withdrawal may leave his well dry and useless, so anybody and everybody who owns a lot in the village of La Brea may with impunity win the pitch lying under his neighbour's land. So far the two learned Puisne judges were agreed. They differed only on one point. Nathan, J., thought that it was decided that an owner of land has no right at common law to the support of subterranean water. That is the head-note in *Popplewell* v. *Hodkinson*, 17 W. R. 806, L. R. 4 Ex. 248. Lewis, J., thought that the head note was not warranted by the decision. Nathan, J., therefore came to the conclusion that the plaintiffs had no case at all, while Lewis, J., thought they were right up to a certain point and gave them a barren victory.

The judgment of the learned Chief Justice is short and to the point. The argument which Nathan, J., has elaborated with much ingenuity and learning is dealt with by anticipation in a single sentence. "Asphaltum," observes the Chief Justice, "is a mineral—not water." He found that the defendants had interfered with the plaintiffs' right of support, that they had let down the surface of the plaintiffs' land, and consequently done injury to the plaintiffs' house, and also that the plaintiffs had suffered injury by the loss of the asphaltum, which, on the removal by the defendants of the lateral support of their land, passed into the defendants' land and was appropriated by them to their own use.

Their lordships agree with the learned Chief Justice. It is not necessary to discuss the question on which Lewis, J., differed from Nathan, J., as to the right of support from subterranean water, because, as the Chief Justice observes, the substance which afforded support in this case was not water. As was laid down by the Court of Queen's Bench in *Humphries* v. *Brogden*, 12 Q. B. 739, the nature of the strata must be immaterial; it is impossible for the court to measure out degrees to which the right of support for the surface may extend. "The only reasonable support," as Lord Campbell observed, "is that which will protect the surface from subsidence and keep it securely at its antient and natural level." The damages awarded by the Chief Justice do not appear to their lordships to have been assessed on a wrong principle or, under the circumstances, to be excessive.

One argument was addressed to their lordships which perhaps ought to be noticed. It was said that digging for pitch was the common industry of La Brea, and that if an injunction were granted the industry would be stopped altogether. In the first place there is no evidence that that would be the result. Whatever the result may be, rights of property must be respected, even when they conflict or seem to conflict with the interests of the community. If private property is to be sacrificed for the benefit of the public it must be done under the sanction of the Legislature, which can and generally does provide compensation. If the inhabitants of La Brea cannot dig their own pitch without invading their neighbours' rights, it is quite possible that the hope of reciprocal advantage and the apprehension of mutual liability may lead to some arrangement for their common benefit, or the difficulties of the case may induce the Legislature to step in and regulate the digging of pitch and the management of the pitch lands.

Their lordships will therefore humbly advise Her Majesty that the plaintiffs' appeal ought to be allowed and the cross appeal dismissed, and the decision of the full court set aside with costs, and the judgment of the Chief Justice restored.

The respondents Ambard and François will pay the costs of the appeal and cross appeal.

Solicitors for the appellants, *Sutton, Ommanney, & Rendall.*

Solicitors for the respondents, *J. N. Mason & Co.*

---

(*From the Supreme Court of British Columbia.*)

June 17, 1899.

CANADIAN PACIFIC RAILWAY CO. *v.* PARKE.

*Statute—Construction—Permissive or imperative—Water—Rights of adjoining proprietors—Irrigation—Negligence—Common law rights.*

*Where the statutory provisions enabling a proprietor to irrigate his land from external sources are permissive merely, the right of action of neighbouring proprietors for injury done to their lands consequent upon any such irrigation are preserved; and this is so though the injury was not occasioned by the negligence of the irrigator.*

Appeal from the Supreme Court of British Columbia.

The facts are given in their lordships' judgment.

*Blake, Q.C.*, for the appellants.

*Haldane, Q.C.*, and *Crawford*, for the respondents.

The judgments of their lordships (Earl of HALSBURY, L.C., Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, SHAND, and DAVEY) was delivered by

Lord WATSON.—The appellants are owners of the Dominion Railway, known as the Canadian Pacific Railway, which, in its course through the Yale district of British Columbia, passes near to the Thompson River, at the distance of about half a mile from the lands belonging to the respondents, which lie to the eastward.

The respondents' ranch, which appears to be about 320 acres in extent, is situated—to use provincial phraseology—upon benches, or, in other words, upon a series of tablelands, rising gradually to the eastward, above the level of the Thompson River. The land was originally acquired from the Crown, under a pre-emption title, by one William Rice Puckett, before the province of Columbia had been admitted into the Union. Puckett, in the year 1872, transferred his interest to James Robinson; and in July, 1884, Robinson transferred his interest to T. G. Kirkpatrick, who, in April, 1894, sold and transferred his interest in the same to the respondents, the transfer being duly recorded.

The British Columbian Land Ordinance of 1870, by section 30, provided that "every person lawfully entitled to hold a pre-emption under this ordinance, and lawfully occupying and *bonâ fide* cultivating, may divert any unrecorded and unappropriated water from the natural channel of any stream, lake, or river adjacent to or passing through such land, for agricultural and other purposes, upon obtaining the written authority of the Commissioner of the district to that effect, and a record of the same shall be made with him. after due notice as hereinafter mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object therefor, and all such other particulars as the Commissioner may require. For every such record the Commissioner shall charge a fee of two dollars, and no person shall have any exclusive right to the use of such water, whether the same flow naturally through or over his land, except such record shall have been made."

Section 33 of the Ordinance enacted that "the right of entry on or through the lands of others for any lawful purpose upon, over, or under the said land, may be claimed and taken by any person lawfully occupying and *bonâ fide* cultivating as aforesaid, and (previous to entry) upon paying or securing payment or compensation, as aforesaid, for the waste or damage so occasioned, to the person whose land may be wasted or damaged by such entry or carrying of water." Section 34 makes provision for the assessment of the amount of compensation payable, in case of dispute, either summarily, or by a jury or five persons.

The 36th section of the Ordinance enacts that "All assignments, transfers, or conveyances of any pre-emption right heretofore or hereafter acquired shall be construed to have conveyed and transferred, and to convey and transfer, any and all recorded water privileges in any manner attached to or used in the working of the land pre-empted."

The provisions already referred to of the Ordinance of 1870 were in substance re-enacted by No. 144 of the Laws of British Columbia consolidated in 1871, which is entitled "An Ordinance to amend and consolidate the laws affecting Crown lands in British Columbia." Sections 39-50 of chapter 66 of the Consolidated Statutes of British Columbia, 1888, relate to the same subject. Section 41 provides that "the owner of any water privilege, or right acquired by record, shall have no exclusive right to the privilege so recorded until he shall have constructed a ditch for carrying the water to the place where it is intended to be used; and, in case any such ditch shall not be of sufficient capacity to carry the quantity of water recorded by the owner of such ditch, then the exclusive right of such owner shall be limited to the quantity which such ditch may be capable of carrying, notwithstanding such record, until such ditch shall be enlarged so as to be capable of carrying the quantity of water recorded by such person." Section 47 of the statute of 1888 empowers the proprietors or occupiers of any lands subject to irrigation, with the consent in writing of the commissioner, by means of flumes, ditches, or drains through the adjacent lands, to run their surplus and waste water into any creek, gulch, or channel. The power thus given is qualified by the condition that it shall be "subject to the provisions of the law for the time being in force respecting compensation for entry upon occupied lands for carrying water through or over them." Section 49 provides that all assignments, transfers, or conveyances of any pre-emption right, when the same are or were permitted by law, and all conveyances of land in fee, whether such assignments, transfers, or conveyances were or shall be made before or after the passing of the Act, shall be construed so as to carry any and all water privileges in any manner attached to, or used in the working of the land pre-empted or conveyed. Section 56 enacts and declares that, whereas, in times past, many records of water rights and privileges had been honestly but imperfectly made, in all cases where the validity of any water record, made before the 6th day of April, 1886, might be called in question, and the court or judge before whom the case was pending should be of opinion that the record was made *bonâ fide*, the same

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

should be held to be good and valid so far as the making and entry thereof is concerned, and effect should be given thereto according to the intent thereof.

In the valley of the Thompson River, and in other districts of British Columbia, irrigation is indispensably necessary in order to develop the fertility of the soil. Accordingly there have been a considerable number of provincial Acts passed from time to time in order to the sanction and regulation of water privileges. Their lordships have not thought it necessary to refer to these in detail, but have noticed all the statutory enactments to which their attention was directed in the argument upon this appeal.

Puckett, the original pre-emptor of the lands now belonging to the respondents, on the 21st of November, 1868, acquired a record of 300 inches of water to be taken from McCallum's Creek, and on the 10th of April, 1871, he acquired a record of 300 inches of water to be taken from McCallum's and Pennie's Creek, for the purpose of irrigating the lands. The respondents, as his successors, have now right to the water privileges which were so acquired by him.

The Canadian Pacific Railway, as it passes the lands of the respondents, was constructed by the Dominion Government, and was thereafter transferred to the appellant company, and opened for traffic in the year 1886. The railway, and the whole undertaking now carried on under the name of the Canadian Pacific Railway, were, by patent of Her Majesty, under the Great Seal of Canada, dated the 25th of May, 1896, granted to the appellant company. The grant was made under the proviso that "should our title to any portion or portions of the said tract of land hereby granted be found to be defective, neither the company, nor its successors or assigns, shall have any claim in respect thereof by virtue of anything contained in these presents." No question arises in this action as to any defect of the Crown title, the only question relates to the powers which the respondents are entitled to exercise, by virtue of the water privileges attached to their lands.

The appellant company brought their writ on the 20th July, 1895, and an amended statement of claim was delivered on the 27th of October, 1896, before the Supreme Court of British Columbia. The amended statement sets forth that the respondents brought large quantities of water upon their lands for the purposes of irrigation, that they did not carry off the surplus water by means of flumes, ditches, or drains, but allowed it to mingle with the subsoil, with the result of causing a slide of the land in the direction of the Thompson River, and thereby occasioning, from time to time, serious damage to the line of railway. The appellant company claimed, "that the defendants, their servants, agents, and workmen, be restrained, by the order of this honourable court, from continuing to bring water upon their lands, and to allow such water to escape to the plaintiffs' line of railway, and to cause land slides thereon as mentioned."

The case went to trial at Vancouver, before Drake, J., and a special jury. The learned judge submitted these two questions to the jury: "(1) Is the water brought by the defendants upon their land for the purpose of irrigation the sole cause of the damage done to the plaintiffs' line of railway by the slide in question? (2) Is the water brought by the defendants on their land for the purpose of irrigation the substantial cause of the damage done to the plaintiffs' line of railway by the slide in question?" The jury answered the first question in the negative, and the second in the affirmative.

The learned judge who presided at the trial, having considered the verdict returned by the jury, refused the injunction craved, and dismissed the appellants' action with costs. On appeal, the full court of British Columbia, consisting of McCreight, Walkem, and McColl, JJ., affirmed, with costs, the judgment of Drake, J.

The learned judges of the Supreme Court fully recognized the gravity of the legal issues which were raised, and their importance to the parties. Drake, J., said: "The jury found, after a trial extending over many days, that the substantial cause of the injury done to the plaintiffs' railway was the water brought on to the lands of the defendants for irrigation purposes, and on that finding the plaintiffs move for judgment, asking that the defendants be restrained from further damaging the plaintiffs' line by irrigating the lands in question. The effect of such an order will be to prevent the defendants carrying on farming operations upon the lands in question."

Drake, J., at the same time, clearly explained the origin and nature of the slide, or landslip, which, during periods of irrigation, encroached upon and damaged the appellants' line of railway: "The defendants irrigated about 34 acres of land on the high bench above the railway with water brought by a ditch capable of carrying 160 inches of water. An inch of water means 12,960 gallons in 24 hours, or 1,728 cubic feet. The soil which the defendants irrigated was proved to be of a very porous quality, consisting of many feet of gravel underlying a slight deposit of sandy loam, and below the gravel was a very large bed of what is called silt, a mineral that absorbs water rapidly, and when its saturation reaches 78 degrees it is converted into liquid mud. At a point on the banks of the Thompson, above and below the plaintiffs' line, a large slide has been formed by water percolating through the soil and causing the earth to slip. This slide is continually moving towards the river, forcing the rails out of position, and frequently large masses of more or less liquid silt carrying away the road bed drop from under the line. This slide is now about sixty-six acres in extent and continually increasing."

The damage done to the railway of the appellant company by the slide, and the constant repair and renewal which it necessitates, may be gathered from the uncontradicted evidence of Henry John Cambie, the chief engineer, since its opening in 1886, of the Pacific Division of the Canadian Pacific Railway. Speaking of that portion of the railway which is affected by the slide in question, he says: "We keep a resident watchman there living on the spot, and no train is allowed to pass over without his signal giving permission. In addition, we have been obliged to divide up the section, and put an extra section gang in order to have three or four men at all times. Besides that we must keep over a great part of the reach twenty-five or thirty men working along for weeks together on this particular piece. They are not able to do it alone. We must put on working trains to bring material, in order to keep up the railway embankment. Notwithstanding all that, there is a very great danger to the trains passing over it."

In coming to the conclusion that the application of the appellant company ought to be dismissed, Drake, J., and McCreight, J., with whom Walkem, J., agreed, proceeded solely upon the ground that the British Columbian legislation, which has been already referred to, gives to the holder of land under a pre-emption title, who has taken a supply of water for irrigation purposes, and has recorded his privilege in accordance with its provisions, an absolute right to use for irrigation the water so taken by him, no matter how injurious the

use may be to neighbouring landowners, and that he was under no liability to compensate them for the injury done, unless it were shown that his use was negligent. In other words, they held that his irrigating the surface of his land, by bringing to and pouring upon it foreign water, which immediately percolated to the substratum of silt, with which it mingled, and then escaped from his land as liquid mud, and seriously damaged the adjoining land, was the necessary consequence of his exercising his statutory right, and did not constitute negligence, or afford the owner of the adjoining land any cause of action. McColl, J., without expressing the same conclusion, proceeds to consider whether the appellant company would have been entitled to an injunction, if they had offered to make compensation to the respondents, in ceasing to irrigate so as to cause a land slide, and the consequent destruction of the railway line. The learned judge, however, does not go so far as to solve the question, seeing it had not been argued, and his brethren had been able to come to the conclusion that the judgment should be affirmed. It may be added, that the record in this appeal contains no materials for raising the question which was discussed by the learned judge.

Their lordships think that the judges of the Supreme Court were right in considering the crucial question in this case to be, whether the Columbian legislation, which they had to construe, was, as between the person using the powers hereby conferred and the owners of adjacent lands, imperative or merely permissive. They examined the leading authorities bearing upon the point, and their conclusion, as expressed by Drake, J., was: "The difference in the present case is that there is no direction that irrigation waters should be used, but only a permission to use them; but the permission to use implies a legal right of use which will bar an action for damages when the use has been non-negligent." The proposition is somewhat too broadly stated. Wherever, according to the sound construction of a statute, the Legislature has authorized a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law, permissive merely, and not imperative, the Legislature must be held to have intended, that the use sanctioned is not to be in prejudice of the common law right of others.

The leading authorities in the law of England upon this question, which though not numerous are of considerable weight, are *Managers of Metropolitan Asylums District* v. *Hill*, 29 W. R. 617, 6 App. Cas. 193, and *London, Brighton, and South Coast Railway Co.* v. *Truman*, 34 W. R. 657, 11 App. Cas. 45. In the first of these cases the managers were authorized by a public statute 30 & 31 Vict. cap. 6, no locality being specified, to erect hospitals for the reception of the sick poor of the metropolis. In virtue of these statutory powers, they commenced the erection of a small-pox hospital at Hampstead, when an injunction was applied for by the respondents who were the proprietors of houses in the vicinity. At the trial, it was found by a jury that the hospital was, or would be to the nuisance of the respondents. The House of Lords decided in favour of the respondents, upon the express ground that the statute was permissive, and gave the managers no authority to erect a hospital which was injurious to neighbouring proprietors. The Lord Chancellor (Selborne) said (6 App. Cas., p. 202): "I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the plaintiffs, without their consent." In the same case (6 App. Cas. 208) Lord Blackburn said: "It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private right of individuals, to show that by express words, or by necessary implication, such an intention appears." The noble and learned lord also observed (at p. 203): "The Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and, if no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others."

In the second case, a railway company were empowered by a local and personal Act, passed after due inquiry, to purchase additional lands not exceeding fifty acres, for the purposes *inter alia* of receiving, depositing, or keeping any cattle, or any goods conveyed or intended to be conveyed on the railway. They were required by the Act to sell superfluous lands within ten years from its passing. Under that power, they purchased between two and three acres of ground adjacent to one of their stations. For nearly ten years the ground was used as a market garden, when the company devoted the land to the purposes of their cattle traffic, and constructed a yard or dock for the cattle carried by them. Certain occupiers of houses in the neighbourhood of the yard, who complained of it as constituting a nuisance, but did not allege negligence on the part of the company in using it, applied for an injunction, which was granted by North, J., and his decision was affirmed by the Court of Appeal. Their decisions were reversed by the House of Lords, who held that the provisions of the Act which related to the acquisition and use of the yard were intended by the Legislature to be imperative in the same sense as its provisions relating to the use of the railway, and that, no negligence having been shown on the part of the company, the injunction ought to be refused.

In the present case, the legislation of British Columbia is perfectly general, and applies to all lands within the province which had been, or at any future time might be acquired by a subject, under a pre-emption title from the Crown. It provides that the proprietor of land held under that title, with consent of the commissioner, and upon making payment of compensation, may compulsorily divert water from any stream, lake, or river adjacent, and may convey it to his own land for the purpose of irrigation; and he has also the right, if lawfully occupying and cultivating his own land, to convey the water through or over land which does not belong to him, upon paying due compensation for waste or damage. Then the statute of 1882 empowers him, after the water has been used for irrigation, to run the surplus or waste water through the adjacent lands by means of flumes, ditches, or drains, subject to the same provisions as to compensation.

The legislation in question, in so far as its provisions relate to the use of the water by the irrigator, after it has been conveyed to his own land, is undoubtedly conceived in language which is permissive. He is allowed to use it for the ordinary purposes of irrigation, which *primâ facie* imply that the water is to be distributed over, and absorbed by the soil; and it is a circumstance not to be overlooked in construing these statutory provisions that the Legislature has contemplated, and has provided compulsory means of carrying off surplus water, which has not been absorbed by the soil, by flumes, ditches or drains through the adjacent lands of other owners. The real question therefore, in this case, comes to be, whether these provisions ought to be construed, as being in their substance, as

well as in their form, permissive merely, and, subject to the obligation, which, in that case, is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or, whether they are to be construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of negligence, to inflict any amount of injury upon his neighbour without incurring responsibility. The respondents contended for the second of these alternatives, which has been adopted by the courts below, but, in order to justify their contention, it is incumbent upon them to show, that the Legislature deliberately intended to take away the rights of individuals to protect their property against invasion. The respondents maintain that, so long as they are not negligent, the Legislature has given them the absolute privilege, for the consequences of which they are not responsible, of causing, by means of their irrigation, a landslip which will have the ultimate effect of carrying the lands situated at a lower level than their own, together with all erections upon them, whether consisting of houses or railways, into the Thompson river.

Their lordships have been unable to discover, in the statutory provisions submitted to them, any sufficient ground for holding that the privilege of irrigating his own soil with foreign water was meant by the Legislature to be imperative, and was intended to exclude all right of action by neighbouring proprietors for injury done to their lands, save in the case where such injury was occasioned by the negligence of the irrigator. It is evident that no such circumstances occur in this case as led to the decision of the House of Lords in *London, Brighton, and South Coast Railway Co.* v. *Truman*. The company could not, under the power conferred upon them, acquire and use additional land for the enlargement of one of their stations, without incurring a statutory obligation to the public, to use that additional land as part of their railway, so long as their line was open for the accommodation and conveyance of traffic. The land added was, in these circumstances, just part of the railway, and within the principle of *Hammersmith and City Railway Co.* v. *Brand*, 18 W. R. 12, L. R. 4 H. L. 171. In the present case, the irrigator is at liberty, subject only to the consent of a commissioner, who is not charged with the duty of seeing that no injury results to lands adjacent to those which are to be irrigated, to determine the quantity of water he desires to appropriate, the means by which it is to be conveyed to his land, and the means by which surplus or waste water is to be discharged. When the water has been conveyed to his land, he is authorized to use it for purposes of irrigation; but it is left to his discretion to determine whether, as circumstances permit, he will use in irrigation, the whole, or part, or none of it. These provisions are certainly consistent with the view that no part of it was meant to be employed to the injury of neighbouring lands.

Their lordships will humbly advise Her Majesty to reverse the judgment appealed from; to grant an injunction restraining the respondents, their servants, agents, and workmen, from so irrigating the respondents' lands, as to cause a land slide or slip, and thereby to injure the appellant company's line of railway; and to order that the respondents do pay to the appellant company their costs of action in both courts below. The respondents must pay to the appellant company their costs of this appeal.

Solicitor for the appellants, *S. V. Blake.*

Solicitors for the respondents, *Hubbard & Wheeler.*

## Court of Appeal.

From Prob. Div. & Adm. Div. (A. L. Smith and Vaughan Williams, L.JJ.) — Nov. 4.

"THE MORGENGRY" AND "THE BLACKCOCK." (*a.*)

*Ship—Collision—Action against tug and tow—Judgment by default against tow—Proceeds of sale of tow paid into court—Plaintiffs' vessel and tug held both to blame—Judgment against tug for half damage—Measure of tug's liability—Right of owners of tug to have credit for sum paid into court.*

*In an action against a tug and a tow for damage by collision, the owners of the tow allowed judgment to go by default, and the proceeds of the sale of the tow—viz., £855—were paid into court. The plaintiffs' vessel and the tug were found both to blame, and judgment was given against the tug for half the damage. The total damage sustained by the plaintiffs' vessel was £4,146.*

*Held, that the plaintiffs were entitled to take the £855 out of court, and that the owners of the tug were liable to pay the plaintiffs £2,073 without having any credit given to them for the £855.*

Appeal from an order of Bucknill, J.

The action was brought by the owners of the steamship *Mourne* against the owners of the barque *Morgengry* and the owners of the steam-tug *Blackcock* for damage by collision.

At the time of the collision *The Morgengry* was in tow of *The Blackcock*, and the actual collision was between *The Mourne* and *The Morgengry*.

The owners of *The Morgengry*, who were foreigners, made default in delivering a defence, and a decree was accordingly pronounced in favour of the plaintiffs against the owners of *The Morgengry* subject to a reference to assess the damage, and *The Morgengry* was condemned in the said damage and costs, and was decreed to be appraised and sold.

The sum of £855 was realized by the sale and was paid into court.

The action, as against the owners of *The Blackcock*, came on for trial before Bucknill, J.

The learned judge held both vessels, *The Mourne* and *The Blackcock*, to blame, and condemned the owners of *The Blackcock* in a moiety of the damage proceeded for by the owners of *The Mourne*, subject to a reference. The registrar reported that the total damage sustained by *The Mourne* was £4,146.

The plaintiffs moved for an order that the sum of £855 which had been paid into court might be paid out to them.

The owners of *The Blackcock* resisted the application, and asked that the sum might be credited to them.

Bucknill, J., held that the plaintiffs were entitled to take the £855 out of court and to receive from the owners of *The Blackcock* the sum of £2,073.

From this order the owners of *The Blackcock* appealed.

It appeared that in an action for limitation of liability the owners of *The Blackcock* had obtained a decree limiting their liability to £1,802.

*Carver, Q.C.*, and *D. Stephens*, for the appellants.

*Lauriston Batten*, for the respondents.

*Cur. adv. vult.*

Nov. 4.—A. L. SMITH, L.J., read the following judgment: On the 17th of December, 1898, a collision took place in the Bristol Channel between

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

one being liable for the whole and the other for half. It is also to be observed that there is no judgment or finding that *The Mourne* was to blame as against *The Morgengry*. If the owners of *The Blackcock* wished for such a finding, I think they should have asked for it by their defence.

*Appeal dismissed.*

Solicitors for the appellants, *Holman, Birdwood, & Co.*

Solicitors for the respondents, *Thomas Cooper & Co.*

---

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — July 29; Aug. 2, 1899.

BEW *v.* BEW. (*a.*)

*Practice—Appeal—Appeal as to costs only—Judge's discretion not exercised—Costs, charges, and expenses—Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 49.

*Notwithstanding section* 49 *of the Judicature Act,* 1873, *an order as to costs, which are in the judge's discretion, is, if made in pursuance of a general rule which excluded the exercise of that discretion, subject to a right of appeal.*

The City of Manchester, 27 *W. R.* 697, 5 *P. D.* 221, *followed on this point.*

Charles *v.* Jones, 35 *W. R.* 88, 33 *Ch. D.* 80, *not followed.*

*There is no right of appeal against an order as to discretionary costs on the ground only that the same order deals with trustees' charges and expenses, as to which there is no appeal.*

Charles *v.* Jones *approved on this point.*

In re Chennell, Jones *v.* Chennell, 26 *W. R.* 595, 8 *Ch. D.* 492, *disapproved.*

Appeal from Kekewich, J.

According to the plaintiff's allegations the facts were as follows: In September, 1897, the defendant Fanny Bew (since deceased), who was then a widow named Fanny Walker, and the plaintiff were engaged to be married. In that month the defendant Mrs. Bew having agreed to advance a sum of £600 to one Moss, a friend of the plaintiff's, upon the security of a mortgage of freehold property belonging to Moss, the plaintiff lent to the defendant a sum of £300 for the purpose of assisting her to make up the sum she was to advance to Moss. It was agreed that the mortgage should be made to the defendant alone, and the deed, which was executed on the 6th of September, 1897, was prepared in that form accordingly. Shortly after the execution of the mortgage the intended marriage between the plaintiff and Mrs. Bew was duly solemnized. After living together for a short time they separated. In December, 1897, Mrs. Bew called in the mortgage. The £600 was accordingly paid to her, and she refused to pay any part of that sum to the plaintiff on the ground that, as she alleged, the £300 which she had received from him was intended not as a loan, but as a gift, and was to be used by her for her maintenance before the marriage. The plaintiff, on the contrary, alleged that the defendant was a trustee of the money secured by the mortgage for the plaintiff as to £300, part thereof, and interest thereon. The plaintiff therefore brought this action against the defendant Mrs. Bew, claiming a declaration to that effect, or alternatively a declaration that £300, part of the money secured by the mortgage, was money lent by the plaintiff to the defendant for the purpose of the mortgage. On the application of the plaintiff, Stirling, J., made an interlocutory order that Mrs. Bew should pay £300 into court, and this was done. Mrs. Bew afterwards died, and the plaintiff revived the action against her executors. The action ultimately came on for trial before Kekewich, J., who, on the 8th of December, 1898, made a declaration that the defendant Mrs. Bew had been a trustee for the plaintiff for the sum of £300 with interest, and ordered that the costs of the defendants, "including the costs, charges, and expenses of the late defendant Fanny Bew as trustee" should be taxed as between solicitor and client, and should be paid out of the fund in court, and that the remainder of that fund should be paid out to the plaintiff. The costs, charges, and expenses directed to be paid out of the fund in court were, it was stated, nearly sufficient to exhaust the fund. The plaintiff appealed against so much of the order as directed payment to the defendants out of the fund in court of their costs of the action as between solicitor and client, and of costs, charges, and expenses beyond the costs of the action; and contended that the defendants ought to be ordered to pay his costs of the action and of the appeal as between party and party. The principal question argued was whether the appeal was not an appeal for costs only, and therefore prohibited by section 49 of the Judicature Act, 1873.

*Warrington, Q.C.*, and *S. O. Buckmaster*, for the appeal, cited *In re Chennell, Jones* v. *Chennell*, 26 W. R. 595, 8 Ch. D. 492; *In re Beddoe, Downes* v. *Cottam*, 41 W. R. 177, [1893] 1 Ch. 547; *The City of Manchester*, 27 W. R. 697, 5 P. D. 3, 221; *Cockle* v. *Treacy*, [1896] 2 I. R. 267, at p. 271.

*P. O. Lawrence, Q.C.*, and *D. Stewart Smith*, for the defendants, cited *Charles* v. *Jones*, 35 W. R. 88, 33 Ch. D. 80.

*Warrington, Q.C.*, replied.

*Cur. adv. vult.*

Aug. 2.—LINDLEY, M.R.—We have taken time to consider our judgment in this appeal, and have consulted our colleagues in the other branch of the Court of Appeal, in order that there may be no doubt on the point in the future. The difficulty arises in this way. [His lordship read section 49 of the Judicature Act, 1873, and proceeded:] Now, that section has been construed in two ways which are inconsistent with each other. The first case in which it came before the court was *The City of Manchester*, decided in 1880. The question there was whether an order giving the plaintiffs their costs of the action in a case of collision where both vessels were to blame was right. The objection was taken that it was an appeal as to costs only, and the court took this view, as expressed by James, L.J., by way of interlocutory observation, at p. 222 (5 P. D.): "Where costs are given with regard to the conduct of the parties there is no appeal; but where a general rule is laid down and costs given according to it an appeal will lie." That clearly lays down this rule, that though the costs may be in the discretion of the court, yet if it appears that this discretion was not exercised, but that the judge applied a rule instead of and as excluding his discretion, the order made is still appealable without leave. When the language of section 49 is looked at there is a good deal to be said for that view, the object of the section being simply that the Court of Appeal should not review the judge's discretion.

The case which conflicts with that is *Charles* v. *Jones*. There *The City of Manchester* was not cited, and the view expressed by Cotton, L.J., 33 Ch. D., at p. 82 (33 Ch. D.), is this: even if the judge did not in the particular case exercise his discretion, yet "if it is a case in which the Act leaves the costs to the dis-

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

cretion of the judge, it takes away the power of this court to entertain an appeal from his decision."

If the case of *The City of Manchester* had been brought to the attention of the court it is probable that Cotton, L.J., would not have expressed himself in quite those terms. But it is obvious that the two views cannot stand together, and the conclusion at which we have arrived is that the interpretation put upon the section in *The City of Manchester* is the correct one. That view is that if the costs are in the discretion of the judge the Court of Appeal will assume that the judge exercised his discretion, unless it is satisfied that he has not exercised his discretion, but has applied some rule which in fact excluded his discretion.

There is one other point. There is a discrepancy between *Charles* v. *Jones* and *In re Chennell, Jones* v. *Chennell*. In *In re Chennell*, Jessel, M.R., laid down that an appeal without leave would lie as to costs, charges, and expenses, and that if those three things were included together in the same order an appeal would lie as to the costs only, without reference to the question whether anything else in the order was appealed against. That is inconsistent with *Charles* v. *Jones*, and on that point we think that *Charles* v. *Jones* ought to be followed. You cannot get an appeal as to costs by invoking in aid another part of the order about which you are not making any complaint. On that point, therefore, we adopt the view of Cotton, L.J., that in such a case you cannot appeal as to costs only if there is nothing wrong with the order as to charges and expenses.

Now we must consider what is the nature of the present case. It is a contest as to the ownership of £300, part of £600 invested on mortgage in the name of Fanny Bew (now deceased). The action was by a husband against his wife to assert his right to the £300. The wife's defence was to claim that £300 as her own, denying that she was a trustee of it for her husband. Obviously in such a case the costs ought to follow the event. But the learned judge, though he has decided in favour of the husband on the merits, has yet ordered the whole of the wife's costs to come out of the fund in court, which he has found belongs to the husband. It is said that he did that in the exercise of his discretion, but from the very imperfect note of his judgment, which has been read to us, it seems that he looked on this as a trust fund, and has not exercised his discretion, but has applied a rule applicable to trustees, and which, if applicable, excluded the exercise of any discretion. The learned judge not having exercised his discretion, the appeal can be heard on the merits, and his decision must be reversed, and the defendants must pay the costs.

The order will be varied as follows: The declaration as to the late defendant Fanny Bew being a trustee of the £300 for the plaintiff will stand; discharge the subsequent part of the order as to costs, and the payment schedule, and in lieu thereof order the defendants Botterill and Hargreaves to pay the plaintiff's costs of this action, such costs to be taxed, and the last-named defendant alleging that the late defendant Fanny Bew incurred as trustee of the £300 certain costs, charges, and expenses (not being costs of this action), which were properly payable out of the £300 or the funds representing the same, refer it to the taxing-master to tax such costs, charges, and expenses (if any); pay such taxed costs, charges, and expenses (if any) out of the funds in court; transfer or pay the balance of such funds to the plaintiff. Liberty to apply.

JEUNE, P., and ROMER, L.J., concurred.

Solicitors, *M. A. Orgill*, for *Empson Alcock*, Burslem, Staffordshire; *H. Mear*, for *E. Hollinshead*, Tunstall, Staffordshire.

From Q. B. Div. (A. L. Smith and Vaughan Williams, L.JJ.) July 27, 1899.

OSMOND v. MUTUAL CYCLE MANUFACTURING AND SUPPLY CO. (LIMITED). (a.)

*Practice—Costs—Solicitor and client—Shorthand notes of evidence—Patent action.*

*On the trial of a patent action it was agreed in court, with the sanction of the judge, that a shorthand note should be taken of the evidence and used at the trial as the authentic record of the evidence, the expense being shared equally between the parties in the first instance.*

*Held, that the solicitor of the defendant company was entitled to be allowed on taxation as against his client the expenses of the shorthand note, which the solicitor had paid.*

In re Blyth & Fanshawe, 31 *W. R.* 283, 10 *Q. B. D.* 207, *discussed.*

Appeal from an order of Channell, J., at chambers.

An action for infringement of a patent was brought by the Pneumatic Tyre Co. against Marwood & Cross, a firm of cycle manufacturers at Leicester, in respect of tyres which had been supplied to them by the present defendants, the Mutual Cycle Manufacturing and Supply Co. This latter company accordingly undertook to defend the action. A company, called the Puncture-proof Pneumatic Tyre Co., were also defendants in an action for infringement brought by the Pneumatic Tyre Co.; and, as the defences to the two actions were the same, it was agreed between Mr. Holmes, the managing director of the Mutual Cycle Co., and Mr. Lee, the managing director of the Puncture-proof company, that the action against Marwood & Cross should be fought, and that the two companies should share the costs equally.

The plaintiff in the present action acted as solicitor for the defendants in the action of *Pneumatic Tyre Co.* v. *Marwood & Cross*. The action was tried before Romer, J., and at the commencement of the trial the learned judge asked if a shorthand note of the evidence was going to be taken. Counsel for the Pneumatic Tyre Co. said that, unless the other side were willing to come to an arrangement to join in taking the shorthand notes, he would object to a shorthand note being used at the trial. Counsel on the other side then said that an arrangement had been come to, and accordingly a shorthand note of the evidence was taken. It appeared that the present plaintiff, acting on the instructions of Mr. Lee, who had a general authority to act for all parties in the defence of the action, made an agreement before the trial with the solicitor for the Pneumatic Tyre Co. that a shorthand note should be taken of the evidence and printed from day to day, and that each party should pay one half of the costs thereof, and according to an affidavit made by the plaintiff it was agreed that the costs thereof should be costs in the cause and paid by the unsuccessful party. Mr. Holmes in an affidavit denied that he was told that it would be necessary to have a shorthand note taken, or that he authorized the agreement to pay half the expenses thereof, or that he was told of it; and that he was never informed by the present plaintiff, nor was it ever explained to him that whatever would have been the result of the action the cost of the shorthand notes might not be allowed on taxation as between party and party. Mr. Lee in an affidavit, on the other hand, stated that he told Mr. Holmes previous to the trial that it would be necessary to have a shorthand note taken of the evidence, and

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Holmes agreed that it should be taken; and that Holmes was present during nearly the whole of the trial, and used to see the daily transcript of the shorthand notes.

The trial lasted several days, and shorthand notes were taken and printed each day, and the present plaintiff paid one half of the cost thereof.

In the result judgment was given for the Pneumatic Tyre Co., and upon taxation of their costs they were allowed the costs of the shorthand notes, less the amount paid by the present plaintiff. It was stated on behalf of the present defendants that this item was not contested on taxation, as it should have been.

The Puncture-proof Co. paid one half of the costs of defending the action, including one half the expense of the shorthand notes. The Mutual Cycle Co. disputed their liability to pay half the costs, and the present action was brought to recover the costs.*

Judgment was given for the plaintiff subject to taxation of the bill.

Upon the taxation the master disallowed the sum paid for the shorthand notes.

Upon an objection being carried in by the plaintiff to the disallowance, the taxing-master stated in his certificate that the item had been properly disallowed, as it was an "unusual expense," and was not sustainable unless the authority of the client had been first obtained, and he had been informed that the costs thereof might fall upon him in any event (*In re Blyth & Fanshawe*, 31 W. R. 283, 10 Q. B. D. 207; *In re Broad & Broad*, 15 Q. B. D. 420, 34 W. R. Dig. 48); and that in this case no such authority was obtained.

Channell, J., at chambers dismissed a summons to review the taxation.

The plaintiff appealed.

*S. T. Evans*, for the plaintiff.—The agreement arrived at between the parties was that the costs of the shorthand notes should be treated as party and party costs. The shorthand notes were printed each day and were used during the trial, and it was impossible to have got on without them. In a patent action shorthand notes of the evidence are indispensable. In such an action the expense of shorthand notes cannot be called an "unusual expense," as in *In re Blyth & Fanshawe*. Romer, J., asked at the trial if shorthand notes were going to be taken, and they were treated as the authentic notes of the evidence. In *Castner Kellner Alkali Co.* v. *Commercial Development Corporation*, 47 W. R. 534, [1899] 1 Ch. 805, the costs of the transcript of the shorthand notes of the evidence for the purpose of the appeal were allowed, as they were necessary to enable the court to follow the arguments. The master and the judge were, therefore, wrong.

*R. M. Bray, Q.C.*, and *Montague Shearman*, for the defendants.—Though the parties agreed to share the expenses of the shorthand notes, there was no agreement that they should be costs in the cause. If the shorthand notes were necessary at the trial, Romer, J., ought to have been asked to allow them as part of the costs. In the absence of any such order of the judge at the trial the costs of the shorthand notes should not have been allowed on taxation between party and party: *Ashworth* v. *Outram*, 27 W. R. 98, 9 Ch. D. 483; *Earl de la Warr* v. *Miles*, 30 W. R. 35, 19 Ch. D. 80. Upon taxation between solicitor and client the costs cannot be allowed against the client, even though he has authorized the shorthand notes being taken, unless he has been informed that such costs may not be allowed upon taxation between party and party: *In re Blyth & Fanshawe*. That decision was approved in *In re Broad & Broad*.

A. L. SMITH, L.J.—I do not intend to decide in any way contrary to any of the authorities, for in my opinion this case is outside them all. The question arises on the taxation of a bill of costs as between solicitor and client. The Pneumatic Tyre Co. brought an action against Marwood & Cross for infringement of a patent, and the action was defended by the Mutual Cycle Co., who may be considered as the real defendants. The Puncture-proof Pneumatic Tyre Co. agreed to share the expenses. The present plaintiff acted as solicitor for the Mutual Cycle Co. The action lasted ten days before Romer, J., and the Pneumatic Tyre Co. were successful. Upon taxation the Pneumatic Tyre Co. were allowed the amount paid by them for the costs of the shorthand notes. The present plaintiff carried in his bill of costs against his clients, in which he claimed to be repaid the sum which he had paid for the expenses of the shorthand notes. The Puncture-proof Pneumatic Tyre Co. paid one half of the costs, but the Mutual Cycle Co. resisted payment of the other half. The present plaintiff thereupon brought this action against them upon his bill of costs, and recovered judgment subject to the bill being taxed. The question now raised is whether the plaintiff is entitled to recover the defendants' share of the expenses of the shorthand notes. It has been held by this court in *In re Blyth & Fanshawe* that a solicitor cannot charge his client with an unusual expense unless he first informs his client that such expense may not be allowed on taxation between party and party. In that case Baggallay, L.J., said: "I take it to be the general rule of law, and an important rule which is to be observed in almost all cases, that if an unusual expense is about to be incurred in the course of an action it is the duty of the solicitor to inform his client fully of it, and not to be satisfied by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party whatever may be the result of this trial." Lindley, L.J., said: "It was the duty of the solicitors to Mr. Wells to give him advice and protection against unnecessary expense, and to point out to him that if he chose to engage shorthand writers the cost of having the transcript of shorthand notes might not be allowed as between party and party." Baggallay, L.J., used the word "unusual," and Lindley, L.J., used the word "unnecessary." The decision was that the expense of the shorthand notes should not be allowed as the solicitors had not informed their client that the expense was one which might not be allowed on taxation as between party and party. In the present case Romer, J., at the trial took the initiative about the shorthand notes, and asked whether a shorthand note was to be taken. One knows how essential it is in most patent actions to have a shorthand note of the evidence. Counsel who appeared for the plaintiffs in that action then said that unless the other side were willing to come to an arrangement to have a joint note taken, he would object to the shorthand notes being made use of at the trial. Counsel on the other side said that an arrangement had been come to, and a shorthand note was accordingly taken on behalf of both parties, and it was used at the trial as the record of the evidence. It is clear to my mind that that amounted to a bargain between the parties that a shorthand note should be taken, and that the expense thereof should be borne equally between them. It was said, however, that there was no agreement that the expense thereof

* It was stated that the Mutual Cycle Co. had gone into liquidation, and the liquidators were resisting the payment of the costs.

should be costs in the cause. I cannot agree. I think that the agreement implies that the expense so incurred should be costs in the cause. The plaintiff paid for half the shorthand notes. Why cannot he recover the sum so paid from his clients? It is said that the decision in *In re Blyth & Fanshawe* prevents the plaintiff from recovering. The decision, however, can only apply where the expense is unusual or unnecessary. In the present case it was clearly necessary to have a shorthand note taken, and to my mind the decision cannot apply in such a case. After the arrangement come to in court as to taking and using the note for the purposes of the trial, it would be contrary to justice to hold that the solicitor must pay for the expense of the shorthand note out of his own pocket. The appeal must therefore be allowed.

VAUGHAN WILLIAMS, L.J.—I entirely agree. During the argument I have looked at most of the authorities upon the question, and I have also looked at the text-book upon Costs of Actions by Mr. W. E. Gordon, and I cannot state the general result of the cases more accurately and more concisely than it is there stated. On p. 227 he says: "The general rule is that the costs of shorthand writers' notes of the evidence are not *primâ facie* to be allowed on taxation between party and party; if there is any special reason for allowing them, application should be made at the hearing for a special direction from the court." For that proposition he cites several authorities, but I will only refer to one—namely, *Ashworth* v. *Outram*. That statement of the law is perfectly accurate with one qualification not material for the purposes of to-day, that, according to *Ashworth* v. *Outram*, if there is an appeal from the judgment, the Court of Appeal may order the costs of the shorthand notes of the evidence to be allowed on taxation between party and party. Of course there is this possible further qualification, where the client, having received due warning of the nature of the expense proposed to be incurred, and having been told that the costs may not be allowed on taxation between party and party, enters into an agreement that they shall be treated as party and party costs. That is the rule, and it is a rule of old standing, and I should be loth to say one word which should trench upon it. There is the further rule established by *In re Blyth & Fanshawe*, as to which Mr. Gordon in his book, at p. 228, says: "It is the duty of a solicitor, who in the course of an action is about to incur unusual expenses—such as the costs of shorthand notes of evidence given at a reference—to point out to his client that the additional expenses so incurred will not"—I should add, to be quite accurate, or may not—"be allowed to him even if successful in the action, on taxation between party and party; and in default of so doing the solicitor will not be entitled to charge the costs so incurred on taxation between solicitor and client." I believe that to be an accurate statement of the law. I am not going to base my judgment on a patent action being a peculiar kind of action, and shorthand notes being a usual expense in such an action. I do not say whether the costs of shorthand notes are or are not a usual expense in such an action, and before holding that they are, I should like to take further time to consider the matter, and to inquire from the taxing-masters what is the practice in such cases. If their practice is to treat the costs as an unusual expense, I should think it wrong to interfere. Nor do I place my decision upon any agreement between the solicitors or between the clients. I have little doubt upon the affidavits that Mr. Lee's authority extended to doing what was right and proper in the action, including the power to make an agreement that the costs of the shorthand notes should be party and party costs. The ground upon which I base my decision is this. It seems to me to be clear from the shorthand notes of the proceedings before Romer, J., that with the consent of the learned judge it was arranged in such a way as to bind both parties that a shorthand note of the proceedings at the trial should be taken and should be the authentic record of the evidence in the case, which notes from that moment both parties were entitled to use as of right, and if an appeal were brought both parties would be entitled to use them upon the appeal. In my judgment, when that state of facts exists, the rules as to the disallowance upon taxation of the costs of the shorthand notes do not apply. That seems to me to be the result of the arrangement made in the patent action, and in these circumstances I think that the plaintiff is entitled to be recouped the out-of-pocket expenses which were incurred by him in obtaining the authentic record of the evidence for the use of the judge and of the parties at the trial. I have no doubt that in truth and in fact the transcript of the shorthand notes was furnished to the judge, and was used not only by the parties, but also by him, as the authentic record of the evidence. I wish to add that such an arrangement is frequently made in a patent action, and judges take the view that the shorthand notes so taken should be the authentic record of the evidence. When that is done I do not think that the rules as to the disallowance of the costs of the shorthand notes apply.

*Appeal allowed.*

Solicitor for the plaintiff, *J. T. Lewis.*

Solicitors for the defendants, *Pollock & Co.*, for *J. E. Hodding*, Leicester.

---

## High Court of Justice.

Chan. Div. } May 10, 12; June 20, 21, 24,
Stirling, J. } 28; Nov. 14.

VALENTINE'S MEAT JUICE CO. v. VALENTINE EXTRACT CO. (LIMITED) AND ANOTHER. (a.)

*Trade name—Defendant using his own name—Sale of same to a company—Imitation—Tendency to deceive—Fraud—Costs.*

*A trader, if he is honestly carrying on a business in a particular article, cannot be restrained from using his own real name in connection with that business, because an old-established trader of the same name has made a reputation in a similar but distinct article.*

*The plaintiffs had long made and sold meat juice, put up in bottles, and used chiefly by invalids, and known on the market by various titles, including "Valentine's" simply. The defendant invented a method of putting up solid meat extract in the form of portable globules, chiefly used by travellers. Before any sales he sold his invention and the goodwill of the business "being created" to the defendant company, bearing his name.*

*Held, that an action for injunction must fail, as, although there were features of suspicion, want of good faith on the part of the defendants was not established either in the inception of the business or in the sale to the company.*

This was an action for an injunction brought by the Valentine Meat Juice Co., founded in the United States of America in 1871, and since that

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

date occupied solely with the manufacture and sale of a preparation of meat juice. Their annual consignment to English firms now reached upwards of a quarter of a million bottles, the article being mainly used by sick people and invalids, but also by persons in good health. It was proved to be sold under the various titles of "Valentine's Meat Juice," "Valentine's Extract," and "Valentine" simply. Until 1898 there was no other similar preparation on the market connected with the name "Valentine."

The defendant company was incorporated in England on the 16th of October, 1897, with a nominal capital of £4,000, one of its objects being the carrying on of the business of meat extract or meat juice manufacturers or extractors, and vendors either wholesale or retail. It had been got up by the defendant C. R. Valentine, then and since its managing director. This defendant, after being employed in 1893 and 1894 as a dairy expert by the Governments of New South Wales and New Zealand, became in 1895 the manager of the produce department of a company formed to take over the English business of the firm of Nelson Brothers. This company did no business in any extract of meat until February, 1897, when it began to receive and sell large consignments of extract of meat in bulk. C. R. Valentine himself was well known to those connected with colonial produce.

Towards the end of 1895 he had the idea of putting up solid meat extract in a globule form, as a portable food for travellers and others. After many experiments he applied in March, 1897, for a patent, which was granted to him. Between then and November, 1897, he showed his globules to various persons, some of whom promised to support the business proposed. By an agreement of the 11th of November C. R. Valentine agreed to sell to the defendant company his invention, patent, &c., and "the goodwill of the business of a meat extract company which is now being created or established by the vendor in connection with the use of the said trade marks"; he further covenanted for a period of ten years not to allow his name to be used in connection with business in meat extract. A few independent and substantial persons held preferred shares, but C. R. Valentine had throughout had the largest interest in the business. The sale of the globules began in February, 1898; they were at first packed in boxes labelled "Valentine's Valtine Meat Globules" ("Valtine" being one of the registered trade marks assigned to the company). Since the beginning of the action the word "Valentine's" had been dropped from such labels. In the same February the defendants issued 90,000 circulars, in two editions, to chemists, nurses, doctors, and grocers, describing the article, and speaking of C. R. Valentine as having "for some years been identified with the manufacture and handling of extract of meat." Out of about 1,000 replies, fifty or sixty showed confusion in the minds of intending customers, but it appeared that in every instance the defendant company at once sent an answer explaining the independence of their business, and the novelty and nature of their articles. Among instructions to travellers, the defendants wrote to one a letter containing the following words: "If the question arises, it is most essential to make it understood that the company has no connection whatever with Valentine's meat juice." From the evidence it appeared that the belief that the defendants' goods were of the plaintiffs' manufacture arose simply from the use of the name "Valentine." It further appeared to the satisfaction of the learned judge that the two articles were of different natures, one being a medicine best used with cold water, the other a food to be used with hot water, and that really there was no substantial competition between them.

*Fletcher Moulton, Q.C., Swinfen Eady, Q.C.*, and *L. B. Sebastian*, for the plaintiffs.—It is settled law that a person now has no control over the name under which another man trades unless special circumstances exist, such as are found where it is shown that some name which he is using is so identified with the goods as to lead the market to believe that goods put on the market under that name are the plaintiffs': *Reddaway* v. *Banham*, 44 W. R. 638, [1896] A. C. 199, setting aside the *dicta* in *Turton* v. *Turton*, 38 W. R. 22, 42 Ch. D. 128, and *Jamieson* v. *Jamieson*, 15 Rep. Pat. Cas. 169, at p. 180, 42 SOLICITORS' JOURNAL 197. Once decide that deception has taken place, and it is immaterial to discuss whether he has used his own name: *Burgess* v. *Burgess*, 3 De G. M. & G. 896. [STIRLING, J., referred to *Warner* v. *Warner*, 5 T. L. R. 327, 359.] The issue to be proved is, not the intention to deceive, but the probability of deception: *Singer Manufacturing Co.* v. *Wilson*, 26 W. R. 664, 3 App. Cas. 376, at p. 391; *Massam* v. *Thorley's Cattle Food Co.*, 28 W. R. 966, 14 Ch. D. 748, at p. 752; *Saxlehner* v. *Apollinaris Co.*, [1897] 1 Ch. 893, 901, 45 W. R. Dig. 164. The case reserved by Stirling, J., in *Tussaud* v. *Tussaud*, 38 W. R. 503, 44 Ch. D. 678, appears to be dealt with in *Brinsmead* v. *Brinsmead*, 12 T. L. R. 631, 13 T. L. R. 3. In *Pinet* v. *Pinet*, *No.* 1 in 14 Rep. Pat. Cas. 933; *No.* 2 in 46 W. R. 506, [1898] 1 Ch. 179, the injunction went, although there was no actual deception, nor was it until the second case that the defendant's name was found to be an assumed one.

*Upjohn, Q.C.* (*A. Sims* with him), for the defendants, contended that they had done everything which could reasonably be done for the purpose of distinguishing their article from that of the plaintiffs. The case seems identical with *Turton* v. *Turton*. There is no such obvious fraud as in *Croft* v. *Day*, 7 Beav. 84, or in *Massam* v. *Thorley's Cattle Food Co.* Excepting that there is no "get-up" common to the trade, the case falls within *Jamieson* v. *Jamieson*. The defendant C. R. Valentine, by his experiments and reputation, has created a connection of his own which distinguishes the case from *Tussaud* v. *Tussaud*.

*Cur. adv. vult.*

Nov. 14.—STIRLING, J., after stating the facts, said:—It may now be convenient to consider the law applicable to such a state of facts upon the assumption that all the acts complained of were being done by the defendant C. R. Valentine, personally. The law on this subject has been very shortly stated by Halsbury, L.C., in the case of *Reddaway* v. *Banham*, [1896] A. C. at p. 204, in this form: "Nobody has any right to represent his goods as those of somebody else." If a plaintiff complains that such representations are being made by a defendant, it is not necessary, in order to obtain an injunction, that he should prove any attempt to deceive on the part of the defendant. This point was decided by Lord Cottenham in *Millington* v. *Fox*, 3 My. & Cr. 338, and again more recently by the Court of Appeal in the case of *Reddaway* v. *Bentham Hemp Spinning Co.*, [1892] 2 Q. B. 639, 41 W. R. Dig. 253, and has been distinctly stated to be the law by the Lord Chancellor in a case before the House of Lords, reported since the argument in the present case. I refer to the *Cellular Clothing Co.* v. *Maxton*, [1899] A. C. 326, 47 W. R. Dig. 193. I will read a few words from the report at p. 334. [His lordship read from the words: "It seems to be assumed that a fraudulent intention," down to the words: "That, my lords, I believe to be the

law."] It lies, therefore, on the plaintiff, in a case such as the present, to establish that the defendant is selling his goods in such a way as to represent to the public that they are the manufacture of the plaintiff. Where the defendant bears the same name as the plaintiff it is not an easy task to satisfy this onus. "If a man," says Lindley, M.R., in *Powell* v. *The Birmingham Vinegar Brewery Co.*, 44 W. R. 688 at p. 689, "uses his own name to denote his own goods it would be intolerable to confer on him the right to prevent other people of the same name from honestly using their own name to denote their own goods, even although they might be of the same kind and be undistinguishable from them." He refers to *Burgess* v. *Burgess* and *Turton* v. *Turton*. The point has recently undergone very careful consideration in the case of *Jamieson* v. *Jamieson*, 15 Rep. Pat. Cas. 169, a case which was referred to in the argument of the present case. Byrne, J., who tried the case, there laid down the law as follows: [His lordship read from the report: "Every trader may use and advertise . . . greater care than another person."] The learned judge was therefore of opinion that the burden was cast on the new trader to take care to distinguish his own goods from those of the original trader, and on the facts he was of opinion that the defendant had not discharged the onus which lay on him. The Court of Appeal, as I read the decisions of the learned judges, did not differ from the law thus laid down, but did differ on the question of fact, being of opinion that the defendant had taken sufficient care to distinguish his goods. [His lordship further examined the decisions in *Jamieson* v. *Jamieson*, and after reading from the judgments of Lindley, M.R., at p. 181, and Vaughan Williams, L.J., at p. 193, proceeded as follows:] It was sought in the argument to distinguish *Jamieson* v. *Jamieson* from the present case, on the ground that the plaintiffs had established that in the market their goods have come to be known by the name of "Valentine." I think the evidence does show that the plaintiffs' preparation has been designated as "Valentine's Meat Juice" or "Valentine's Extract" or "Valentine" simply, and if the defendants were selling a preparation similar to the plaintiffs' it may be that the latter would have succeeded in establishing what the Lord Justice calls the first premise (viz., that in the market the goods of the plaintiff have come to be known by his name). The plaintiffs, however, have never manufactured or sold any goods such as the defendants have put on the market. The articles sold by the defendants are both in appearance and in reality different from that made and sold by the plaintiffs. No one buying the defendants' article could possibly suppose that he had ever bought such an article from the plaintiffs. The defendants' article has never been known on the market as the plaintiffs'. If the well-known firm of Bass & Co. brewed nothing but pale ale and that ale had acquired the name of Bass, could that firm restrain another brewer of the same name from selling porter or stout in bottles with labels simply stating that the liquor was porter or stout manufactured by the second brewer, giving his name and address? I think that the answer must be in the negative, and in my judgment the defendant C. R. Valentine, if he were honestly carrying on the business of selling these meat globules in his own name and on his own account, could not be restrained from using his name in connection with that business. That, however, does not dispose of the case. I have still to inquire whether, in the language of Lindley, M.R., the defendant C. R. Valentine has not done something more than use his own name in such a way as to render him liable to be restrained from carrying on business as he has done. [His lordship considered an attack made by the plaintiffs on the good faith of the said defendant in respect of the signing by him of a declaration as to a foreign trade mark, and added:] "For the purpose of this action I must say that the acts and evidence of a man who permits himself to do what this defendant admitted that he did, cannot be regarded in the same way as those of one whose integrity is beyond suspicion." [After examining the evidence as to the circulars containing "very loose and exaggerated statements as regards C. R. Valentine's connection with extract of meat," as to alleged misrepresentations by the defendants' travellers, his lordship discussed the plaintiffs' contention that the travellers should, without waiting to be asked questions, have offered information as to the difference of the goods.] It seems to me that this would have been what was termed in *Jamieson* v. *Jamieson* "extra precaution," such as was there held to be unnecessary, and it would be still less necessary in the present case, where the goods are much more different from those of the plaintiffs. On the whole, although the case has many features of suspicion, I have come to the conclusion that want of good faith on the part of the defendants is not established.

It still remains to inquire whether the defendant company is entitled as against the plaintiffs to make use of the name "Valentine." If the defendant, C. R. Valentine, had himself commenced the business and carried it on under his own name, I think that he would have been entitled to assign to a company formed for the purpose the goodwill of that business and the right to use his name in connection with it, always supposing that all this was done in good faith. The defendant, C. R. Valentine, however, never himself carried on the business of manufacturing and selling these globules. He formed the defendant company, giving it his own name and making over to it a so-called goodwill consisting of the benefit of promises made to him by persons well-disposed towards him and the business proposed to be carried on. Such a goodwill could not be of any substantial value, though it is possible that the right in respect of it might have been enforced in equity upon the principles laid down in *Trego* v. *Hunt*, 44 W. R. 225, [1896] A. C. 7. Still, C. R. Valentine was the inventor of the globules. He had a certain reputation as a man of business, though not in connection with extract of meat, and he intended that the business of globules should be carried on for his own benefit, though apparently his own resources were not sufficient to enable him to start it. I think that under these circumstances he was entitled, acting in good faith, as I have come to the conclusion that he did, to give his own name to the company which he founded. It is true that that company consisted, and consists to a large extent, of real shareholders who have never been mere trustees of their shares for him. Still, he was and is the largest shareholder, the managing director, and unquestionably the life and soul of the defendant company. I do not think this falls within the principle of such cases as *Croft* v. *Day*, where a man having no real interest in a business was introduced into it simply to give it the desired name. In my judgment, therefore, the action fails and must be dismissed.

I have had considerable difficulty as to the proper mode of disposing of the costs of the action. On the one hand the plaintiff fails, and fails on a charge of bad faith against the defendant C. R. Valentine. On the other hand, the acts of that defendant gave reasonable ground for suspicion. The admission which he was compelled to make added substantially

to the length and expense of the trial, and in the original label the defendants went to, if not beyond, the extreme verge of their rights. On the whole, I think that the action must be dismissed without costs.

*Action dismissed without costs.*

Solicitors, *Wilson, Bristows, & Carpmael; Campion & Co.*

## Court of Appeal.

From Q. B. Div. (A. L. Smith, Collins, and Vaughan Williams, L.JJ.) — Nov. 15.

MOXHAM AND OTHERS *v.* GRANT. (*a.*)

*Company—Winding up—Misfeasance—Director—Unauthorized payment of capital to shareholders—*Ultra vires *act—Order on directors to refund—Right of indemnity from shareholders.*

*The directors of a shipping company, having received a sum of money under a policy of insurance on one of the company's ships which had become a total loss, distributed the money among the shareholders, who had notice of the facts and consented to the distribution. Subsequently the company was wound up. An order was made in the winding up under section* 10 *of the Companies (Winding-up) Act,* 1890, *declaring that the payments to the shareholders were payments in reduction of the capital of the company, and were unlawful, and the directors were ordered to repay the amount to the liquidator.*

*Held, that the directors were entitled to recover from the shareholders the money paid to them.*

*Judgment of the* Divisional Court (47 *W. R.* 282, [1899] 1 *Q. B.* 480) *affirmed.*

Appeal from the judgment of the Divisional Court (Lawrance and Channell, JJ.) affirming the decision of the Swansea County Court judge in favour of the plaintiffs: reported in 47 W. R. 282, [1899] 1 Q. B. 480.

The plaintiffs were the directors of a company called Cory's Steamers (Limited), and the defendant was a shareholder in the company. In February, 1894, *The Primrose*, a steamer belonging to the company, became a total loss. *The Primrose* was insured, and the underwriters paid to the company £719 2s. 6d. in respect of the loss. On the 10th of April, 1894, the directors of the company sent the following circular to the shareholders, including the defendant: "We have a sum of money in hand from insurance received on account of the loss of *The Primrose*. We propose remitting 10s. per share. If you see no objection we will send you £ , being 10s. on your shares, on your sending a receipt on enclosed form, and provided all the shareholders consent. There will be a considerable sum more to receive for insurance of *The Primrose*." The receipt was as follows: "Received of Cory's Steamers (Limited) the sum of £ , being a reduction of 10s. per share on the shares held by me." The defendant wrote a letter in answer to the circular, in which he said: "I quite agree with the proposition of your letter of the 10th of April, and enclose my receipt for £13, being 10s. on my twenty-six shares." Further payments were made to the shareholders out of the insurance money of *The Primrose*, the total amount received by the defendant being £35 15s.

On the 29th of December, 1896, a winding-up order was made against the company, and on the 22nd of December, 1897, the liquidator of the company obtained an order under section 10 of the Companies (Winding-up) Act, 1890, declaring that the payments made to the shareholders out of the moneys received in respect of the insurance of *The Primrose*, amounting in all to £719 2s. 6d., were payments of part of the capital of the company, and were unlawfully and improperly paid in reduction of the capital of the company, and it was further ordered that the directors should pay to the liquidator the sum of £719 2s. 6d. This order was expressly made without prejudice to the right of the directors to be recouped by the shareholders the sums paid to them.

The present action was brought by the directors against the defendant to recover £35 15s. paid to him.

The county court judge gave judgment for the plaintiffs, and the Divisional Court affirmed his decision.

The defendant appealed.

*Witt, Q.C.*, and *Poley*, for the defendant.—This was a payment of money with full knowledge of the facts, under a mistake of law, by the directors to the shareholders, and cannot be recovered back. The doctrine that a trustee, who pays money to his *cestui que trust* in breach of trust, can recover the money back, does not apply here, because the directors are not trustees for the shareholders. A company is not a trustee for its shareholders: *Salomon* v. *Salomon & Co.*, 45 W. R. 193, [1897] A. C. 22; and, therefore, the mere agents or servants of the company cannot be trustees for the shareholders. Even if the directors held this money as trust money for the company, they cannot recover it back from the shareholders in a court of equity, as it was money paid under a *bonâ fide* mistake of law: *Rogers* v. *Ingham*, 25 W. R. 338, 3 Ch. D. 351; *In re Sharpe*, 40 W. R. 241, at p. 242, [1892] 1 Ch. 154, at p. 166; Lindley on Companies (5th ed.), pp. 389, 390. *Holmes* v. *Newcastle-upon-Tyne Freehold Abattoir Co.*, 24 W. R. 505, 1 Ch. D. 682, is not in point, because there the shareholder, who was the plaintiff, and who complained of the payment of the company's money to the other shareholders as *ultra vires*, was no party to the illegal payment, and therefore the rule as to a payment made under a mistake of law not being recoverable did not apply. That distinction was pointed out by this court in *Blackburn Building Society* v. *Cunliffe, Brooks, & Co.*, 34 W. R. Dig. 25, 29 Ch. D. 902, at p. 910. Nor does the common law principle, that money paid by one person to another at the implied request of a third person can be recovered from that third person, apply to the present case, because this was a voluntary and not a compulsory payment by the directors to the shareholders. That rule is exemplified in *Bonner* v. *Tottenham Building Society*, 47 W. R. 161, [1899] 1 Q. B. 161. In accordance with that principle, if an executor pays the residue to the residuary legatee with knowledge of a debt, and he is afterwards obliged to pay the debt, he cannot call upon the residuary legatee to refund: *per* Cotton, L.J., in *Whittaker* v. *Kershaw*, 39 W. R. 22, at p. 24, 45 Ch. D. 320, at p. 325. Even if the obligation of the directors to refund the moneys to the liquidator is to be looked at, which is not admitted, the payment by the directors to the liquidator was not in relief of the shareholders, so as to bring the case within the rule stated in *Bonner* v. *Tottenham Building Society*, and therefore cannot be said to have been made at the shareholders' request, inasmuch as the liquidator could not have taken

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

proceedings against the shareholders under section 10 of the Companies (Winding-up) Act, 1890. That section does not make the shareholders liable to the liquidator.

They also referred to *Deering* v. *Winchelsea*, 2 Bos. & P. 270; *Wye Valley Railway Co.* v. *Hawes*, 29 W. R. 177, 16 Ch. D. 489.

*Meager*, for the plaintiffs.—It was argued in the court below that the directors and shareholders were joint tort-feasors, and that there was no right of contribution between them. The doctrine that there is no contribution between joint tort-feasors does not apply to a breach of trust committed by the directors and the shareholders, as it is not a case of tort at all: *In re Exchange Banking Co., Flitcroft's case*, 30 W. R. 695, at p. 697, 21 Ch. D. 519, at p. 527. The right of directors to recover moneys of the company paid to shareholders is recognized in *In re National Funds Assurance Co.*, 27 W. R. 302, 10 Ch. D. 118; *In re Alexandra Palace Co.*, 30 W. R. 771, 21 Ch. D. 149; *In re Oxford Building Society*, 35 W. R. 116, 35 Ch. D. 502; and *Leeds Estate Co.* v. *Shepherd*, 36 W. R. 322, 36 Ch. D. 787; as the order against the directors was in each case made without prejudice to their rights over against the shareholders. *In re Sharpe* does not affect that question. Secondly, directors are in some cases trustees for the shareholders, and having improperly paid trust money to the *cestuis que trust* can recover it back: *Ferguson* v. *Wilson*, 15 W. R. 80, L. R. 2 Ch. App. 77. The directors in the present case were acting as trustees for the shareholders. Again, the directors were trustees of the money for the company, and the shareholders who received the money knowing that it was part of the capital of the company were constructive trustees, and the rule in equity as to indemnity or contribution between two trustees applied: *Russell* v. *Wakefield Waterworks Co.*, 23 W. R. 887, at p. 888, L. R. 20 Eq. 474, at p. 479.

*Witt, Q.C.*, in reply.—The test is not whether the shareholder is a constructive trustee, because he would be equally a constructive trustee if he received the money in ignorance that it was being improperly dealt with. In such a case the shareholder is clearly not liable to refund the money.

A. L. SMITH, L.J.—This is an action by the directors of a company to recover the sum of £35 15s. which they have paid to the defendant as a shareholder, and which they have been compelled to refund to the liquidator of the company under section 10 of the Companies (Winding-up) Act, 1890. Part of the capital of the company was invested in the steamship *Primrose*. In 1894 the steamship was lost, and the underwriters paid in respect thereof the sum of £719 2s. 6d. to the company. This sum was admittedly part of the capital of the company, as it represented the ship which had been lost. The directors and the shareholders seem to have come to the conclusion that this sum was not wanted as capital, and they agreed to distribute it. The shareholders therefore had notice that they were receiving part of the capital of the company. It was not a case in which the shareholders received money of the company in ignorance that they had no right to receive it. Everything would have been in proper form if an order of the court had been obtained for the reduction of the capital of the company, but no such order was obtained. The company then got into difficulties, and was wound up. The liquidator discovered how the money had been applied. In my opinion he might have taken proceedings against anyone who had, with notice, received any portion of the £719 2s. 6d. As the shorter and more convenient course he took proceedings against the directors who had received the money and distributed it among the shareholders, and recovered the whole sum from them. Thereupon the directors sought to recover from each shareholder the money received by him which they had been compelled to pay to the liquidator. For that purpose they brought an action in the county court against the defendant to recover the sum paid to him, and they recovered judgment, and that judgment was upheld by the Divisional Court.

It is necessary to consider the position of a shareholder who has received money of the company with notice that it forms part of the company's capital. It seems to me that the position is that laid down by Sir George Jessel in *Russell* v. *Wakefield Waterworks Co.* The money of the company is a trust fund, and a person taking it from the agents of the company with notice that it is being applied to improper purposes cannot say that he is not a constructive trustee. That being the position of the defendant, I must now see what is the rule in equity as between two trustees who are both guilty of a breach of trust. The rule is now well settled, and I need only refer to a late case upon the subject: *Chillingworth* v. *Chambers*, 44 W. R. 388, [1896] 1 Ch. 685, where the subject was fully gone into by Lindley and Kay, L.JJ., and by myself. In that case I said that "as between two trustees who are *in pari delicto*, the one who has made good a loss occasioned by a breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other." The case cited in support of that proposition is *Lingard* v. *Bromley*, 1 Ves. & B. 114. In such a case the rule as to there being no contribution between joint tort-feasors does not apply. In the present case the defendant received his share of the £719 2s. 6d. with notice that it formed part of the capital of the company. He thereby became a constructive trustee, and according to the rule in equity he must recoup his co-trustees, who have made good the loss occasioned by the breach of trust, the amount received by him. Upon that ground I think that the judgment of the Divisional Court was right. I also think that the doctrine stated in *Bonner* v. *Tottenham Building Society* applies to this case, but it is not necessary to decide it, as I rest my judgment on the ground given above.

I desire to add this, that the passage in Lindley on Companies (5th ed.), pp. 389, 390, which has been relied upon by the defendant, does not apply where, as in this case, the defendant received the money with notice, nor where one person has been compelled by process of law to pay in relief of another.

COLLINS, L.J.—I am of the same opinion. When the circumstances of the case are understood, it becomes clear that the liquidator of the company could have enforced against each shareholder repayment of the moneys received by him. That he could have enforced repayment against the directors to whom the whole fund had originally passed lies at the root of the matter. Therefore we begin the discussion with these facts. The directors, being the persons who collected and distributed the fund, were liable to the liquidator. The persons to whom they distributed it were also liable to the liquidator, and the directors were compelled to pay to the liquidator the whole sum so distributed. Furthermore, that payment necessarily operated in relief of the liability of the shareholders. Upon these facts—that is, a payment by compulsion by one of a sum for which another was liable to the same person—there arises by implication of law a right in the person so paying to be recouped by the person in whose relief the payment was made. Having got those facts, which entitle the person so paying to indemnity or

contribution, what is the answer attempted to be set up? The only possible answer seems to me that these persons are joint tort-feasors, and that, consequently, there is no right of indemnity or contribution. In *Betts* v. *Gibbins*, 2 A. & E. 57, at p. 74, Lord Denman, in dealing with the case of *Merryweather* v. *Nixan*, 8 T. R. 186, 1 Sm. L. C. (10th ed.), 383, said that that "case seems to me to have been strained beyond what the decision will bear. The present case is an exception to the general rule. The general rule is that between wrongdoers there is neither indemnity nor contribution; the exception is where the act is not clearly illegal in itself." I do not suppose for one moment that those who dealt with this money thought that they were acting illegally. The only illegality was a technical one; the act was *ultra vires*. It has been held over and over again that the fact that money is paid in breach of trust to a person who receives it, knowing it to be paid in breach of trust, does not constitute those so dealing with the trust money joint tortfeasors. Channell, J., has in the court below dealt with that point and with the line of cases relating to it, and there is also the case of *In re Exchange Banking Co., Flitcroft's case*, where Bacon, V.C., held that in such a case there is no tort at all.

That disposes of the case, but I will deal with the point whether there is a trust in this matter. The only bearing this has is for the purpose of establishing that the person who received the money received it in such circumstances as made it capable of being recovered back. If the money were paid to the shareholder unearmarked in such a manner that the liquidator could not claim it as money had and received to his use, the chain of consecution out of which the right to indemnity arises would be broken. Unless the payment by the person claiming the indemnity is made in relief of the person against whom the indemnity is claimed, the claim for indemnity is gone. Therefore it must be shown that the liquidator was entitled to sue the shareholder. That is established if the liquidator can follow the money. That is so in the present case, because the shareholder received the money with notice, from which, if he knew his law, he must have known that the directors had no right to pay it to him. The liquidator therefore could follow the money, and the whole chain of consecution is thus established. The payment by the directors to the liquidator was in relief of the existing liability of the shareholders, and it was a payment which the directors were compelled to make. Therefore, both at common law and on the general rules of equity, a right to indemnity is established, and that right is not affected by any question of joint tort-feasors.

VAUGHAN WILLIAMS, L.J. — I am of the same opinion. In my opinion the doctrine under which one who has made a voluntary payment cannot recover the sum so paid has no sort of application in the present case, for the following reason. The money which was paid by the directors and which is now sought to be recovered from the defendant by those who paid it was not money voluntarily paid, but money paid under compulsion, as pointed out by Collins, L.J. In that state of things *primâ facie* the doctrine applies which may be shortly stated thus: Where two persons are equally liable to be sued by another, and one of those persons is sued and has to pay, it follows that the person so paying will have a right over against the other person liable, which right over will be measured by the benefit which that other has received. It may sometimes be a right to indemnity, it may sometimes be a right to contribution. In each case the principle is the same. That seems to me to be the doctrine of *Bonner* v. *Tottenham Building Society*, a doctrine which is applicable at common law and in equity. Why should not that doctrine apply to the present case? It is said that it does not apply because there is no right of contribution or indemnity between joint tort-feasors. That objection cannot be successfully urged here because the directors who paid and the shareholders who received the money were not joint tort-feasors within the meaning of the rule laid down in *Merryweather* v. *Nixan*.

This does not seem to me to be a case in which the parties were guilty of any fraudulent act. The directors merely made a wrongful distribution of the capital of the company among the shareholders in circumstances which gave rise to the legal presumption that they were both aware of the illegality of the act. That does not make it a tort.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Evans, Richards, & Marriott*, for *J. R. Richards*, Swansea.

Solicitor for the defendant, *F. Du Bois*.

---

From Q. B. Div. (Bkcy.) (Lindley, M.R., Jeune, P., and Romer, L.J.) — Oct. 27; Nov. 10.

*In re* ROBERTS.
*Ex parte* THE DEBTOR. (*a.*)

*Bankruptcy — Property vesting in trustee — Exception of personal earnings limited to what is necessary for support of bankrupt and his wife and family—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

*Section* 44 *of the Bankruptcy Act*, 1883, *which vests all the bankrupt's property in the trustee, is subject to an implied exception of such personal earnings of the bankrupt as are necessary to support him and his wife and family. Personal earnings beyond the amount required for this purpose vest in the trustee under section* 44.

Appeal from Wright, J., in bankruptcy.

The debtor, John Roberts, the celebrated billiard player, was adjudicated bankrupt in April, 1898.

On the 5th of October, 1898, an agreement was made between the debtor and the Benzoline Manufacturing Co. (Limited), by which the company agreed to supply the debtor every year with 2,000 billiard balls, he on his part agreeing not to play billiards in public (except in genuine championship matches) with any balls except those made by the company. It was stated that the balls were of the value of about 6s. each.

On the 24th of July, 1899, Wright, J., sitting in bankruptcy, made an order that the debtor should deliver to his trustee all billiard balls, up to the value of £200, which were in his possession on the 1st of May, 1899. It was stated that the balls in the debtor's possession were worth £70 or £80.

The debtor appealed against the order.

*Tindal Atkinson, Q.C.*, and *F. Cooper Willis*, for the appeal, referred to sections 44, 53 of the Bankruptcy Act, 1883; *In re Graydon*, 4 W. R. 495, [1896] 1 Q. B. 417; Williams on Bankruptcy (7th ed.), p. 197; *In re Shine*, 40 W. R. 386, [1892] 1 Q. B. 522; *Williams* v. *Chambers*, 10 Q. B. 337, at p. 344; *Wadling* v. *Oliphant*, 24 W. R. 246, 1 Q. B. D. 145; *Chippendall* v. *Tomlinson*, 4 Dougl. 318, Cooke's Bankrupt Laws (8th ed.), 428, 7 East 57*n*; *Ex parte Benwell, In re Hutton*, 33 W. R. 242, 14 Q. B. D. 301.

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

*Herbert Reed, Q.C.*, and *Holloway*, for the trustee, referred to *Emden* v. *Carte*, 30 W. R. 17, 19 Ch. D. 311; *In re Hawkins*, 40 W. R. 484, [1892] 1 Q. B. 890; *In re Rogers*, [1894] 1 Q. B. 425; *Mercer* v. *Vans Colina*, 67 L. J. Q. B. 424, 4 Manson 363, 46 W. R. Dig. 13; and *Herbert* v. *Sayer*, 5 Q. B. 965.

*Tindal Atkinson, Q.C.*, replied.

*Cur. adv. vult.*

Nov. 10.—LINDLEY, M.R., read the judgment of the court. His lordship stated the facts, and proceeded: The trustee claims these billiard balls under section 44 of the Bankruptcy Act, 1883. Mr. Roberts contends that he is entitled to retain them upon the ground that they are his personal earnings, and are therefore excepted from the operation of that section. The alleged exception is not to be found in the Act itself, but is said to be an implied exception based upon a long series of authorities, and well recognized for the last hundred years. On looking into these authorities we are of opinion that they have no application to the present case.

The exception is based upon the case of *Chippendall* v. *Tomlinson*, decided in 1785. In that case a solicitor who had become bankrupt brought an action for professional services rendered by him after his bankruptcy. His assignees made no objection, and made no claim to the money which he sought to recover, and it was held that under these circumstances the bankruptcy of the plaintiff was no bar to the action. That was the only point really decided. Lord Mansfield said: "The only question is whether the assignees of a bankrupt are entitled to the profits arising from his personal labour. The assignees cannot let out the bankrupt; they cannot contract for his labour." Attempts have been made to establish on the foundation of these statements the doctrine that whatever a bankrupt earns by his personal labour or ability after the bankruptcy belongs to him. *Chippendall* v. *Tomlinson* is not an authority for any such proposition, and both Buller, J., and, according to a note in Douglas, Lord Mansfield also, stated that if a bankrupt acquired a large sum of money or considerable effects these would undoubtedly belong to his assignees. So also said Lord Alvanley in *Hesse* v. *Stevenson*, 3 Bos. & P. 565, in which it was held that a patent acquired by a bankrupt after his bankruptcy passed to his assignees. Lord Alvanley's observations on pp. 577-8 appear to us to represent the true doctrine on this subject. It may be that a bankrupt's trustee cannot maintain an action for money earned by the bankrupt since his bankruptcy by his personal exertions if such money is required by him for his support and maintenance: see *Williams* v. *Chambers* (the pleadings in which, however, alleged promises to pay to the assignees for work done by the bankrupt). The Bankruptcy Act of 1883, like its predecessors, excepts a bankrupt's tools, and contemplates the acquisition of future property by a bankrupt, and he must live to use his tools and to acquire such property. The present Act, like previous Bankruptcy Acts, must be construed so as to enable him to do this; and the language of section 44, clear and express as it is, must not, therefore, be taken so literally as to deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live. But, on the other hand, the necessity is the limit of the exception.

This is in entire accordance with modern decisions: *Mercer* v. *Vans Colina*; see *In re Graydon*, *Wadling* v. *Oliphant*, *Emden* v. *Carte*, *Ex parte Benwell* does not conflict with other cases. That case turned entirely on section 53, and is only an authority for the proposition that a prospective order cannot be made impounding the future personal earnings of a bankrupt. Similar observations apply to *In re Shine*. These cases are no authority for the proposition that property of a bankrupt acquired by his personal exertions since his bankruptcy, and not wanted for his present support, does not belong to his trustee. No such doctrine can be maintained in face of section 44. After bankruptcy, and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. He may sue for and recover his earnings if his trustee does not interfere; but what he recovers he recovers for the benefit of his creditors, except to the extent necessary to support himself and his wife and family. The exception seems to include them.

In this case we have not to consider the right of the trustee to sue a stranger for money payable to the bankrupt, for the bankrupt has in his own possession the property ordered to be delivered up. Moreover, that property is not wanted for the bankrupt's support; he can, and does, support himself without it. Even if, therefore, the billiard balls can be regarded as obtained by the personal exertions of the bankrupt, the order for their delivery to the trustee would be quite right. This being so it is necessary to consider whether the billiard balls can be properly regarded as personal earnings. They are delivered to the bankrupt under an agreement which imposes no obligation on him to play billiards or otherwise exert himself. All he undertakes to do is not to play in public (except in genuine championship matches) with any billiard balls except those made by the Benzoline Co. The agreement is no doubt based on the assumption that Roberts will play billiards in public; but, after all, its object is to advertise the company's balls; and as Roberts need not play at all, or otherwise exert himself, it is not easy to see how the case can be brought within the exception, even if it were wider than upon examination it turns out to be.

The appeal must be dismissed.

*Appeal dismissed.*

Solicitors, *Letts Brothers*; *Roscoe & Hincks*.

---

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — Nov. 1.

THOMAS *v.* SUTTERS. (*a.*)

*Local government—County council—Bye-law—Betting—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 16—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Metropolitan Streets Act*, 1867 (30 & 31 *Vict. c.* 134), *s.* 23.

*A bye-law that "No person shall frequent or use any street or other public place, on behalf either of himself or any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager with any person, or paying, or receiving, or settling bets," is a bye-law for the good government of the district, and is valid under a statutory power for the local authority to make bye-laws for the good government of the district. Nor is such a bye-law repugnant to section 23 of the Metropolitan Streets Act*, 1867, *which prohibits three or more persons assembling together in a street for the purpose of betting.*

White *v.* Morley, 47 *W. R.* 583, [1899] 2 *Q. B.* 34, *approved.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This was an appeal against a decision of Kekewich, J. The real question involved was whether a bye-law of the London County Council, prohibiting street betting, was valid or not. The bye-law in question came into force on the 1st of October, 1898, and it provides that "no person shall frequent and use any street or other public place, on behalf either of himself or of any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager with any person, or paying, or receiving, or settling bets." The point was raised in the present case in a peculiar way. The plaintiff claimed the dissolution of a partnership between himself and the defendant, and the taking of the usual accounts. The defence was that the principal business of the partnership, and for the carrying on of which it was formed, consisted of betting transactions in streets and public places within the County of London, and that in the course of that business both the plaintiff and the defendant necessarily frequented and used the said streets and public places for the purpose of betting and of paying and receiving of payments of bets. In these circumstances the defendant submitted that by reason of the bye-law the partnership was illegal, and that the plaintiff was not entitled to maintain the action. In answer to this the plaintiff contended that the bye-law was invalid.

Kekewich, J., following *White* v. *Morley*, 47 W. R. 583, [1899] 2 Q. B. 34, held that the bye-law was valid.

The plaintiff appealed.

Section 23 of the Municipal Corporations Act, 1882, which, by section 16 of the Local Government Act, 1888, is made applicable to county councils, provides that "the council (of a borough) may from time to time make such bye-laws as to them seem meet for the good rule and government of the borough." The bye-law in question purported to be made under these sections.

*Stutfield* (*Joseph Walton, Q.C.*, with him), for the appeal.—This bye-law is too wide. Its application must be limited to cases which are necessary for the good government of the county. I admit that *White* v. *Morley* is against me, but that decision is contrary to the following series of cases which go to show that a bye-law cannot be made to regulate moral conduct, under a power to make bye-laws for good government: *Calder and Hebble Navigation Co.* v. *Pilling*, 14 M. & W. 74; *Macdonald* v. *Lochrane*, 51 J. P. 629; *Heap* v. *Burnley Sanitary Authority*, 32 W. R. 661. 12 Q B. D. 617; *Johnson* v. *Mayor of Croydon*, 16 Q. B. D. 708, 34 W. R. Dig. 129; *Strickland* v. *Hayes*, 44 W. R. 398, [1896] 1 Q. B. 290. This bye-law really creates a new offence, and is bad on that ground. The question of street betting is dealt with by 30 & 31 Vict. c. 22, s. 23, and this bye-law must be held to be repugnant to that: *Burnett* v. *Berry*, 44 W. R. 512. [1896] 1 Q. B. 641; and *Kruse* v. *Johnson*, 46 W. R. 630, [1898] 2 Q. B. 91.

*A. T. Lawrence, Q.C.*, and *Cautley*, for the respondent, were not called upon.

LINDLEY, M.R.—I do not think this case presents any difficulty at all. I agree with Mr. Stutfield that in considering the validity of any bye-law, we must look to the power which exists to make it. The power here to make the bye-law in question is conferred by the 23rd section of the Municipal Corporations Act, 1882, which says that the council of a borough "may from time to time make such bye-laws as to them seem meet for the good rule and government of the borough." Now, the power which is conferred on the borough council is conferred upon the county council by the Local Government Act, 1888, s. 16. I need not read that. It simply gives them the same power in their district that the borough council has in theirs. Therefore I come back to the law-giving power which is to be traced to and depends upon the true construction of section 23 of the Municipal Corporations Act, 1882.

Now I cannot conceive any reason why we should limit that language, why we should not give it full effect. If authority is wanted for so construing that section and similar sections, we have it in the case of *Kruse* v. *Johnson*, to which Mr. Stutfield has referred.

Now, when we come to look at that, what is there in the bye-law which can be said to be unreasonable or objectionable, having regard to the very wide power of making bye-laws which is conferred by section 23 of the Act of 1882? It is a bye-law, one of a set made by the London County Council for the good rule and government of the County of London. Under that section they may make any such bye-laws as to them may seem meet for that purpose.

They see meet to make this bye-law about betting. [His lordship read the bye-law, and continued:] Now, the governing and important words there are "frequent and use" and "for the purpose." That does not prevent two people walking down the street from either making a bet or paying one. If they choose to amuse themselves in that way they can do it so far as I can see. But they shall not frequent or use the street for the purpose. That is the bye-law.

Now, it is said there is something unreasonable in that. As regards the authorities the cases of *Burnett* v. *Berry* and *White* v. *Morley* are in favour of this bye-law, and we are asked to overrule them. Why should we? There is no reason to my mind that can be urged. Mr. Stutfield has done the best he could, but when you come to examine his reasons they are reduced to this, that the decision, which I took part in, of *Strickland* v. *Hayes* goes the whole length of his argument. He very ingeniously puts it in this way. He says there is an Act of Parliament here—viz., the Metropolis Streets Act, 1867, which deals with betting in streets, and as Parliament has directed its attention to betting in streets and regulated that in the mode in which Parliament thought best, there ought to be no further bye-law upon it. except one possibly to better carry that out. There is something in that argument, and in the case of *Strickland* v. *Hayes* I thought a good deal turned upon it. Although I have not the slightest doubt now, as I had not then, that the bye-law there in question was hopelessly bad, it struck me it was necessary to consider whether it might not be amended, and if amended, whether it would be good; and the reason I came to the conclusion that if amended it would be bad was this, that there it did deal precisely with a matter with which Parliament had dealt in an Act of Parliament addressed to the very same thing, and I gave my decision on that reason so far as the amended bye-law went.

But the difference between that case and this is obvious enough to my mind. In inserting section 23 in the Metropolitan Streets Act, 1867, one sees what Parliament was aiming at. It was not aiming at betting at all. It was aiming at street traffic. The whole object of the Act is to regulate the traffic in the metropolis, that is the whole purpose of the Act. It is very true that the Legislature has put in section 23, and with reference to the traffic has said, "that three people assembling for betting shall be deemed to be obstructing the street." That is the only point that Mr. Stutfield has. I decline to stretch or extend the case of *Strickland* v. *Hayes*, which I think was perfectly right, to the length of

holding that because there is a regulation of that kind in a traffic Act, therefore the county council have no power to regulate the streets with reference to another matter—viz., betting without obstruction. It strikes me there is nothing in the point at all; and taking the whole case it appears to me that it would be going a great deal too far to say that this is not and cannot reasonably be construed as a bye-law for the good rule and government of the borough. The county council have ample power to say that in their opinion it is, and unless there is some good reason to the contrary, unless there is some clear excess of the jurisdiction, we ought rather to uphold than to invalidate the bye-law. I think the bye-law is perfectly good and the appeal must be dismissed, and dismissed with costs.

JEUNE, P.—I agree, though I confess I thought this matter was entirely governed by several decisions of late years and that the ghost of these objections to bye-laws was by this time fairly laid. We have had to-day put very forcibly, not for the first time, an objection of the kind which has been dealt with over and over again.

In the first place it is said that this bye-law is too wide, or rather, deals with matters outside the powers of the county council, because their powers are limited to making bye-laws for the good rule and government of the borough, and this is a matter which goes outside the good rule and government of the borough, a matter which it is suggested rather deals with the morals of the community than the actual management and government of the borough. I do not feel certain that even in the narrower sense this bye-law is not perfectly justifiable (quite apart from any question of the morality of the inhabitants or the respectability of the place) on the ground that it deals with matters which may cause annoyance or obstruction; but for myself I confess I should not shrink from saying that I cannot take any such limited view of the power of the county council.

A case like that of *Calder* v. *Hebble Navigation Co.* appears to me to be wholly different. I quite agree a navigation company has powers given it to make bye-laws for the good management of their canal, that is, matters which relate to the supply of water and so forth, and which do not relate to the question of the morality or good behaviour of the persons who use it. That is outside their functions. That is a matter of the general law and not a matter for the canal company, whose business it is to keep their canal going and not to provide for the good behaviour or morals of the persons who use it, or matters of that kind. In the case of a muncipality dealing with the good order of their streets the power to make bye-laws appears to me to go far beyond that. I should hesitate long before I said that a municipality had not a perfect right, and indeed a duty, to deal with matters which affect the respectability and moral conduct of the persons in their streets—of course in so far as they are matters of public interest and affecting persons who use the streets.

Then it is said that Parliament has already dealt with this matter and dealt with it in such a way that the bye-laws ought not to deal with it again. I quite agree if you had a case of difference between the bye-laws and the Act—I mean if a bye-law decided something to be legal which the public law declared to be illegal, or *vice versâ*—you might well say that that bye-law had no right to set itself up against an Act of Parliament in that sense; but there is nothing of that kind in this instance. It is an Act of Parliament, as the Master of the Rolls has just pointed out, dealing with traffic regulation, which provides that no more than three persons shall assemble together for betting in a street so as to cause obstruction. That is a provision intended solely for the purpose of keeping the streets clear and nothing else.

It may be that the bye-law goes beyond that, but I cannot see myself any objection to the bye-law even if it does go somewhat beyond an Act of Parliament. An Act of Parliament speaking for the whole country, renders certain things illegal. It does not at all follow that a bye-law, speaking for a particular locality, may not make some more stringent regulations with the same object. That appears to me to be perfectly within the competency of the borough. On the contrary, where you find an Act of Parliament has made provision forbidding certain Acts to be done in certain places, it seems to me to be perfectly consistent with that, that a municipality with regard to their particular locality should go somewhat beyond the Act of Parliament, not affecting the spirit, but carrying out its spirit and providing regulations somewhat wider than those found in the Act of Parliament. That is what has happened in this case, because the Act of Parliament has forbidden the assembling together of people in the streets for the purposes of betting, while the municipality, acting in the same spirit as that regulation but no doubt going somewhat further, have provided that persons shall not frequent or use the public streets for the purposes of betting or matters connected with betting.

That is a matter which has been dealt with by more than one authority, but I refer especially on these points to the decision of Darling, J., in *White* v. *Morley*, and I desire only to express my acquiescence in his opinion on this point without occupying time by reading it.

Now, Mr. Stutfield has fallen back on an objection which I think also has been disposed of by previous decisions. He has said that the bye-law is too wide, unless it contains some words in effect saying that a nuisance or annoyance is caused by the particular act prohibited. Now that was exactly the matter which had to be dealt with in the case of *Kruse* v. *Johnson*. That was a case of music, and the whole objection in that case was that there were no such limiting words as Mr. Stutfield insisted there must be. It was said that you could not by a bye-law prohibit music altogether, even if some persons took objection, and therefore you must have some such words as, "if a nuisance or annoyance is caused thereby." For my own part it seemed to me sufficient in that case to say that the fact that it was required that persons should complain, was evidence that to that person, at any rate, annoyance would be caused. But I might have gone further, and I am not sure that I did not go further, for I find I said: "It is never necessary to give evidence of actual annoyance. It is enough if the circumstances render annoyance certain or even probable." Now, I desire to repeat that language. I will not quote the authorities which I cited then and which appear to me to bear out that rule, but, dealing with this case, it appears to me sufficient to say that to consider that if persons assemble in a street for betting it is certain or probable that annoyance will be caused is a reasonable view to be taken. And it is not unreasonable for a municipality to pass a bye-law forbidding public betting in the streets without any provision that actual annoyance should be caused; for this reason, that the thing in itself is such that it is highly probable—nay, almost certain, that annoyance will be caused. That is sufficient to justify a bye-law which prohibits a thing from which annoyance is very probable and almost certain to follow. For these reasons I am of opinion that the previous authorities, *Burnett* v. *Berry* and *White* v. *Morley*, were cases

which were quite rightly decided and decided for the right reasons. I think, therefore, Kekewich, J., was perfectly right in not only following those cases, but in expressing approval of them.

ROMER, L.J.—Under the Act in question I think that a local authority may make a bye-law to prevent its public streets or places from being habitually used, not in the ordinary way for the purpose of passing to and fro, but for the purpose of carrying out transactions which, though they may not be illegal in themselves, tend against the morality of the locality and the welfare of its inhabitants, and on this ground alone I think the London County Council was entitled to make a reasonable bye-law preventing the public streets or places under its control from being frequented or used for the purpose of carrying on or carrying out betting transactions. And further, I think that the particular bye-law in question was not too wide or unreasonable in its terms, and certainly not repugnant to section 23 of the Metropolitan Streets Act, 1867. I therefore agree in thinking that this appeal should be dismissed.

Solicitors, *Lewis & Lewis*; *C. B. Peachey.*

---

## High Court of Justice.

Chan. Div. }
Stirling, J. } Nov. 2, 9, 21.

*In re* TURNBULL.
TURNBULL *v.* NICHOLAS. (*a.*)

*Practice—Married woman—Judgment debtor—Order for payment into court—Default—Writ of attachment—Separate estate—Married Women's Property Act,* 1882 (44 & 45 *Vict. c.* 21), *ss.* 1 (2), 18 24 - *Debtors Acts,* 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5; 1878 (41 & 42 *Vict. c.* 54)—*R. S. C., ord.* 42, *rr.* 4, 24.

*A married woman married before* 1882, *was, as administratrix of a deceased intestate, ordered to pay into court a sum forming part of the estate. In default a motion was made for leave to issue a writ of attachment against her.*

*Held, that, in the absence of proof of a breach of trust or* devastavit, *an order for payment by the defendant out of her separate estate would not be appropriate and that the order for the issue of the writ of attachment ought to go.*

Motion for attachment.

In this action the defendant, Agnes Nicholas, a married woman, administratrix of the estate of an intestate, had been by two orders of the court, dated the 8th of May and the 10th of July, 1899, directed to deliver an account of the personal estate which had come into her hands, or, by her order or for her use, into the hands of others. An account having been at last delivered, the defendant, by a further order, dated the 10th of August, was ordered within four days of service to pay into court the sum of £277 13s. 7d. in respect of the account.

The order was served on the 23rd of August; payment had not been made by the 5th of September; notice of motion to attach the defendant was dated the 6th of September.

*G. Henderson*, in support of the motion, submitted that the defendant could be attached, having been married before the Married Women's Property Act, 1882 (*Otway* v. *Wing*, 12 Sim. 90); Debtors' Act, 1869, s. 4, sub-section 3, expressly exempting the abolition of imprisonment for debt where "default is made by a trustee or person acting in a fiduciary capacity, and ordered to pay by a court of equity any sum of money in his possession or under his control."

*Pemberton* v. *MacGill*, 4 W. R. 1, 25 L. J. Ch. 49, was also referred to.

*H. L. Fraser*, for the defendant, resisted the motion on the ground that the court had no jurisdiction to commit the defendant, being a married woman and administratrix, on a *devastavit*: *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120; Married Women's Property Act, 1882, ss. 13, 24. It was agreed to dispose of the case on the hearing of the motion as if the defendant had given notice of motion to vary or discharge the order of the 10th of August, 1899.

*Cur. adv. vult.*

STIRLING, J., after stating the facts, said that by ord. 42, rr. 4 and 24 of the R. S. C. of 1883 an order for payment of money into court might be enforced by writ of sequestration or, in cases in which attachment was authorized by law, by attachment. As was pointed out by Chitty J., in *In re Greer*, 43 W. R. 547, [1895] 2 Ch. 217, attachment there meant attachment of the person. By virtue of the third exception contained in section 4 of the Debtors Act, 1869, such attachment was authorized by law in the case of default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a court of equity any sum in his possession or under his control. If the defendant were not a married woman there would clearly be jurisdiction to order the issue of the writ. What was decided in *Scott* v. *Morley* was that there was no power under section 5 of the Debtors Act to commit to prison a married woman for her default in paying a sum for which judgment had been recovered against her in a court of law, and which under the Married Women's Property Act, 1882, s. 1, sub-section 2, was payable out of her separate property, and not otherwise. His lordship, after referring to the form of judgment as settled by the Court of Appeal in *Scott* v. *Morley*, said that that decision plainly did not govern the present case; but it was necessary to consider the reasons on which it was based, and to ascertain how far they applied. Shortly, the *ratio decidendi* appeared to be this: Section 1, sub-section 2, of the Act conferred on a married woman the capacity of entering into and rendering herself liable on any contract in respect of and to the extent of her separate estate, and of suing and being sued either in contract or tort as if she were a *feme sole*, but the damages and costs recovered against her in any action or proceeding against her were to be payable out of her separate estate and not otherwise; and this enactment (in the words of Bowen, L.J.) created only a proprietary, and not a personal liability. On the other hand, section 5 of the Debtors Act, 1869, only authorized a committal where there was a "debt due from" the defendant; and a debt payable out of the separate property of a married woman was not a debt due from her. The order in the present case was not an order for payment of a sum to a person but for payment of a sum into court. The distinction between the two was pointed out and explained in *In re Greer*. The present order did not create a debt, and the provisions of section 5 of the Debtors Act, 1869, had no application. The material sections of the Married Women's Property Act, 1882, were section 1, sub-section 2 (which was dealt with in *Scott* v. *Morley*), and sections 18 and 24. These enactments introduced very considerable changes in the law. They enabled a married woman to accept the office of a trustee, executrix, or administratrix without the consent of her husband, which she could not previously do;

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

they made her separate estate liable for her breaches of trust and devastavits, which it previously was not (*Wainford* v. *Heyl*, 23 W. R. 848, 20 L. R. Eq. 321), and they relieved her husband from liability and from being sued in respect of her acts. If the object of the order of the 10th of August, 1899, was to compel the defendant to make good a loss occasioned by some act of hers amounting to a devastavit or breach of trust, then much of the reasoning in *Scott* v. *Morley* as to the nature of the liability might apply to the case before him, and the order might have been held wrong in form and proper to be discharged or varied so as to make it accord with the form settled by the court in *Scott* v. *Morley*. His lordship thought however that such was not the object of the order. So far as appeared from the evidence on which the order was made, no breach of trust or devastavit had been committed, nor any liability by reason thereof incurred by the defendant. What did appear was that the defendant had in her hands a sum of money forming part of the intestate's estate. That sum of money ought not to have been mixed up with the defendant's separate estate, but ought, if the defendant had performed her duty, to be standing to a separate account in her name as administratrix with some bank; and the object of that order was to get that sum, for greater security, transferred from the bank into court. It seemed to his lordship that an order for payment of the sum by the defendant out of her separate estate would not be appropriate to such a state of facts and that the order was properly made in the present form. That being so the case fell within the third exception in section 4 of the Debtors Act, 1869; and an order for attachment might be made, if there was jurisdiction to make such an order previously to the passing of that Act. Upon that, authority was very scanty; for, previously to the passing of the Married Women's Property Act, 1882, the husband was liable and orders would be naturally sought for and made against him, and not against the wife. The cases of *Bell* v. *Hyde*, Prec. in Ch. 328, and *Otway* v. *Wing*, appeared to show that attachment might in a proper case issue against a married woman; so far as at present appeared, this seemed to be a proper case. The provisions, however, of the Debtors Act, 1878, must be taken into consideration. Upon the motion for the attachment, an affidavit had been made by the defendant's present solicitor to the effect that she had applied the sum appearing by the account to be in her hands, or part of it, in payment of the intestate's debts or liabilities, or otherwise improperly. The affidavit, however, was insufficient to enable his lordship to exercise the discretion which was vested in him under the Act of 1878, and it contained no explanation as to how the balance, if any, of the fund in the lady's hands had been disposed of. His lordship was quite unable to understand why a further affidavit had not been made, and so he was willing to believe that it might be due to the illness of the defendant, and under the circumstances it seemed to him that the order for the issue of the writ ought to go, but that it ought to lie in the office for a fortnight or three weeks to enable the defendant to make a proper affidavit showing how the funds had been actually dealt with. To secure further discussion of this important matter, if necessary, his lordship desired to add that if it were made to appear that a breach of trust or *devastavit* had been committed, so that the case fell within the terms of section 1, sub-section 2, and section 24 of the Married Women's Property Act, he should as at present advised feel great difficulty in allowing the writ to go.

**Solicitors,** *Johnson, Weatherall, & Sturt*; *J. Greenfield.*

Chan. Div. Stirling, J. } Oct. 31; Nov. 1, 8.

SILKSTONE AND HAIGH MOOR COAL CO. (LIMITED) v. EDEY AND OTHERS. (*a.*)

*Company—Sale set aside—Interest on rents and profits—Breach of trust—Sale by trustee to himself—Liability of trustee.*

*Where the sale of an undertaking of a company effected by its liquidator, nominally to another company, but really to himself, had been set aside on the ground of fraud, and the re-transfer of the undertaking to the original company had been ordered,*

*Held, that the liquidator, being in a fiduciary capacity, should repay the rents and profits which had accrued, but that he was not to be charged with interest on the same.*

Motion to vary proposed minutes.

In this action the court had declared that a sale of the undertaking of the plaintiff company by its liquidator, the defendant Edey, nominally to the defendant company, but really to himself, ought to be set aside on the ground of fraud. It had been decreed that the colliery and a certain number of leases and depôts in London and elsewhere should be re-transferred by the defendants to the plaintiffs. It was proved at the trial that while the defendants were carrying on the business, they created certain incumbrances upon not only the property which they had originally acquired from the plaintiff company, but also upon certain other properties subsequently acquired, which by the decree went back to the plaintiffs as accretions to the original property. The order as to accounts and inquiries contained (*inter alia*) the words "an account of the profits made and other benefits, if any, received."

*Jenkins, Q.C.* (*Rowden, Q.C.*, with him), for the defendant Edey.—The defendants ought not to be charged with interest at 4 per cent. on rents and profits, as proposed in the minutes. Moreover, the words "and other . . . received" ought to be struck out, as the court intended to substitute therefor a special inquiry directed "at the plaintiff's request and risk, and without prejudice to any question." There is analogy in an action for rescission of contract between vendor and purchaser: see precedent in 3 Seton, p. 1929, also *Plowright* v. *Lambert*, 52 L. T. 646 (in which Field, J., appears to have been taking Chancery actions), where a plaintiff gets capital back and he elects to take defendant's profits, then the profits are the interest, and there is no precedent for the addition of interest to sums due. The remedy of a *cestui que trust* is given by Romilly, M.R., in *Jones* v. *Foxall*, 15 Beav. 388. [STIRLING, J.—Supposing Edey has put in his pocket £2,000, being profits of this concern, and has had them in his pocket ever since, and had the benefit of this sum, why is not he to account for that benefit?] He is accounting for it; the money he has put in his pocket is part of his profits, but you cannot go on following his profits.

*Gatey* (*Warmington, Q.C.*, with him), for the defendant company, to same effect.

*Upjohn, Q.C.* (*Norton* with him), for the plaintiff company.—It is immaterial whether the defendant was technically a trustee or whether he was in a fiduciary capacity. I am getting the property back on the footing that the profits were my profits all along; and where a person in a fiduciary position makes a secret profit, he is to be charged with interest thereon, at least simple interest: 3 Seton,

(*a.*) Reported by W. H. DRAPER, Esq., Barrister-at-Law.

1939-1940; *Imperial Mercantile Credit Association* v. *Coleman*, L. R. 12 Eq. 504: *Boston Deep Sea Fishing Co.* v. *Ansell*. 39 Ch. D. 339, 37 W. R. Dig. 117; *Panama Telegraph Co.* v. *Indiarubber Works Co.*, 23 W. R. 583, L. R. 10 Ch. App.515; *Attorney-General* v. *Alford*, 2 W. R. 580, 4 De G. M. & G. 843; *Walrond* v. *Walrond*, 29 Beav. 586. 10 W. R. Ch. Dig. 74. The shortest and least expensive plan would be to say that where profits were made or moneys taken out of the concern and applied not for the purposes of any businesses that the plaintiff company is taking over, then simple interest at the low rate of 4 per cent. should be allowed.

*H. Humphry* and *Pattullo*, for different incumbrancers.

*Jenkins, Q.C.*, replied, referring to *Erlanger* v. *The New Sombrero Phosphate Co.*, 27 W. R. 65, 3 App. Cas. 1218; *In re Barclay, Barclay* v. *Andrew*, [1899] 1 Ch. 674, 47 W. R. Dig. 195; and, upon the point as to rents, to *Campbell* v. *Walker*, 5 Ves. 678; *Ex parte James*, 8 Ves. 337.; *Watson* v. *Toone*, 6 Madd. 153; and *Mill* v. *Hill*, 3 H. L. Cas. 828.

*Cur. adv. vult.*

STIRLING, J.—The question on which I reserved my judgment was this, whether the defendants are to be charged with interest upon profits and rents received by them and withdrawn by them from the business of the defendant company. As the minutes stand, interest is proposed to be charged on all rents and profits received by the defendants; but it was properly admitted that that went too far, because it is clear that large amounts of rents and profits have been retained in the business of the company, and of these the plaintiff will get the benefit in the ordinary way, and the question which I have to decide is limited to that which I have stated. Now, the plaintiffs rely on the decisions which show that a trustee who makes a secret profit is charged with interest thereon: see Seton, vol. 3, pp. 1939-1940, and *Imperial Mercantile Credit Association* v. *Coleman*. These decisions are in strict accordance with the principle laid down in *Attorney-General* v. *Alford* and *Burdick* v. *Garrick*, 18 W. R. 530, L. R. 5 Ch. App. 453. The trustee has retained in his own hands part of the trust property, and is liable to be charged with the interest he actually received or that which the court is entitled to say that he ought to have received. The present case, however, is not precisely of that character; it is one in which the point to be considered is what are the proper terms on which a sale, improperly made by a liquidator, standing therefore in a fiduciary relation to the plaintiffs, ought to be set aside. The law is thus stated in the successive editions (and I have referred to several dating from the second) of Lewin on Trusts (10th ed.), pp. 558-559, citing the Irish case of *Macartney* v. *Blackwood*, 1 Ridg. Lapp. & Sch. 602: "The *cestui que trust*, if he chooses it, may have the specific estate reconveyed to him by the trustee, or, where the trustee has sold it with notice, by the party who purchased, the *cestui que trust* on the one hand repaying the price at which the trustee bought, with interest at 4 per cent., and the trustee or purchaser on the other accounting for the profits of the estate, but not with interest, and if he was in actual possession, being charged with an occupation rent." [After reading from the facts and judgment in the case thus cited, his lordship continued:] The judgment in *Macartney* v. *Blackwood* is based on the fact that the rents and profits were received not by the trustee, but by the purchaser. His title was bad as against the plaintiff, but he did not himself stand in a fiduciary relation to the plaintiff, and it might be thought that a trustee who received rents and profits ought to be charged with interest on them. It was pointed out, however, that it did not appear to have been the practice to charge such interest, and I was referred to various cases in which the reports show or appear to show that interest had not been charged. I have examined the original records in some of these cases, particularly those in *Watson* (or *Whatton*) v. *Toone* (6 Madd. 153; also see 5 Madd. 54) and in *Tate* v. *Williamson* (14 W. R. 449, L. R. 1 Eq. 528, the decree in which is also given in Seton, vol 3, p. 1929), and these bear out the contention of the defendants' counsel. I have myself failed to find any case in which a trustee has been clearly and explicitly charged with interest on rents upon a sale to him being set aside. In the absence of any express authority on the point and having regard to the statement which has been made in Lewin on Trusts for so long a period, I must take it that the settled practice of the court is as stated by that learned author, and the minutes must be altered accordingly.

Solicitors, *Bell, Brodrick, & Gray*, for *Rogers, Thomas, & Sandford*, Sheffield; *Badham & Williams*; *T. W. Hall*; *Torr & Co.*, for *Stewart & Chalker*, Wakefield; *Jaques & Co.*, for *Porett & Fawcett*, Sheffield.

---

Chan. Div.
Kekewich, J. } Nov. 29, 30.

*In re* WEST.
GEORGE *v.* GROSE. (*a.*)

*Will — Construction — Trust for sale — Trustees' indemnity and reimbursement clause — Unexhausted residue—Resulting trust.*

*A gift of property to trustees on trust for sale, followed by the declaration of a particular trust which does not exhaust the whole of the property thus given, will be treated as creating a primary general trust of the whole of such property, so that there will be a resulting trust of the unexhausted residue in favour of the testator's heir and next-of-kin. The insertion of a trustee's indemnity and reimbursement clause will further strengthen the conclusion thus drawn from the presence of the trust for sale.*

Further consideration.

This was the further consideration of an action for the administration of the estate of Elizabeth Ann West, who died on the 28th of February, 1896. By her will, dated the 15th of February, 1887, Elizabeth Ann West devised and bequeathed unto W. R. Grose, J. George, R. Pengelley, and R. G. Pollard, all her moneys and securities for money, plate, linen, china, household goods, and furniture, and also her freehold property consisting of her farms called Pellingallow and Rose in the Vale in the parish of St. Kew, and Hendra Wether in the parish of Minster, upon trust that, as soon as conveniently might be after her decease, they should sell the same, either together or in parcels, and either by public auction or private contract, with full power to buy in and to rescind any contract for sale and to resell without being responsible for any loss occasioned thereby, and to do and execute all such acts and assurances for effectuating any such sale as they should think fit. And the testatrix declared that the said W. R. Grose, J. George, R. Pengelley, and R. G. Pollard should, out of the moneys to arise

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

from any such sale, pay her funeral and testamentary expenses and debts and certain specific legacies therein more particularly mentioned; and the testatrix further declared that the trustees for the time being of her will should be chargeable only with such moneys as they respectively should actually receive, and should not be answerable for any moneys they might not receive. And that the trustees might reimburse themselves out of the moneys that should come into their hands under the trusts aforesaid, for all expenses which should be incurred in or about the aforesaid trusts. And the testatrix appointed the said W. R. Grose, J. George, R. Pengelley, and R. G. Pollard executors of her will.

It appeared from the evidence that after the sale of the property devised and bequeathed to the trustees and executors, and after payment by them, out of the proceeds of the said sale, of the funeral and testamentary expenses and debts of the testatrix, and the various legacies in the said will, there remained in the hands of the executors and trustees a certain unexhausted residue. The question now arose on further consideration whether, in the events which had happened, there was a resulting trust of the said residue in favour of the co-heirs and next-of-kin of the testatrix, or whether the trustees were entitled to retain it beneficially.

*Warrington, Q.C.*, and *Cozens-Hardy*, for the trustees—There is here no resulting trust, and the trustees are entitled beneficially to the residue: *Croome* v. *Croome*, 59 L. T. Rep. 582, *per* Cotton, L.J., at p. 584; *Williams* v. *Roberts*, 6 W. R. 33, 27 L. J. Ch. 177, 4 Jur. N. S. 18. In these cases, it is true, there was no trust for sale; but here the trust for sale is mere machinery for carrying out the particular trusts imposed on the plaintiffs by the terms of the will. When they have carried out those particular trusts they are entitled to retain the residue for their own benefit. It will probably be said that the last words of the will show an intention that the trustees are not to take beneficially. Precisely the same words occurred however in *Pratt* v. *Sladden*, 14 Ves. 198, and were there held not to disentitle the trustees.

*J. G. Wood*, for the two co-heirs of E. A. West.—There is clearly a resulting trust in favour of the heir and next-of-kin. *Pratt* v. *Sladden* was decided under the old law prior to statute 11 Geo. 4 and 1 Will. 4, c. 40. Its force is destroyed by the judgment in *Williams* v. *Roberts*, as reported in 4 Jur. N. S. 18. [KEKEWICH, J.—I agree.] As to *Croome* v. *Croome* and *Williams* v. *Roberts*, they enable us to classify cases of this kind under two heads: (1) Cases in which a gift is made to a donee, charged with the payment, or conditionally on the payment, of part of it to a third person; (2) gifts in which a trust is declared of the whole estate, though a part of the estate is left unexhausted by the subsequent declaration of particular trusts. *Croome* v. *Croome* is a good illustration of the first class; this case of the second. In *Croome* v. *Croome* no trust was declared of the whole property—there was an out-and-out absolute gift, conditioned, as to part, by a trust. All the Lords Justices relied on words which are absent here. Here, on the contrary, we have a general devise of the whole property on trust to convert. To say that that is mere machinery does not get rid of the difficulty. It is a necessary part of the will. An absolute owner, subject to a charge, would need no machinery. He could sell without it. As to "thereout" in *Croome* v. *Croome*, the words "out of the proceeds" here, are used in a different collocation.

*W. T. Lawrance* and *H. C. Davenport*, for two of the next-of-kin.—The law is summarized in the fifth edition of Jarman on Wills, vol. 1, p. 530: "Indeed, where the property is devised in trust to be sold, the point is so clear against the trustees, that a claim by them is seldom advanced." This principle was illustrated in the case of executors in *Travers* v. *Travers*, L. R. 14 Eq. 275, 21 W. R. Dig. 286.

*E. Symonds*, for three others of the next-of-kin.

*Mark Romer* and *Stock*, for other persons interested.

*Warrington, Q.C.*, in reply.—Lord Cairns has pointed out in *Williams* v. *Arkle*, 24 W. R. 215, 7 H. L. Cas. 606, that in cases like this the statute 11 Geo. 4 and 1 Will. 4, c. 40, has no effect at all.

KEKEWICH, J.—The difficulty in coming to a decision here is clearly a difficulty of construction. The difficulty arises in this way. The testatrix, in this case, has given to her trustees certain real and personal property; but the whole of this property has not been exhausted by the trusts with respect to it that are subsequently declared. The question then arises: What is to be done with the unexhausted residue? Now it is impossible for me to say that because the property is given to these persons as trustees, they are therefore necessarily precluded from taking any beneficial interest in it. To say that, would be contrary to all experience of the language of wills and to all the decided cases. Still, a gift in trust raises a presumption on the face of it that those to whom it is given are intended to take it as trustees only. It is not uncommon, on the other hand, for a gift to be given by a testator, charged with the payment, or conditionally on the payment, of a certain part of it, to some third person. Whether, however, the payment of a certain part of a gift is to take effect as a trust, or a charge, or a condition, is really immaterial, provided that the donor has made quite clear whether the donee is, or is not intended, to take himself some beneficial interest. And in order to determine the latter question it is clear that we must look for some principle of construction. Is there any such principle? Now *Croome* v. *Croome* has been treated as the latest application of the decision in *King* v. *Denison*, 1 Ves. & B. 277. In *Croome* v. *Croome*, however, the Lords Justices have laid down what they consider to be the rule in language of their own. I do not now propose to read their judgments at length; but I wish to be taken as having read them. The rule that they embody is simple and intelligible, and is conveniently summarized in the pithy statement of Stuart, V.C., in *Williams* v. *Roberts*, as reported in the *Law Journal*, "The language of the will cannot, I think, be construed in any other way than as making her (the testator's devisee) a trustee of that portion of the property only which is given to the legatees other than herself." There we have the pith of the whole matter. Is this will to be construed as making the devisees trustees of that portion only of the property given them which is to be expended in payment of legacies, debts, and testamentary expenses; or is it to be construed as making them trustees of the property as a whole? Let us look at the wording of the will. First we have a general devise and bequest of certain freehold and personal properties to certain persons upon trust. I say nothing as to those words being in themselves conclusive. I think, on the contrary, I might easily find those words, and yet feel myself bound to hold that the trustees were still intended to take some beneficial interest. But what is the nature of the trust thus created? It is a trust for sale. Mr. Warrington argues that such trust for sale is merely a matter of machinery. But surely that machinery would be quite unnecessary if the property had been

intended to be given to the donees, in the first instance, as their own property. A beneficial owner stands in no need of machinery to enable him to sell. It seems to me that, in construing this will, we cannot afford to put aside this trust for sale in the manner suggested. It seems to me, on the contrary, that this trust for sale is a strong indication of intention—of intention that the whole of the property is to be given in the first instance to the trustees as trustees only. There is, moreover, a minor matter which points in the same direction. The will says that the trustees are to "be chargeable only with such moneys as they respectively shall actually receive, and shall not be answerable for any moneys they may not receive. And that the trustees may reimburse themselves out of the moneys that shall come to their hands under the trusts aforesaid all expenses to be incurred in or about the aforesaid trusts." That clause, from the trustees' point of view, would hardly, I think, be necessary unless the testatrix contemplated the possibility of the property given by her to the trustees not being large enough to pay off her legacies, debts, and funeral and testamentary expenses. I thought at first that the observation in *Pratt* v. *Sladden* 14 Ves. (at p. 200) might perhaps be useful here. "But little reliance," says Grant, M.R., "is to be placed upon clauses in a will, which are contended only to be unnecessary. So many unnecessary directions ordinarily find their way into wills, even those which are not inartificially drawn, that it would be too much to infer direct and clear intention from the use of them in any given case." But I do not think, after all, that that observation is much use here. It seems to me that the trust for sale and the trustees' indemnity clause must here be read together, and I think that they show that the testatrix was contemplating a trust of the whole of her property. I repeat that this is a case only of the construction of a particular will, and I think its true construction brings it, not into the class of cases such as *Croome* v. *Croome*, where part only of the property devised is devised upon trust, but into that class of cases where the trust is co-extensive with the whole of the property devised.

Solicitors, *Robbins, Billings, & Co.*, for *Symons & Gameson*, Weybridge; *Lyell & Co.*, for *Mark Grey*, Bodmin; *Hallyor & Co.; Coode Kingdom & Cotton.*

---

Chan. Div. }
Byrne, J. } Nov. 7.

*In re* NORTON.
NORTON *v.* NORTON. (*a.*)

*Practice—Partition action—Claim for sale by infant as sole plaintiff—Defendants interested in moiety desiring a sale—Sale directed if parties other than infant found entitled to moiety—Conversion—Partition Act,* 1876 (39 *&* 40 *Vict. c.* 17), *s.* 6.

*An infant's share in realty will not be converted by a sale of such interest in a partition action in which the infant was plaintiff, where the judgment directed a sale, if (as was found to be the fact) the defendants were entitled to a moiety, although the infant has in his pleadings requested a sale; the form of the judgment precluding the view that the sale was made at the request of the infant.*

Summons.

The object in this summons was to determine whether the interest of an infant who had died before attaining majority in certain hereditaments sold in a partition action, in which the infant was the plaintiff, had been converted or remained realty. The facts of the case were as follows:—The infant was absolutely entitled to two-sixths of the hereditaments and to a further one-sixth subject to an estate by the curtesy, vested in one of the defendants. The remaining defendants were interested in the remaining three-sixths. The writ and statement of claim asked for a sale, or in the alternative, partition. In the statement of claim it was stated that it would be for the benefit of the parties interested to have a sale instead of partition. The defendants in their pleadings admitted that a sale would be beneficial for them. The judgment—after stating that the plaintiffs and defendants to the action, who together claimed to be absolutely entitled to the entirety of the said hereditaments, by their counsel requested a sale—directed the usual inquiry as to who were the parties interested in the hereditaments and premises, for what estates and interests and in what shares and proportions, and whether they were parties to the action; and in case it should be certified that all persons interested were parties to the action, and that the defendants were interested to the extent of one moiety or upwards in the said hereditaments, a sale thereof was ordered. But in case it should be certified that any of the persons interested were not parties, or that the defendants were not interested to the extent of a moiety or upwards in the hereditaments, there was liberty to apply in chambers for a sale. The defendants were found by the certificate to be entitled to the extent of one moiety, and the hereditaments were sold.

*Rowden, Q.C.*, and *W. M. Cann*, for the plaintiff.—The Partition Act, 1876, s. 6, allows an infant to request a sale, and in this case a sale was requested by the infant's counsel. Therefore a conversion was effected: *Rimington* v. *Hartley*, 29 W. R. 42, 14 Ch. D. 630; *Wallace* v. *Greenwood*, 16 Ch. D. 362, 29 W. R. Dig. 148. It was quite sufficient in this case that counsel consented on behalf of the infant. In fact this is the only way in which an infant's consent is obtainable. A married woman can consent in another way, but an infant cannot.

*Mulligan, Q.C.*, and *Charlton Hawkins*, for the defendant.—*Foster* v. *Foster*, 24 W. R. 185, 1 Ch. D. 588, a case under sections 23-25 of the Partition Act, 1868, is still an authority against conversion. The broad principle on which the court acts in such a case is shown in *Re Barker*, 29 W. R. 873, 17 Ch. D. 241, and that case at least shows that conversion cannot be effected by anyone in the position of a next friend. *Wallace* v. *Greenwood* was before the court in *Re Barker*. In the present case the order was carefully worded and there is nothing on the face of it to show that the infant consented: *Davis* v. *Ingram*, 45 W. R. 459, [1897] 1 Ch. 477.

They also referred to *Mordaunt* v. *Benwell*, 30 W. R. 227, 19 Ch. D. 302.

*Rowden, Q.C.*, in reply.—In *Re Barker* there was no request for sale. In the present case it is difficult to see how the infant could have consented more fully than he did by his next friend.

*Howard* v. *Jalland*, [1891] W. N. 210 was also referred to.

BYRNE, J.—Two questions were argued before me, the broader one being, whether or not a sale ordered by the Court under the provisions of the Partition Acts of 1868 and 1876 upon a request for sale made on the part of an infant by his next friend effects such a conversion of his real estate as to be free from an

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

equity for reconversion on the part of the heir of such infant in the event of his dying under the age of 21 years. It is clear that but for the 6th section in the Act of 1876 such an equity would exist: see *Foster* v. *Foster*; and I doubt whether Sir George Jessel, in the case of *Wallace* v. *Greenwood*, meant to lay down that such an equity for reconversion on the part of the heir would be lost simply by reason of the sale having been made at the request of the infant, such request for sale having been made under a special statute involving statutory incidents, including a provision for the reinvestment of the proceeds of sale in real estate, until such time as the infant, being of full age, could ask for payment as to a person absolutely entitled, as in this case. *Howard* v. *Jalland* has been referred to. As I have been furnished with office copies of the judgment and orders made in that case, I may state that it appears there that an infant by his next friend was one of several plaintiffs; that the judgment was prepared as follows: "And the plaintiffs and defendants, who claim to be interested in a moiety of the hereditaments in the statement of claim mentioned requesting a sale thereof and a distribution of the proceeds thereof instead of a division of the said hereditaments between or among them." And Kekewich, J., there said that he could not hold that the mere request for sale of counsel or solicitors for an infant operated as an election by an infant to take as personality. This case appears to me to be an authority for saying that when an infant by his next friend is one of several plaintiffs by counsel requesting a sale, and a sale is ordered upon such request, the proceeds of the infant's share ought to be ear-marked as real estate. In the present case, however, it does not appear to me to be necessary to decide whether this case is reconcilable with *Wallace* v. *Greenwood*. I have to deal with a special form of judgment, which in my opinion precludes the view that the court acted upon the request of the infant in directing the sale which was actually carried out. In the present case the action was brought by an infant as sole plaintiff by his next friends, and the writ and statement of claim asked for the sale of the real estate, to one moiety of which the infant plaintiff was absolutely entitled subject, to a tenancy, by the courtesy subsisting in one of the defendants. The defendants were between them entitled to the other moiety. [His lordship referred to the judgment and certificate, and continued:] The effect of the judgment was to leave to the defendants the right to demand a sale, if they were entitled to a moiety. It cannot therefore be said that the hereditaments were sold on the request of the infant. I therefore hold that there is no conversion of the infant's share; but that it remains realty.

Solicitors, *Charles Sawbridge & Son.*

---

Chan. Div.
Cozens-Hardy, J. } Nov. 9.

KENRICK *v.* MOUNTSTEVEN. (*a.*)

*Partition — Practice — Form of judgment—Permanent improvements—Allowance.*

*A tenant in common, claiming partition, is entitled whether charged with occupation rent or not, to have in the judgment for partition an inquiry as to expenditure properly made in permanent improvements to the property, during the co-ownership, and the inquiry should be reciprocal.*

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

*Observations on the authorities.*

Williams *v.* Williams, [1899] *W. N.* 66, 47 *W. R. Dig.* 143, *approved.*

Action.

This action was brought by the plaintiff Anne Jane Kenrick against the defendants as trustees of a settlement dated the 22nd of September, 1847, made on the marriage of Miss Harriet Chamberlaine and the Rev. Wm. Hy. Pook, for partition of the landed estates which formerly belonged to a Mr. George Chamberlaine, and which, on his death on the 20th of April, 1868, passed to the above-named Anne Jane Kenrick and the above-named Harriet Chamberlaine as his co-heiresses at law, he dying intestate.

Harriet Chamberlaine's moiety of the property was, by a deed dated the 6th of May, 1878, settled, pursuant to a covenant as to after-acquired property contained in the said marriage settlement, upon trust for herself for life, with remainder to her husband for life, with remainder to their children.

In the year 1883 an informal division of the property in question was made between the plaintiff and Harriet Chamberlaine, and an agreement embodying the terms of this division was signed by them, and the rents and profits had ever since been divided and enjoyed accordingly, but it was admitted at the hearing that this agreement did not bind the defendants, and that the case was not affected by its terms.

Minutes of judgment had been prepared, but a question arose as to whether the plaintiff, who claimed to have expended large sums on permanent improvements, and to have thereby increased the value of the property to be partitioned, was entitled to have an inquiry inserted as to expenditure on improvements. She had resided on part of the property, and had not been charged with anything by way of occupation rent, but it was contended that she was nevertheless entitled to have in the judgment an inquiry to the following effect—namely, an inquiry whether any and which of the persons interested in the said real estates and hereditaments have or has with the sanction and consent of the other persons entitled or interested in the said real estates and hereditaments properly laid out and expended any and what sums of money in substantial repairs or lasting improvements upon the said real estates and hereditaments or any part thereof.

*Eve, Q.C.*, and *E. S. Ford*, for the plaintiff.—The question is, to what extent is a tenant in common claiming partition entitled to have an inquiry as to permanent improvements?

They cited *In re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461, 41 W. R. Dig. 143; *In re Cook's Mortgage, Lawledge* v. *Tyndall*, 44 W. R. 646; and *Williams* v. *Williams*, W. N. (1899), 66, 47 W. R. Dig. 143, as establishing the right to the inquiry asked.

*Astbury, Q.C.*, and *Vaughan Hawkins*, for the defendant.—There is no authority for allowing the plaintiff an inquiry: *Swan* v. *Swan*, 8 Price 519; *Teasdale* v. *Sanderson*, 33 Beav. 534. Permanent improvements do not give the right as against a co-tenant unless an occupation rent is charged: see the 6th and 7th inquiries in *Cooper* v. *Fisher*, 2 Seton (5th ed.), p. 1565. That was the law till *Parker* v. *Trigg* (1874), W. N. 27, which was a very special case, and was, moreover, a sale and not a partition case. In *Watson* v. *Gass*, 30 W. R. 286, 2 Seton (5th ed.), p. 1566, the order was not a hostile order. *Leigh* v. *Dickeson*, 33 W. R. 538, 15 Q. B. D. 60, was not a decision on the point, and the *dicta* at pp. 67 and 69 are wrong, though they are relied on by North, J., in *In re Jones*, where *Teasdale* v. *Sanderson* was distinguished, and cited by Stirling, J.,

in *Hill* v. *Hickin*, 46 W. R. 137, [1897] 2 Ch. 579. [COZENS-HARDY, J., referred to *Leslie* v. *French*, 31 W. R. 561, 23 Ch. D. 552.]

COZENS-HARDY, J.—On principle the question is one of difficulty. But regard being had to the authorities, I think that it would not be right for me to express any view of my own. I find the point dealt with by Bacon, V.C., in 1874 (*Parker* v. *Trigg*), by Fry, J., in 1881 (*Watson* v. *Gass*), by Cotton and Lindley, L.JJ., in 1884 (*Leigh* v. *Dickeson*), by North, J., in 1893 (*In re Jones*), and again in 1896 (*In re Cook's Mortgage*), by Stirling, J., in 1897 (*Hill* v. *Hickin*), and by Kekewich, J., in 1899 (*Williams* v. *Williams*), and there is no break in this current of authority. I must follow the uniform decisions since 1874. I hold that a tenant in common is entitled to an inquiry, and it should follow the form approved by Kekewich, J., in *Williams* v. *Williams*, and be reciprocal.

Solicitors for the plaintiff, *Robins, Hay, Waters, & Hay*, for *Ffooks & James*, Sherborne.

Solicitors for the defendant, *Eyre, Dowling, & Co.*

NOTE.—*Williams* v. *Williams* was one of several actions for partition of different properties in which improvements had been severally effected by the defendants or their predecessors in title. Kekewich, J., in lieu of the form of inquiry given in 2 Seton (5th ed.), p. 1565, directed the following account and inquiry to be inserted in the judgments in the several actions—viz.: "An account of the moneys, if any, expended by the defendant or his predecessors in title in permanent improvements to the said hereditaments since" [the date of the party's title accruing], "and an inquiry as to the extent to which the present value of such hereditaments had been increased by such expenditure."

---

Q. B. Div.
(Ridley and Darling, JJ.) Nov. 2.

SHARMAN *v.* MASON. (*a.*)

*Bankruptcy—Reputed ownership—Goods used for purposes connected with trade or business—Mantle-stands—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (*iii.*).

*Goods "in the possession, order, or disposition of the bankrupt in his trade or business" which pass, by virtue of section* 44 *of the Bankruptcy Act*, 1883, *to the trustee in bankruptcy, may include goods used for purposes connected with the bankrupt's trade or business.*

*Stands or models used, with the knowledge and acquiescence of the true owner, in the business of a mantle dealer, who became bankrupt, were accordingly held to be goods in the bankrupt's possession in his trade or business, and, there being no proof of a custom to the effect that stands not belonging to the trader were used in the business, passed to the bankrupt's trustee.*

Appeal from the Mayor's Court.

The action was brought to recover possession of thirty-two mantle-stands used in the business of a mantle dealer, or, alternatively, for damages for their detention.

The stands were the property of the plaintiff, who had lent them to his brother in order to enable him to set up business as a mantle maker. The brother afterwards sold his business to a mantle dealer, and became manager of the business so sold.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The mantle dealer having become bankrupt, the defendant, who was her trustee in bankruptcy, took possession of the stands.

The plaintiff in this evidence admitted that he knew that the mantle dealer was using the stands in her business.

The defendant pleaded that the bankrupt was the reputed owner of the stands within the meaning of section 44 (iii.) of the Bankruptcy Act, 1883, and that he as her trustee was therefore justified in taking them.

The recorder left the question to the jury whether the stands were "in the possession, order, or disposition of the bankrupt in her trade or business by the consent and permission of the true owner under such circumstances that she was the reputed owner thereof."

The jury answered in the affirmative, and the recorder gave judgment for the defendant.

The plaintiff appealed.

*Jelf, Q.C.*, and *Cranstoun*, for the plaintiff.—The question left to the jury involved, really, two questions. One, namely, whether the stands were in the order or disposition of the bankrupt, was a question of fact properly left to the jury. The other was whether they were in the bankrupt's possession in her trade and business under such circumstances that she was the reputed owner thereof, and this was a question of law. Goods belonging to a third party are not within section 44 (iii.) of the Bankruptcy Act, 1883, unless they were left with the bankrupt under such circumstances that, as reputed owner, he could have sold them, or otherwise obtained credit upon them, in the course of his trade or business: *per* Lord Watson, *Colonial Bank* v. *Whinney*, 34 W. R. 705, at p. 707, 11 App. Cas. 426, at p. 440. It is clear that in the present case the trader had no power lawfully to sell or obtain credit for the stands. They were merely lent to him to be kept in his possession: *Whitfield* v. *Brand*, 16 M. & W. 282, and *Mace* v. *Cadell*, Cowp. 232.

He cited also *Ryall* v. *Rowles*, 1 Ves. sen. 348; *Joy* v. *Campbell*, 1 Sch. & Lef. 328.

*Danckwerts*, for the defendant.—The question left to the jury was a question of fact. The question of reputed ownership is a question of fact in each case: *Ex parte Watkins, In re Couston*, 21 W. R. 530, L. R. 8 Ch. App. 520. The point to consider is not whether the trader has the power to sell or pledge the goods, but whether persons seeing the goods on his premises would be induced thereby to give credit. Thus if there were a notorious custom for goods to be on the trader's premises which did not belong to him the section would not apply: *Thackthwaite* v. *Cock*, 3 Taunt. 487; *Priestley* v. *Pratt*, 15 W. R. 639, L. R. 2 Ex. 101; and *Whitfield* v. *Brand*. Here no such custom had been proved. It is not necessary for the section to apply that the trader should deal in the goods. It is enough if the goods are used in connection with his business.

*Cranstoun* replied.

RIDLEY, J.—The question for decision is whether these stands used for the exhibition of goods for sale, but not being part of the goods for sale, were goods in the order and disposition of the bankrupt within the meaning of section 14 (iii.) of the Bankruptcy Act, 1883. The words of that section have more than once been the subject of judicial construction. In the case of *In re Jenkinson*, 15 Q. B. D. 441, 15 W. R. Dig. 15, where the bankrupt was a stockbroker, silversmith, and watchmaker, it was decided that certificates of shares deposited by him with bankers in his own name to secure his trade account did not pass to the trustee because they were

not in his possession in his trade or business. The words of the Act were distinguished from those of the Act of 1869, and it was pointed out by the court that goods, if they are to pass to the trustee, must come into the bankrupt's possession in his trade or business, and not merely as a trader. The question arose again for determination in the case of *Colonial Bank* v. *Whinney* (in the Court of Appeal), 33 W. R. 852, 30 Ch. D. 261. There the bankrupts, who were stock and share brokers, and who were in the habit of purchasing shares and obtaining advances on them by equitable mortgages, had deposited shares so bought to secure an advance made to them by a bank, and the question was whether the trustee in bankruptcy could take the shares as being within the operation of this clause. In the end it was decided by the House of Lords that the shares were *choses in action* within the proviso at the close of the section; but as the majority of the Court of Appeal was of a different opinion on that point it was necessary for them to determine whether the shares were goods in the order or disposition of the bankrupts in their trade or business. Cotton, L.J., says: "Where we have goods such as stock-in-trade there is no difficulty. The goods or stock-in-trade of the firm would be in the order or disposition of the bankrupt in his trade or business. But in my opinion the words of the section would go further than that. I think the true construction is that the goods must be in the bankrupts' order or disposition for the purposes of or purposes connected with his trade or business." Lindley, L.J., agreed, and the decision was that as the custom of the firm was to buy shares out of the partnership money and use them for the partnership business, and as these shares were intended to be so used, they were in the order or disposition of the bankrupts within the meaning of the statute. It further appears from the judgment of Lindley, L.J., that the chief doubt in his mind arose from the fact that the shares were not visible. He says: "One question, which to my mind is a most important and difficult question, is this, whether anything is meant by the expression in the Act which is not applicable to a visible thing. I can understand how goods and chattels in the ordinary sense visible —things in a shop or factory—are in a man's trade or business; and it was contended by the appellants, and very ably contended, that nothing was in a man's trade or business within the meaning of the section which was not visible." Now, in the present case, the stands in question are visible, so that the argument which had so much weight with the Lord Justice cannot be raised. And the stands, though in a different way, are quite as much connected with the trade or business as were the shares in the *Colonial Bank case*.

During the argument several instances were put by counsel for the appellant of things used similarly to these stands which would not (as it was contended) be considered to be connected with the bankrupt's trade or business; such were a brougham to convey goods, or stands of little value in a wig-shop. But it appears to me that in each instance the things in question would be connected with the trade or business, and therefore within the order or disposition section if the bankrupt was in possession of them under such circumstances that as the reputed owner he could have sold them or otherwise obtained credit upon them in the course of his trade or business. That point did not arise at the hearing of the *Colonial Bank case* in the Court of Appeal, for it was conceded. But what I have just said are the words of Lord Watson when the case was under the consideration of the House of Lords. It was argued indeed that in order to satisfy those words the very particular thing must be such as the bankrupt could have obtained money upon if he were to pledge it, and that the stands were not such as the bankrupt could have obtained money upon if he were to pledge them. I, however, think it more probable that his lordship was dealing with the goods and chattels in the shop as a whole, and that all goods which might be held to have sufficient importance to enter into the value of the trade or business in the mind of an intending lender would fall within the rule. That question would be one of fact, and would be for a jury; and I think a direction to that effect would be more accurate than one that the jury should merely consider the value of each particular thing. Here the question was left to the jury by the recorder in the general form it is true, and they answered it in the favour of the trustee. Nor can this court alter the decision.

It was further urged for the appellant that the possession of these stands would not raise a presumption of reputed ownership by the bankrupt, and the case of *Ex parte Watkins* was quoted. I think that where it is known generally that the trader may be in possession of the goods in some other capacity, such as warehouseman or factor, they are not within the statute. Such a case was that of the wine merchant in *Ex parte Watkins*, and the bookseller in *Whitfield* v. *Brand*. Guns left at a gunmakers for repair, or plate, will afford other examples. But in each case it is a question of fact that is properly to be determined by a jury. Nor do I see that in such a case as the present it can be said that a finding in favour of the trustee was a wrong finding. Certainly no custom can be alleged here at all similar to those found in the wine merchant's and bookseller's cases. *Thackthwaite* v. *Cock*, quoted in the argument, was a case relating to hops left in the merchant's warehouse after sale, where it was found that the custom was not proved as a fact.

The appellant further placed reliance on the observations made by Lord Fitzgerald in the *Colonial Bank case*, and in the earlier cases of *Ryall* v. *Rowles* and *Joy* v. *Campbell*, as showing that there must be something contrary to good faith in the transaction, before the court will allow goods belonging to one person to be taken in satisfaction of the debt of another. No doubt the possession, order, or disposition must be in a person who is not the owner, and who ought not to have them; and no doubt the object of the Acts of Parliament passed on this subject has been to prevent deceit by a trader who is in the visible possession of property to which he is not entitled. These are the words of Lord Redesdale in *Joy* v. *Campbell*, many times approved by subsequent decisions. But they do not mean that it is necessary, in order that the statute may apply, that there should be any actual bad faith. If so, where was the bad faith in the *Colonial Bank case*? The same observation applies to many other cases. It is true that Lord Redesdale uses the word unconscientiously—"whom the owner permits unconscientiously to have such order and disposition"; but he adds, "as the Act supposes." The expressions mean no more than this, that the mere possession by a person not the owner, with the consent of the true owner, so as to obtain credit, was considered by the Legislature unfair.

I would add that the case *Lingard* v. *Messiter*, 1 B. & C. 308, does not appear to me to affect the principle under discussion and merely turns upon the evidence produced in that particular case to show that the bankrupt in question had ceased to be the reputed owner of the goods.

For these reasons I think that there was evidence on which the jury might properly find as they did, and that the appeal should be dismissed.

DARLING, J.—The question is, whether stands, or models for the display of costumes, when allowed by the true owner of them to remain in possession of a bankrupt person for the purpose of displaying upon them for sale clothes sold by the bankrupt in the ordinary course of his business, are goods "in the possession, order, or disposition of the bankrupt in his trade or business" within the meaning of section 44 of the Bankruptcy Act, 1883. It was argued by Mr. Jelf on behalf of the appellant that these goods are not subject to that section of the Act, because they were not such things as were for sale in the business of the bankrupt. Now, if I could entirely accept some of the expressions used in judgments given in the older cases, I should agree that this is law to-day. But having regard to the language of judges of late years, I cannot think that such phrases as "The goods must be such as the party suffers the trader to sell as his own" can now be accepted, although they are quoted with apparent approval by Parke, B., in *Whitfield* v. *Brand*. As to what may be the real meaning of the words in question, there is, I think, no direct authority. Indeed it is said by Lord Fitzgerald in the latest case (*Colonial Bank* v. *Whinney*) that "their construction has yet to be determined." It is to be remarked, however, that the words are not now, and have not been since 6 Geo. 4, c. 16, s. 72, what they were when many of the earlier cases were decided. It is pointed out by Parke, B., in *Whitfield* v. *Brand* that they now stand as "possession, order, or disposition," instead of "possession, order, and disposition." I think, therefore, that it is enough if these goods were in the possession of the bankrupt in his trade or business. although they were not in his disposition therein in the sense that they were such things as he sold in his trade. The words "order or disposition" seem to me necessary to enlarge the word "possession" so as to include something beyond visible occupation by a reputed owner. If it be said that this construction appears inconsistent with Lord Watson's words in *Colonial Bank* v. *Whinney*: "The principle which appears to me to be deducible from the authorities is this, that the goods belonging to a third party are not within section 44 (iii.) of the Bankruptcy Act, 1883, unless they were left with the bankrupt in such circumstances that, as reputed owner, he could have sold them, or otherwise obtained credit upon them in the course of his trade or business," then I would answer that I understand Lord Watson to have meant by obtaining credit upon the goods, not merely getting a loan by pledging them, but obtaining credit on the purchase of other goods, because of the bankrupt appearing to own things valuable for business purposes, though not for sale in his business. This construction recommends itself to me as being entirely consonant with the passage quoted by Lord Ashbourne from *Ryall* v. *Rowles* as applicable to the existing bankruptcy law, that the intent of it is "to prevent traders from gaining a delusive credit by a false appearance of substance to mislead those who should deal with them": see *Colonial Bank* v. *Whinney*, in the House of Lords, p. 447.

Moreover, I think there is extreme force in the passage from the judgment of Cotton, L.J., in *Colonial Bank* v. *Whinney*, cited by my learned brother. It is plain that the words used by the Lord Justice would cover goods much less directly connected with the bankrupt's trade than are those here in question. Indeed, it is probable that, although not for sale, these stands might rightly be considered as part of the stock-in-trade of the bankrupt as being goods necessary to the carrying on of the trade or business. Further on, in the same case Lindley, L.J., construes these words as meaning "not merely visibly employed in his trade or business, but acquired for the purposes of the business and used for those purposes."

The decision of the Court of Appeal in which these expressions were used was reversed by the House of Lords; but the reasoning of the Lords Justices upon those points remains unaffected by that decision. Still, the passages I have quoted from their judgments are said by Mr. Jelf—though I do not agree with him—to be *obiter dicta*, and further, to be in conflict with an unreported decision of my own at *nisi prius*. Such decisions at *nisi prius* as had the good fortune to be reported by Lord Campbell are admittedly of high authority, but I cannot bring myself to attribute to that particular decision of a court of first instance which has been pressed upon me, an authority overbearing the opinion of the Lords Justices, *obiter dicta* though they be.

*Appeal dismissed.*

Solicitor for the appellant, *S. S. Seal.*

Solicitor for the respondent, *C. Butcher.*

---

Q. B. Div. (Bigham, J.) June 16, 22, 1899.

GREAT WESTERN RAILWAY CO. v. LONDON AND COUNTY BANKING CO. (LIMITED). (*a*.)

*Banker—Cheque—"Customer"—Defective title—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

*A rate collector by falsely pretending that a rate had been made obtained from the plaintiffs a cheque, drawn in the collector's favour as payee, crossed generally and marked "not negotiable." The collector took the cheque to the defendants' bank at which he had for some years been in the habit of cashing cheques, but at which he kept no account; a part of the amount of the cheque was at the collector's request credited to the account of a local authority which banked with the defendants, and the balance was handed to the collector and appropriated by him to his own use. The defendants in due course presented the cheque and received payment thereof.*

*The Bills of Exchange Act*, 1882, *s.* 82, *provides that where a banker in good faith and without negligence receives payment of a crossed cheque for a customer who has a defective title to the cheque the banker shall incur no liability to the true owner of the cheque.*

*Held, that it is a question of fact whether a person is a "customer" of a bank within the meaning of section* 82; *that the collector was a customer of the defendants, and that they received payment of the cheque for him within the meaning of the section.*

Action tried in the Commercial Court.

The plaintiffs sought to recover the sum of £142 10s., as money had and received by the defendants to the use of the plaintiffs, or alternatively as damages for the conversion of a cheque.

The facts are fully stated in the judgment.

*H. D. Greene, Q.C.*, and *Park Goff*, for the plaintiff.

*H. T. Lawrence, Q.C.*, and *Guy Lushington*, for the defendants.

The following cases were cited: *Mathews* v. *Brown & Co.*, 63 L. J. Q. B. 494; *La Cave & Co.* v. *Crédit Lyonnais*, [1897] Q. B. 148, 45 W. R. Dig. 8; *White* v. *Garden*, 10 C. B. 919; *Arnold* v. *Cheque Bank*, 24 W. R. 759, 1 C. P. D. 578; *Mathiessen* v. *London and County Bank*, 27 W. R. 838, 5 C. P. D. 7; *Fisher* v. *Roberts*, 6 Times L. R. 354; *National Bank* v. *Silke*, 39 W. R. 361, [1891] 1 Q. B. 435;

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

*Kleinwort, Sons, & Co.* v. *Comptoir National d'Escompte de Paris*, [1894] 2 Q. B. 157. *Cur. adv. vult.*

June 22.—BIGHAM, J., read the following judgment: This was an action brought for £142 10s., money had and received by the defendants to the use of the plaintiffs, or, in the alternative, for damages to a like amount for the conversion of a cheque. The facts were as follows: One, Huggins, had been for many years a rate collector in the employment of the Wantage Rural District Council and for other similar bodies. In this capacity he had been in the habit of receiving from the plaintiffs and others cheques for the amounts payable by them for rates, and the cheques he received he used frequently to cash through the defendants' branch bank at Wantage. He had been in the habit of cashing cheques in this way for fifteen or twenty years, and a considerable number of cheques (fifty or sixty) were cashed by him in the course of each year. Apparently Huggins, on receipt of the money for the cheques, distributed it among the local bodies to whom he had to account. He was well known to the manager and officials of the bank at Wantage. The bank were the bankers of the Wantage Rural District Council. Huggins, however, kept no account with the defendants, nor had he any pass book; each of his transactions with the defendants were completely disposed of as and when he brought the cheques. In November, 1898, Huggins falsely pretended to the plaintiffs that a rate had been made, and that the plaintiffs owed in respect of the same £142 10s. By this means he induced the plaintiffs to give him their cheque for that amount. The cheque was drawn on the London Joint Stock Bank in favour of Huggins or order; it was crossed generally and marked "Not negotiable." On the 16th of November, Huggins in accordance with his usual course of dealing with the defendants, took this cheque to their bank at Wantage to get it cashed. He handed it across the counter to the bank clerk, and the latter filled up a paying-in slip, which Huggins signed. This paying-in slip contained no reference to the cheque itself, but purported to show a payment into the bank of £142 10s. in money, a payment out to Huggins of £117 10s. and a payment to the credit of the district council's account at Huggins' request of £25. The business effect of this was, that the bank handed to Huggins the amount of the cheque, £142 10s., which he there and then disposed of to his own use. Having thus obtained the cheque, the defendants crossed it to themselves and sent it up to their head office in London for collection. It was duly presented and paid. The question is whether the defendants are liable to account to the plaintiffs for the money so paid. Now, if this cheque had neither been crossed nor marked "Not negotiable" there could be no doubt as to the right of the defendants to retain the proceeds. It would be true to say that Huggins' title to it was defective. See section 29, sub-section 2, of the Bills of Exchange Act; but inasmuch as the defendants took the cheque in good faith and for value, and without any notice of the defect, the plaintiffs would have no cause of action against them; what then is the effect of the crossing? The effect of crossing a cheque is stated in section 79, sub-section 2, of the Act. It is that if the banker on whom it is drawn pays it otherwise than to a banker, he renders himself liable to the true owner for any loss he may sustain owing to the cheque having been so paid. Then section 80 provides that if the banker on whom the cheque is drawn pays it in good faith and without negligence to another banker, he shall stand in the same position as if he had made the payment to the true owner of the cheque. These two sections deal with the liabilities and rights of the banker on whom the cheque is drawn. The next two sections define the position, first, of any person who may take a crossed cheque marked "Not negotiable," and secondly, of a banker who receives payment for a customer of a crossed cheque. Section 81 provides that a person who takes a crossed cheque marked "Not negotiable" shall have no better title than the person from whom he took it had. Section 82 provides that where a banker in good faith and without negligence receives payment for a customer of a crossed cheque, and the customer has no title or a defective title to it, the banker shall incur no liability to the true owner by reason only of having received such payment. Applying the law as contained in these sections to the facts of this case, it appears to me that Huggins, who, as I have said, had only a defective title to the cheque, could give no better title to the defendants because the cheque was crossed and marked "Not negotiable," but that though he could only give a defective title to the defendant, yet if the defendants, being bankers, can show that they did no more than receive payment of the cheque in the manner described in section 82, they are protected. Now, I find as a fact that the defendants received the payment in good faith and without negligence. I find also that they received it for Huggins. It was argued that they did not receive for Huggins, but for themselves. It was said that they bought the cheque, but if by this expression it meant that they took the cheque without recourse, I am clearly of opinion that the contention is wrong. What the bank did was this: They advanced £142 10s. to Huggins, and Huggins became their debtor to that amount; they then undertook with him to send forward the cheque for collection, and to apply the proceeds, when received, to the extinguishment of his indebtedness. This, in my opinion, amounted to receiving the money for Huggins. Suppose the bank had not paid any money to Huggins on the 16th of November, could it then be argued that in presenting the cheque they were not presenting it for him? Clearly not; and I cannot see why the fact that they paid him the money on the 16th of November in anticipation of the payment of the cheque next day in the clearing-house should make any difference. Only one question then remains—the real question in the case, Was Huggins a customer within the meaning of section 82? Now, whether a person is or is not a customer of a bank must be a question of fact to be determined with reference to the circumstances of each case. It is undesirable to attempt to define what constitutes a man a customer of a bank. It is much better to leave the question at large, so that a jury or the court may deal with each case as it arises. The Act of Parliament has not attempted any definition; banker is defined, but not customer; and I think the Legislature wisely omitted to define the expression. Then was Huggins in fact a customer? I think he was; he had been in the habit for many years of using the defendant bank in connection with transactions which undoubtedly constitutes part of a banker's business: the collection of cheques; and he was well-known to the bank. This is, I think, sufficient to constitute him a customer within the meaning of the section.

I come, therefore, to the conclusion that the defendants are entitled to the protection of the section, and are consequently not liable in this action. In these circumstances it becomes unnecessary for me to deal with the other questions raised in argument by Mr. Lawrence,

*Judgment for the defendants.*

Solicitor for plaintiffs, *R. R. Nelson.*

Solicitors for defendants, *Harries, Wilkinson, & Raikes.*

Chan. Div. Stirling, J. July 19, 20; Aug. 1, 1899.

TALLERMAN v. THE DOWSING RADIANT HEAT CO. (LIMITED). (a.)

*Trade competition — Rival manufacturers of medical apparatus—Appropriation of medical testimonials—Fraudulent representations—Damage to manufacturer —Injunction refused.*

*A manufacturer of patented medical apparatus had received favourable notices and comments in the medical and other press, which a rival manufacturer of later and similar apparatus had copied, in modified forms, into several pamphlets by which he advertised his goods.*

*Held, that there was no evidence that the defendant's goods were passed off for the plaintiff's, and that the application for an interlocutory injunction to restrain the issue of such pamphlets containing the testimonials must be refused.*

Franks v. Weaver, 8 *L. T.* (*O. S.*) 510, 10 *Beav.* 297, *distinguished.*

Batty v. Hill, 11 W. R. 745, 1 *H. & M.* 264, *approved.*

Motion.

The plaintiff Lewis Abraham Tallerman was the inventor of a mode of treating various diseases by means of superheated air, and was the patentee of an apparatus for carrying this mode of treatment into effect. Since 1893 his system had been in practical operation, and during that period had attracted the favourable attention of many members of the medical profession. In the *Lancet* of the 29th of August, 1896, there appeared an article on the subject by Dr. Knowsley Sibley, containing an account of the Tallerman mode of treatment, and particulars of its application to specific cases. Dr. Sibley had also made a speech upon the same subject before the British Balneological and Climatological Society. The defendant company was formed in December, 1898, for the purpose of applying a rival mode of treatment to the same class of cases, the apparatus for this having been patented in 1897 and 1898 by Herbert John Dowsing, an electrical engineer. The main difference between the two systems was that luminous heat was made use of by Dowsing, while the plaintiff applied dark or obscure heat. Dowsing's system had been favourably noticed by some medical men. For the purpose of advertising Dowsing's system, the defendant company had issued and circulated three pamphlets, in regard to each of which the plaintiff made some complaints. The first pamphlet was entitled "The Dowsing Radiant Heat System," and contained an extract from the *Daily Mail* of the 17th of January, 1899, which stated that Dr. Sibley, senior physician at the North-West London Hospital, had contributed an article to the *Lancet* on this system, whereas, in fact, the article related to Tallerman's system. The second pamphlet, which was entitled "The Radiant Heat Treatment (Dowsing's Patent): Extracts from the Medical Press," contained what purported to be an "extract from an article published in the *Lancet* by Mr. Knowsley Sibley, M.A., M.D., B.C. Camb., M.R.C.P. Lond. (Senior Physician to Out-Patients at the North-West London Hospital), on Local Hot-Air Treatment for Rheumatism, Gout, and Allied Affections." The extract omitted from the title the name of the plaintiff Tallerman which appeared in the title of the original article, and also any mention whatever of the plaintiff Tallerman or his system. The extracts had been so made that the reader would naturally believe that certain statements of fact which appeared in the article related to the defendant's system, whereas in fact they related to the plaintiff's. For example, on p. 4 of the pamphlet the following passage occurred: "A period of two years has enabled me to form a definite opinion that the value of the treatment is not merely a temporary one, but is of a more or less permanent nature." The third pamphlet was entitled, "The Dowsing Radiant Heat Co. (Limited)—Extracts from the Journal of Balneology and Climatology," and contained what purported to be a report of the speech made at a meeting of the society of that name. In that speech as delivered certain specific references were made to the systems both of the plaintiff and of the defendant company; but in this pamphlet both had been struck out. Under these circumstances the plaintiff Tallerman and the Patents and Manufacturers' Development Co. (Limited), a company which he had formed for the development of his invention, brought this action and moved for an injunction to restrain the defendants from printing, publishing, issuing, or circulating any pamphlet, notice, circular, or advertisement which contained any press notice, testimonial, or other document, or any other extract therefrom originally written in favour of the plaintiff's hot-air treatment, or in which any use was made of the reputation of the plaintiff Tallerman or his hot-air treatment, or which would lead to the belief that any press notice, testimonial, or other document, originally written in favour of the plaintiff's hot-air treatment, was written in favour of the defendants' treatment; and also from representing or doing anything leading to the belief that the defendants' treatment by hot-air is the same as, or substantially equivalent in results to, the plaintiff's hot-air treatment. The plaintiff's evidence showed that these pamphlets had been sent to persons who had been treated by the plaintiff's system, some of whom had been misled into the belief that Dr. Sibley's article and speech related to the defendant's system; and, further, that the circulation of these pamphlets among such persons was attributable to the exertions of a Mr. Pritchard, who was formerly secretary of the plaintiff company, but who had since entered the service of the defendant company and was carrying on their business from his former office. The defendant Dowsing attempted to explain the extracts in the pamphlets by saying that the article in the *Lancet* contained a number of well-stated propositions applicable to any of the existing systems for the applications of dry heat for therapeutic purposes, but this was not made out; and he further stated, as the fact was, that the report of Dr. Sibley's speech was obtained from Dr. Sibley himself, and that the proofs were corrected by him. He also offered to discontinue the employment of Pritchard from September next.

*W. H. Upjohn, Q.C.*, and *W. H. Cozens-Hardy*, for the plaintiff, submitted that this was unfair competition which the court would restrain, because the extracts as published were untrue and were fraudulently made for a purpose involving damages to the plaintiff and pecuniary advantage to the defendants to which they were not entitled, *Pasley* v. *Freeman*, 3 T. R. 51 2 Smith's Leading Cases (10th ed.) 64. The plaintiff had not advertised his system, but had left himself in the hands of the medical profession, relying solely for his reputation on the notes of cases in the medical journals, and these notes had been fraudulently appropriated; in *Franks* v. *Weaver*, 10 Beav. 297, specific relief had been granted on a very similar point according to the report of that case in 8 L. T. (O. S.) 510.

*C. E. Jenkins, Q.C.*, and *A. R. Ingpen*, for the

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

defendants, contended that this was not a passing-off case and must fail as a matter of law; it is not actionable for one tradesmen to use testimonials given to another tradesmen, but they can only be used as evidence in a passing-off case. *Franks* v. *Weaver* is distinguishable on that ground. The court will not restrain statements merely because untrue: *per* Lord Herschell in *White* v. *Mellin*, 43 W. R. 353, [1895] A. C. 154. These erroneous impressions caused by user of advertisements are not enough unless there is passing-off of the defendants' goods as and for the plaintiff's: *Birmingham Vinegar Co.* v. *Powell*, 44 W. R. 688, affirmed in [1897] A. C. 710, 46 W. R. Dig. 164; *Clark* v. *Freeman*, 11 Beav. 112; *Ajello* v. *Worsley*, 46 W. R. 245, [1898] 1 Ch. 274.

*Cur. adv. vult.*

STIRLING, J., after stating the facts, and having observed that, as to Dowsing's explanation of the extracts, his conduct might have been very proper if, instead of including statements of particular fact, he had confined himself to general statements, continued: In my opinion, whatever may be the legal merits of the case, the plaintiffs have reason to complain of what the defendants have done. The use made of the extracts from Dr. Sibley's article and speech was calculated to cause annoyance to the plaintiffs and the employment of Pritchard to rouse their suspicions. The case, however, is admitted not to be one in which the defendants are selling or trying to pass off their treatment or apparatus as and for the plaintiffs'. Neither can it be said that their pamphlets contain false statements as to the plaintiffs' business; the false statements relate to the defendants' business. What is said is that the defendants are making statements, false to their knowledge, which will cause damage to the plaintiffs, and the judgments in *Pasley* v. *Freeman* were referred to, particularly that of Buller, J., in which it was laid down that "fraud without damage or damage without fraud gives no cause of action, but where these two concur an action lies." The principle established by that case is thus stated by Parke, B., in *Langridge* v. *Levy*, 2 M. & W. 519, at p. 531: "A mere naked falsehood is not enough to give a right of action, but it is so if it be a falsehood told with intention that it should be acted on by the party injured, and that act must produce damage to him." Here, however, the statements complained of were not intended to be acted on by the plaintiffs and have not been acted on by them. But it was said that the principle went beyond this, and reference was made to some observations of Mellish, L.J., in *Singer Manufacturing Co.* v. *Wilson*, 24 W. R. 1023, 2 Ch. D. 434, at p. 453, when he was considering the case of the wrongful user of a trade-mark. The Lord Justice there said: "Originally, I apprehend, the right to bring an action in respect of the improper use of a trade-mark arose out of the common law right to bring an action for a false representation, which, of course, must be a false representation made fraudulently. It differed from an ordinary action for false representation in this respect, that an action for false representation is generally brought by the person to whom the false representation is made; but in the case of the improper use of a trade-mark, the common law courts noticed that the false representation which is made by putting another man's trade-mark, or the trade name of another manufacturer, on the goods which the wrongdoer sells, is calculated to do an injury, not only to the person to whom the false or fraudulent representation is made, but to the manufacturer whose trade-mark is imitated, and therefore the common law courts held that such a manufacturer had a right of action for the improper use of his trade-mark."

The case which was greatly relied on on behalf of the plaintiffs was the case, before Lord Langdale, of *Franks* v. *Weaver*, which is reported in 10 Beav. 297 and more fully in 8 L. T. (O. S.) 510. There the plaintiff complained that the defendant, who made a medical preparation similar to that of the plaintiff, had made it up in such a way as to bring on the wrappers the plaintiff's name, and also had enclosed within the wrappers copies of testimonials given by eminent medical men in favour of the plaintiff; and, no doubt, a use, and an improper use, was there made of the testimonials which had been given in favour of the plaintiff. But it seems to me that the user there was of a totally different kind from that which occurs in the present case. I am reading from the report in the *Law Times*. Lord Langdale says: "It seems to me to be perfectly clear that nobody can look at all these circumstances without observing that the name and the testimonials of the plaintiff are so craftily applied—for that is the word which is properly applicable here—so craftily applied that they are well calculated to produce in the minds of ordinary readers, who are generally the majority of those who would read it, they were calculated to produce in the minds of persons who are ordinary readers the impression that the mixture or solution prepared and sold by the defendant is the same as the mixture or solution to which these testimonials apply—that is to say, the mixture or solution of the plaintiff." And a little further on he says: "The fraud certainly consists in the crafty adoption of these words in such a manner as to say the thing he makes is prepared by the plaintiff; he issues it in such a way that it is difficult for any person who is not a critical reader to find out that he does not mean to do that." And then he finally says: "I believe that this falls within the principle of the former cases of this kind, that he is doing that ordinarily and constantly which is calculated to make persons believe that when he is selling his own article he is in fact selling the article of the plaintiff." Now, the basis of that judgment was that the defendant was selling his own goods as those of the plaintiff. It is admitted that this case does not fall within that principle. But what was much pressed upon me was that after granting an injunction in the ordinary form, according to the report in the *Law Times*, the Master of the Rolls went on to grant an injunction to restrain from publishing or circulating any cover or wrapper and so forth, in which any use was made of the character and reputation of the plaintiff. I have compared the report in the *Law Times* with the order as found in the registrar's book, and I find there a few more words added. It ran there, not merely "in which any use is made of the character and reputation of the plaintiff," but these words follow, "as applicable to any preparation or compound of the defendant or his firm," and I do not know that the addition of these words makes any material difference, but it seems to me that the justification for that modification of the ordinary form of injunction must be found in this, that the Master of the Rolls came to the conclusion that such a use of the character and reputation of the plaintiff was a means of passing off the goods of the defendant as those of the plaintiff. I cannot say that I can arrive at this conclusion in the present case, and therefore it seems to me that that case of *Franks* v. *Weaver* is no authority which guides me in the present case. On the other hand, I find what seems to me an authority which points the other way. I refer to the case before Hatherley, V.C., of *Batty* v. *Hill*. That certainly was a very gross case,

because the plaintiff there, who was a maker of pickles, had had awarded to him a prize medal at the International Exhibition of 1862. He and another were the only persons who obtained prize medals in respect of their manufacture, and the defendant Hill was advertising his goods as having obtained prize medals. The case was argued by Sir Hugh Cairns and Mr. Bagshawe. Hatherley, V.C., says this: "I ought to be careful as to acting in this case. On the question of balance of convenience, I should be decidedly in favour of the plaintiff; the inconvenience of the defendant would be merely the necessity of telling the truth. It is, however, no part of the duty of this court to enforce the observance of the dictates of morality, and though the old maxim, *rem facias rem si possis recte, si non quoumque mode rem*, seems to apply in full force to modern times, I can only interfere when some private right is thereby infringed." Then he goes on to remark on some portions of the evidence, and says: "But, as I have come to the conclusion that there is no substance whatever in the charge of a previous attempt to pass off the defendants' goods as the plaintiff's, I must deal with the present case without the only element which would enable me to make the order which is now applied for." He goes on to discuss the case at great length and to go further into it. So that the Vice-Chancellor in a case in which a flagrant untruth was stated, and one which would seem calculated to cause damage to the plaintiff complaining there, refused to interfere, at all events by way of interlocutory injunction. The Legislature afterwards came to the relief of the plaintiff in that case, and passed Acts prohibiting any such conduct in future; but as the law then stood it seems an authority. Now, it seems to me that untrue statements, such as occur in the present case, are very different from those which were found in *Batty* v. *Hill*. There is no evidence of any actual damage having been suffered by the plaintiff, and, I confess, regard being had to the nature of the statements as they are found in the pamphlets, I entertain great doubt as to whether any actual damage will ever accrue. Under these circumstances I think I ought not to interfere by way of an interlocutory injunction, and I therefore make an order on the motion, but I specially reserve the costs to be dealt with at the trial.

Solicitors, *Davidson & Morris; H. Clifton Lambert.*

---

Chan. Div. }
Kekewich, J. } Nov. 16, 22.

THIERY v. CHALMERS, GUTHRIE, & CO. (a.)

*Lunatic—Lunatic not so found—Foreign lunatic—Status of lunacy declared by competent foreign court—Guardian appointed by competent foreign court—"Tuteur"—Vesting of property in guardian—Power of guardian to give receipts and discharges—Payment and transfer to guardian.*

*Where application is made to the court to direct an English firm holding moneys and securities of a foreign lunatic for payment and transfer thereof to the applicant, if there has been a judicial declaration of the status of lunacy by a competent court of the country to which the lunatic belongs, and if the applicant on the lunatic's behalf has, according to the laws of the lunatic's country, the latter's property vested in him in the sense that he has the right to retain and deal with it without becoming the actual owner, the application may properly be, and generally should be, granted.*

Semble, *a French "tuteur" is such an applicant.*

Further consideration of an action claiming an account of moneys deposited with or received by the defendants, Messrs. Chalmers, Guthrie, & Co., of 9, Idol-lane, in the City of London, for or on behalf of the plaintiff as his bankers and agents, and for payment of what should be found due.

The action was originally brought by the plaintiff George Thomy Thiery, a person of unsound mind not so found, who sued by Ernest William Woods Davey, his next friend; but on the 24th of March, 1899, the writ was amended pursuant to an order of the master dated the 13th of March, 1899, by adding, as co-plaintiff, the name of Joseph Jean Edouard Le Juge de Segrais, who sued as the "tuteur" or guardian duly appointed of George Thomy Thiery.

On the 29th of March, 1899, the plaintiffs obtained an order for an account of all money deposited with or received by the defendants for or on behalf of George Thomy Thiery as his bankers and agents as claimed by the indorsement on the writ, and the further consideration was adjourned.

An the 10th of July, 1899, the master by his certificate found that a balance was due on the account from the defendants to the plaintiff George Thomy Thiery of £2,362 15s. 8d., and that the defendants further held as plaintiff's bankers and agents the following securities: 500 £5 per cent. debentures of the Poor Law Commission, Mauritius, and a certificate for 10 Bank of Mauritius shares of £10 each.

George Thomy Thiery was domiciled in France, and from the affidavit with exhibits of a French avocat it appeared was on the 4th of April, 1898, declared "interdit" or lunatic by the judgment of the duly constituted French civil tribunal, and a council of his family were ordered to appoint a "tuteur." Such judgment was, according to French law, a judicial finding affecting the status of George Thomy Thiery.

On the 6th of May, 1898, the family council duly appointed Le Juge de Segrais as "tuteur." By virtue of this appointment the whole estate of George Thomy Thiery was, according to French law, vested in Le Juge de Segrais, who thereupon became entitled to take possession of every part of it whatsoever and wheresoever, to maintain actions on behalf of his estate, and in every respect to represent his estate in the most complete manner, and to give good and valid discharges in respect of all moneys, stocks, funds, and securities paid or transferred to him forming part of such estate. As "tuteur" he was consequently in a totally different position from an "administrateur provisoire," in whom the lunatic's estate would not be vested.

The defendants were willing to pay over the moneys and securities, and also other moneys for interest, &c., accrued since the date of the master's certificate if the court was of opinion that Le Juge de Segrais was competent to give them a good and valid discharge. Minutes had been prepared which the court was now asked to sanction, and were to the following effect:

"That the defendants may be ordered to pay to the plaintiff Le Juge de Segrais as 'tuteur' to the plaintiff George Thomy Thiery, or as he may direct, the sum of £2,362 15s. 8d. certified to be due from them to George Thomy Thiery by the certificate filed in this action on the 14th of July, 1899, and any further moneys which they may have received or may receive either by way of dividend or otherwise on account of the said George Thomy Thiery.

"That the defendants may also be ordered to transfer to Le Juge de Segrais as such 'tuteur,' or as he shall direct, the securities mentioned in the said

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

certificate as being held by them on account of the said George Thomy Thiery."

*Rolt*, for the plaintiff.—*Didisheim* v. *London and Westminster Bank*, 43 SOLICITORS' JOURNAL, 642, does not apply. That was the case of an "administrateur provisoire," who is in a totally different position to a "tuteur," inasmuch as the lunatic's estate would not be vested in him. We ask for payment, and delivery of the securities. Cases where the money is in court, or under the Trustee Act, or where the application is made under the Lunacy Act, are entirely different. There the court has and exercises a discretion: *In re Knight*, 46 W. R. 289, [1898] 1 Ch. 257 (Lunacy Act); *In re Garnier*, 20 W. R. 288, L. R. 13 Eq. 532 (Trustee Relief Act); *In re Chatard's Settlement*, 47 W. R. 515, [1899] 1 Ch. 712 (Trustee Relief Act); *In re Barlow*, 35 W. R. 737, 36 Ch. D. 287 (Trustee Relief Act); *Grimwood* v. *Bartels*, 25 W. R. 843. Here it is merely a case of debtor and creditor, and the "tuteur" is entitled to the order: *Newton* v. *Manning*, 1 Mac. & G. 362; *Scott* v. *Bentley*, 3 W. R. 280, 1 K. & J. 281, and *In re Morrison* there cited; *Hessing* v. *Sutherland*, 4 W. R. 820. The defendants could not have paid money into court under the Trustee Acts (*In re Sutton's Trusts*, 27 W. R. 529, 12 Ch. D. 175), nor under the Judicature Act, 1873, s. 25 (6), as there is no notice that is disputed.

*Christopher James*, for the defendants.—We do not dispute the fact that we hold the money and securities for the lunatic, and we are quite willing to pay it over to the "tuteur" if he can give us a proper discharge, so that we may be protected. The only question is, Can we do so? There are cases where the court will not part, as of course, with a lunatic's money—*e.g.*, in cases of money paid in under the Trustee Relief Act; but that is not the case here. Here it is really only a question of debtor and creditor. The case of *In re De Linden*, 45 W. R. 342, [1897] 1 Ch. 453, is distinguishable from *Didisheim* v. *London and Westminster Bank*, and is practically on all fours with the present case. It is really a question of fact. Can the applicant, being the appointed officer of the French court, give us a good discharge? SOLICITORS' JOURNAL, October 1st, 1898 (Lunatics Out of the Jurisdiction).

*Cur. adv. vult.*

KEKEWICH, J.—This action was brought to recover from the defendants money and securities held by them as bankers and agents of the plaintiff George Thomy Thiery, who sues as a person of unsound mind not so found by Ernest William Woods Davey, his next friend, but before judgment the writ was amended by adding as co-plaintiff Joseph Jean Edouard Le Juge de Segrais, whose title I must presently examine. On the 29th of March, 1899, an order was made directing an account of all moneys deposited with or received by the defendants for or on account of the plaintiff George Thomy Thiery as his bankers and agents, and the further consideration of the action was adjourned.

On the 10th of July, 1899, the master made a certificate finding that a balance of £2,362 15s. 8d. was due from the defendants on the account mentioned, and that they also held as bankers and agents of the plaintiff George Thomy Thiery certain securities specified in the certificate. On the hearing on further consideration it was asked that the certified balance might be paid, and that the securities mentioned in the certificate might be transferred to the plaintiff Joseph Jean Edouard Le Juge de Segrais as "tuteur" of the plaintiff George Thomy Thiery. The defendants are prepared to pay the balance and transfer the securities, but they of course require a legal discharge, and the question is whether the plaintiff Joseph Jean Edouard Le Juge de Segrais is competent to give them such discharge. That is the question calling for decision, and I reserved judgment on it in order to look more carefully into some authorities. Passing over for the moment *Scott* v. *Bentley*, those authorities are *In re Barlow's Will*; *In re Brown*, 44 W. R. 17, [1895] 2 Ch. 666; *In re De Linden*; and *Didisheim* v. *London and Westminster Bank*. After carefully considering them I think that there may be extracted a general rule that where there has been a judicial declaration of the status of lunacy and the applicant on the lunatic's behalf has the latter's property vested in him in the sense mentioned by the Master of the Rolls in *In re Brown*—namely, that he has the right to retain and deal with, without becoming the actual owner of the lunatic's property, the application may properly be and generally ought to be granted. In the most recent case of *Didisheim* v. *London and Westminster Bank* I understand North, J., refused the order asked for because the case did not fall within that rule, while on the other hand the order was made by Stirling, J., in *In re De Linden* because the rule was applicable. In the present case I have sufficient evidence, that of Edward Gallet, a French advocate, to which are exhibited divers French proceedings proving that the plaintiff George Thomy Thiery is a domiciled Frenchman, has been declared lunatic by a competent tribunal, and the plaintiff Joseph Jean Edouard Le Juge de Segrais is entitled according to French law to take possession of the lunatic's property whatsoever and wheresoever, maintain actions on behalf of his estate and give valid and good discharges in respect of all moneys, stocks, funds, and securities paid to or transferred to him forming part of the estate. That seems to me to bring the case clearly within the rule above stated. Under these circumstances no difficulty arises from the fact that the plaintiff George Thomy Thiery is described, and properly described, as a person of unsound mind not so found, and therefore sues by his next friend, and I ought to make the order asked in favour of the co-plaintiff who is entitled according to the evidence to represent him for this purpose.

In truth, although the action was I think properly framed as it was framed, the last-named plaintiff might have sued in his own name and alleged that the defendants were directly responsible to him. This does not touch an entirely different class of cases which were considered by me in *In re Chatard's Settlement*. And I do not consider my present decision in the least inconsistent with my decision in that case. On the other hand I am not as at present advised disposed to give much weight to the distinction urged in argument between cases where the claim is by a creditor against a debtor, and those where the court is in possession of a trust fund. I see no reason why the rule should not be applied as much to one class of cases as to the other. The plaintiff relied on the case of *Scott* v. *Bentley*; as regards that it is to be observed that the Master of the Rolls in *In re Brown* distinguished it from that then before the court, and North, J., in *Didisheim* v. *London and Westminster Bank* said that it was based on a wrong decision in *Morrison's case*. It may justify, and certainly it is not adverse to, my conclusion here, which, however, is based on the later authority above mentioned. The order may therefore go as asked by the proposed minutes, and I have no objection to its covering, as those minutes suggest, any further moneys which the defendants may have received or may re[illegible] by way of dividend or otherwise on ac[illegible] said George Thomy Thiery, but the n[illegible]

provide for the defendants' costs, to which they appear to be entitled. Those costs should be deducted from the certified balance and taxed only in case of difference, the plaintiff Le Juge de Segrais being competent to agree as to the costs on behalf of the estate which he represents.

*Order according to minutes.*

Solicitors, *Flux, Thompson, & Flux; Clarke, Rawlins, & Co.*

---

Chan. Div. }
Cozens-Hardy, J. } Nov. 30; Dec. 1.

ATTORNEY-GENERAL *v.* HUGHES. (*a.*)

*Charity—Unknown origin—Dispute as to objects—Letter of Charity Commissioners—Final determination—Local Government Act,* 1894 (56 *&* 57 *Vict. c.* 73), *s.* 70 (2).

*In consequence of disputes as to the proper objects of a charity and of an application made to them by the defendant, who was a trustee, the Charity Commissioners caused a local inquiry to be held, and subsequently wrote to the defendant stating their views on the matter. No appeal was brought against their decision.*

*Held, that the letter constituted a determination of the commissioners under section 70, sub-section 2, of the Local Government Act, 1894, and was conclusive upon the question.*

This action related to seventeen acres of land, in the parish of Upton Snodsbury, in Worcestershire, called the "Church lands." The defendant Hughes was the people's churchwarden, the other defendants were the vicar and his churchwardens. The land in question was, by an award of January, 1775, under an Inclosure Act, allotted "unto the vicar and churchwardens of the parish of Upton Snodsbury and their successors for the time being for ever . . . as proprietors of certain charity lands within" certain common fields the subject of the inclosure. No trusts of the lands were mentioned in the award, and the origin of the charity was unknown. The rents had usually been applied for the repair and maintenance of the parish church, and expenses of divine service, but the defendant Hughes alleged that they had been on various occasions applied to other purposes, and that the original trust was for the poor of the parish. Hughes had been chairman of the parish council since 1895, and was appointed people's churchwarden at Easter, 1896. Disputes arose between the parish council and Hughes on the one hand and the vicar on the other as to the proper administration of the charity and application of its rents, and in July, 1895, Hughes, as chairman of the council, wrote to the commissioners submitting certain persons for their approval as trustees of the charity, and asking for a scheme. Further correspondence followed between him and the commissioners as to the administration of the charity, and in consequence the commissioners caused a local inquiry as to the administration of the charity to be held, and subsequently, in March, 1897, they sent to Hughes the following letter:

"Charity Commission, March 8th, 1897.

"County, Worcester; Place, Upton Snodsbury; Church lands.

"Sir,—The commissioners have had under consideration the report of the assistant commissioner who visited Upton Snodsbury on the 18th of February last, and inquired into the administration of the charity known as the 'Church lands.'

"The commissioners are of opinion that by the inclosure award of the 13th of January, 1775, the vicar and churchwardens of Upton Snodsbury were constituted trustees for all purposes of the lands awarded to them by that instrument, and that they are not in the position of bare trustees as you are understood to contend.

"With regard to the purposes to which the income of the Church lands is applicable, the commissioners are further of opinion that the usage by which it is applied to the repairs and maintenance of the parish church and to the defraying of the expenses incidental to the performance of divine service is ancient and unbroken, and in the absence of any original express trusts that such usage ought to prevail.

"With regard to the letting of the lands in question, the commissioners are unable to interfere with the decision of the trustees in the matter, but they have suggested to the vicar that in the circumstances it is desirable that the lands should be re-valued by a competent valuer whom the commissioners are prepared to nominate and let in accordance with his advice.—I am, sir, your obedient servant,

"Mr. John Hughes, "G. HOLFORD.

"Upton Snodsbury, Worcester."

Notwithstanding this letter the defendant Hughes paid a sum of two guineas to the Worcester Infirmary and £2 to the Foresters' Club, and appeared to have considered he had still a right to make such payments. After some further correspondence between him and the commissioners, the commissioners decided to certify a case for the Attorney-General, who brought this action, asking for an injunction restraining Hughes from collecting the rents and acting in the administration of the charity without the consent of and so as to exclude the other trustees, an account of moneys received by him for the charity, and payment of what should be found due thereunder, and for a scheme to be settled by the court.

*P. V. Smith*, for the defendant Hughes, raised a preliminary objection that the parish council ought to have been made a party.

*Dibdin*, for the Attorney-General — This is an ecclesiatical charity, and the parish council have no interest in the matter. This was decided by the letter of the Charity Commissioners of the 8th of March, 1897, which was a determination under section 70 (2) of the Local Government Act, 1894. This decision has not been appealed against within the time prescribed, and is consequently conclusive upon the question.

He referred to *In re Donnington*, 8 W. R. 301.

*P. V. Smith.*—This case is distinguishable from *In re Perry's Almshouses and In re Ross's Charity*, 47 W. R. 197, [1899] 1 Ch. 21, where the objects of the charities were not the same as those of either church rates or poor rates. The charity here is admittedly for one or other of those objects. Therefore in 1819 the land vested in the churchwardens and overseers under 59 Geo. 3, c. 12, s. 17: *Attorney-General* v. *Lewin*, 8 Sim. 366. It is parish property; and if it belongs to the poor, vested in the parish council under section 6 (1) (*c*) (iii.) of the Local Government Act, 1894. The question must therefore be decided under section 70, sub-section 1, and not under sub-section 2. At any rate the letter of the commissioners of the 8th of March, 1897, was not a complete and final decision.

COZENS-HARDY, J. (after hearing the evidence).—The facts bring the case within section 70, sub-section 2, of the Local Government Act, 1894. A question had arisen under that sub-section, there had been a request by a trustee (for such Mr. Hughes was), and the letter of the 8th of March, 1897, constituted a

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

determination of the commissioners. No appeal was brought against that determination within the prescribed time. It was a decision by a competent authority and is conclusive. It decided that the objects of the charity are ecclesiastical, not secular. The defendant ought to have abided by that decision. He nevertheless made payments (small, no doubt) of a secular character. The action was rendered necessary by his conduct, and I must order him to repay the sums of two guineas and two pounds and the Attorney-General's costs of the action up to to-day.

Solicitor for the Attorney-General, *The Treasury Solicitor.*

Solicitors for the defendant Hughes, *Church, Rendell, Todd, & Co.*, for *Samuel Southall*, Worcester.

---

Chan. Div.
Cozens-Hardy, J. } Nov. 22, 23, 27, 29.

CAMPBELL *v.* GILLESPIE. (*a.*)

*Practice—Creditors' deed—Action for account—Discretion of court—R. S. C.*, 1883, *ord.* 55, *r.* 10.

*The court will, in the exercise of its discretion under ord. 55, r. 10, not order an account of the dealings and transactions of the trustee under a creditors' deed of arrangement, where it can determine the questions between the parties without such order, and where such order would have mischievous results, notwithstanding that the trustee may have been guilty of some misconduct in his duties.*

By a creditors' deed of January, 1887, between Thomas Campbell of the first part, and three of his principal creditors of the second part, and the defendant Thos. Gillespie, a chartered accountant, of the third part, the debtor conveyed all his real and personal estate to the defendant.

The deed contained various provisions enabling the defendant to carry on the debtor's business, which was that of a brewer and wine and spirit merchant, comprising public-houses, and he was authorized to buy liquors and goods from the said creditors, and to borrow money from the bankers.

The material trusts were to pay costs, remuneration to trustee, an allowance to the debtor, the debts due to the creditors other than those parties to the deed, then the money due to the bankers, and to the creditors parties to the deed, and lastly, to pay and transfer the surplus to the debtor. There was a clause making a certificate of the trustee that the trusts and powers of the deed had been executed conclusive evidence of the fact.

The debtor took upon himself the management of the business, substantially consisting of three public-houses and little or nothing else, and this continued until the end of 1896. In August, 1893, the debtor assigned all his interest under the deed to his wife, the plaintiff, for her separate use, and in November, 1896, the defendant transferred to the plaintiff the three public-houses and a life policy and all other the real and personal estate then vested in him upon the trusts of the deed of 1887. This deed did not contain any release by the plaintiff to the defendant, but it contained a recital that all debts and other moneys the payment whereof was secured or provided for by the deed of 1887 had been paid and discharged, and the defendant certified that all the trusts and powers of the deed of 1887 had been executed.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

The present action was commenced in October, 1898. The statement of claim made a series of charges against the defendant which his lordship found the plaintiff had to a large extent failed to prove. The plaintiff claimed (1) an account of all dealings and transactions of the defendant as trustee under the deed of 1889; (2) an account of the receipts and payments of the defendant as such trustee on the footing of wilful default; and other subsidiary relief.

*Eve, Q.C., Edward Ford*, and *Boxall*, for the plaintiff.

*Warmington, Q.C., Robson, Q.C.*, and *O. L. Clare*, for the defendant.

Nov. 29.—COZENS-HARDY, J.—On the plaintiff's opening I held that the facts alleged did not amount to wilful default, and I must therefore dismiss the action so far as it seeks to charge the defendant with wilful default. It remains, however, to consider to what relief, if any, the plaintiff is entitled. Under the old law I think it is plain that the plaintiff would have been entitled as a matter of right to a common account against the defendant. There has been no release, no settled account, nothing upon which the defendant could rely by way of defence. But, happily, under ord. 55, r. 10, I have now a discretion, and I am not bound to give to the defendant a decree for a common account, if the questions between the parties can be properly determined without such a decree. This discretion must be exercised upon due consideration of all the facts of the case. Now, it has been proved to my satisfaction that the defendant did keep proper books of account, in which were entered receipts and payments in the manner adopted by skilled accountants. These accounts were from time to time submitted to and approved by the agents of the three principal creditors, who have in the course of the trial been somewhat inaccurately called a committee of inspection, and at the cost of the defendant by Mr. Foster, a competent accountant, in November or December, 1896. He certified to their correctness. Some, but not all, of the twenty-nine accounts thus audited were handed to the plaintiff's solicitor. The plaintiff required information as to how much money the defendant claimed in order to close the trust and pay off all liabilities, and this information was given by the defendant. Among the liabilities mentioned was one item, "Private bills, £52 17s. 6d.," upon which I shall have to comment. The amount claimed was provided by the plaintiff, and the deed of November, 1896, was executed. The plaintiff and her solicitor were apparently satisfied with the information and accounts thus furnished. I do not find that any application for more detailed accounts was ever made to the defendant by or on behalf of the plaintiff until shortly before the writ in this action was issued. The defendant in or about July, 1898, sent the account-book of this trust to a marine store dealer for destruction, together with other books which had been stowed away in an attic. The destruction was not effected with any idea of avoiding investigation by the plaintiff, though it was most unwise, and having regard to the item £52 17s. 6d. improper. This destruction renders it almost impossible for the defendant to render full accounts under an ordinary decree. Under these circumstances I have come to the conclusion that it is not right that I should make a full administration decree, notwithstanding the fact that I am unable to acquit the defendant of some misconduct. I believe the trust accounts were honestly, properly, and accurately kept, and that Mr. Foster's certified accounts correctly represent what the books themselves have shown. I see no reason to doubt that the

tea, sugar, &c., in the paper in which it is wrapped, so that the paper goes to make up the required weight. What the respondent's manager did was to place in the weighing machine a piece of paper which represented the bag in which each parcel of tea was afterwards wrapped. The custom referred to was upheld in *Harris* v. *Allwood*, 56 J. P. 709. [DARLING, J.—In that case the proceedings were under section 26, for wilful fraud in using a weighing machine, and the tea was weighed with the paper in the presence of the customer; it was found that that was not a fraud. Here the tea was not weighed in the customer's presence.] The paper placed in the machine is not analogous to a piece of lead or other substances similarly placed, because the paper was connected with and, in effect, formed a part of the article weighed: *Carr* v. *Stringer*, 18 W. R. 859, L. R. 3 Q. B. 433. The justices found that the machine in itself was just. If the respondent committed any offence it was in the user of it, and he ought consequently to have been proceeded against under section 26, and not section 25.

RIDLEY, J.—The case must go back with an intimation to the justices to convict. The proceedings were not taken under section 26 of the Weights and Measures Act, 1878, and no charge of fraud against the respondent is involved. The question is whether the respondent or his servants have been guilty of an offence under section 25. [After stating the facts, his lordship proceeded:] What we have here got is this that these scales, as used in the habitual practice of the firm, were used with a piece of paper upon them which added to the weight, and which was practically in the same condition as would be a piece of lead or a piece of any other substance which has weight of any kind at all, and that it was habitually there for the purpose of making up the weight. So used, in my judgment, the scales are unjust scales. You must take them as they are used, not as they are not used. It is of little consequence for the purpose of this inquiry whether the particular makeweight was fixed in the scales so as to require force to remove it or not. Nor was it a good argument to say that the scales without the paper were just. The fact was that as they stood and were used the scales did not stand level. I therefore think that the scales as used were false or unjust within the meaning of the Act.

Mr. Elliott argued that because the makeweight was a piece of paper smaller than the bag in which the packet of tea was going to be sold, and because there was a custom that in making up packets of tea the paper was weighed with the tea, therefore the respondent had a right to do what he did. I do not think that there is any such custom, but if there were that would not make this into an honest balance. It is not necessary to decide what would be the legal result if the bag was weighed in the scoop and not placed, as here, under it.

DARLING, J.—I am of the same opinion. It appears that what happened was this: This tea merchant was in the habit of selling what professed to be quarters of a pound of tea in packets. He sold them in paper, and there was not a quarter of a pound of tea in them, but there was a quarter of a pound of tea and paper together. As the case says, in order to facilitate and quicken the process of weighing he put under the scoop which formed the receptacle of the scale in which the tea was placed when being weighed a piece of paper. Now, what the statute enacts shall not be done is this: you are not to use or have in your possession scales which are false or unjust. Now, what was the result of putting that piece of paper under the scoop of the scale? The result was that if you put anything into the scale to weigh it you would not get the true weight of it. The result was that if the scales were left quiescent with no weight on the one side nor any article to be weighed on the other side the scales would not remain at the balance. The arm with the paper under the scoop would remain permanently depressed. Therefore it seems to me that as long as the paper remained there these scales were not in the true sense a balance. They remained scales; but what sort of scales? False scales. The justices themselves, although they do say *per se* the scales were true, also say this: "In the absence of the said piece of paper, the said weighing machine would have shown the actual weight of the article in the scoop." That amounts to saying that with the presence of the paper the scales would not show the actual weight of the article in the scoop. If they will not, they are not true and just scales.

Mr. Elliott sought to get out of this by saying that it was perfectly true that if you tried to weigh things like gold dust or diamonds in the scales you would be grossly defrauded, but that seeing that scales were only used for weighing tea, and that in the tea trade there is a widely-spread habit of selling tea and paper as tea, the scales remained just scales. In my opinion it does not matter what the article weighed in the scales is. If they are false for one article they are false for all, and therefore these scales as they were used were false and unjust within the meaning of section 25 of the Act.

*Appeal allowed.*

Solicitor for the appellant, *W. A. Blaxland.*

Solicitor for the respondent, *H. R. Jones*, Wandsworth.

---

Q. B. Div. (Grantham and Kennedy, JJ.) — June 24; July 1, 1899.

*In re* AN ARBITRATION BETWEEN PEARSON AND I'ANSON AND ANOTHER. (*a*.)

*Landlord and tenant—Market garden holding—Improvements—Compensation—Special bargain—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict.* c. 61), s. 57.

*A tenant who, by agreement with his landlord, is to receive compensation for improvements, and who might, but does not, make a claim for compensation under the Agricultural Holdings (England) Act*, 1883, *is not debarred by section* 57 *of the Act from recovering compensation under his agreement.*

Award in an arbitration in the form of a special case stated by the arbitrator under the Arbitration Act, 1889, s. 19, and an order of the court.

The facts were as follows:

Some time prior to 1871 William Pearson became tenant from year to year of ten acres of land (situate near to, and subsequently forming part of, a certain farm or holding known as Broom Hall Farm), which land was both before and in that year used and cultivated and thereafter continued to be used and cultivated by Pearson as a market garden.

The ten acres were in 1871 purchased by one George Lane Fox, to whose agent (one G. A. B. Leatham) Pearson from time to time paid the rent accruing due in respect thereof.

During 1883 Pearson had several interviews with Leatham (who acted as agent for George Lane Fox in the management of his estates) at which negotiations

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

took place relating to a proposed tenancy by Pearson of Broom Hall Farm, and on the 30th of October, 1883 —*i.e.*, shortly before the Agricultural Holdings (England) Act, 1883. came into force, an agreement was entered into in the following terms:

"Wakefield, October 30th, 1883.

"I hereby agree to take for one year—namely, from the first day of January, 1884, to the first day of January, 1885, the farm in Wrenthorpe, now occupied by George Thompson, the property of George Lane Fox, Esq., and containing 118a. 2r. 0p., more or less, at the yearly rent of two hundred and thirty-six pounds, payable quarterly and subject to the same clauses and conditions as Mr. Fox's other tenants are subject to.

"And we hereby further agree to contract ourselves out of the Agricultural Holdings (England) Act of 1875. £236. "WILLIAM PEARSON."

"I hereby agree to let the above on the terms specified.

"GERALD ARTHUR BUXTON LEATHAM.
"WILLIAM PEARSON."

(A specimen form of the agricultural leases granted by George Lane Fox to his tenants was annexed to the award.)

In answer to an inquiry by Pearson, Leatham wrote a letter, dated the 30th of December, 1884, saying "your agreement for the farm you hold under Mr. Lane Fox at Wrenthorpe includes the old take."

At subsequent interviews between Pearson and Leatham the latter consented to the execution of extensive repairs to the farm buildings on the holding, which were thereupon carried out and paid for by Leatham as agent for Lane Fox.

Pearson continued to cultivate the ten acres of land as a market garden, but the residue of the holding was cultivated by him as ordinary agricultural land. Finding that his farming operations proved unsuccessful, Pearson wrote and posted to Leatham in the month of May, 1887, a letter (addressed to him at the estate office, Bramham) the original of which was not produced at the hearing. The agent occupying the position formerly held by Leatham attended on a *subpœna duces tecum* and deposed that he had not seen the original letter and that it could not be found. In this letter (as to the contents of which parol evidence was given by Pearson) the writer stated that farming was "going from bad to worse," that he could do much better if he were to cultivate the remaining portion of the land in his occupation as a market garden, the farm being close to the city of Wakefield, whence manure could readily be obtained.

The letter then contained an inquiry as to whether he would be allowed a market garden valuation on quitting the farm if he were to continue tenant of the farm and cultivate it as a market garden.

To this letter the following reply, dated the 4th of May, 1887, was sent to Pearson by Leatham: "I will allow you a market garden valuation should you leave the farm you now occupy under G. Lane Fox, Esq."

Pearson accordingly expended large sums of money (the aggregate amount of which was not proved in evidence) in the planting of portions of the said farm and in its cultivation as a market garden, and in particular he erected forcing sheds and other fixtures, and planted many acres with rhubarb, fruit bushes, strawberries, mint, and various vegetable crops.

In July, 1896, the farm was offered for sale by public auction and I'Anson and Calvert became the purchasers, and on the 14th of December, 1896 (prior to the completion of the purchase), Pearson received from the agent of Lane Fox notice to quit. No notice of intention to claim compensation was given within the time prescribed by section 7 of the Agricultural Holdings (England) Act, 1883.

Disputes arose between Pearson and I'Anson and Calvert as to the amount (if any) of compensation to which Pearson was entitled in respect of tenant right and improvements on quitting the premises. These disputes were by agreement referred to arbitration.

Since the arbitration I'Anson had died, and by consent his executors were substituted for him in the proceedings.

The award of the arbitrator was by an order of the master remitted to the arbitrator to state his award in the form of a special case raising the following, among other, questions of law:

(1) That the letter of the 4th of May, 1887, relied on by Pearson was, if an agreement, one beyond the authority of the agent of the landlord to make; that there was no consideration for the agreement alleged to have been made by the letter, and that in any event the letter could not extend to improvements commenced or executed after the date of it.

(2) That the compensation claimed was in respect of improvements, for the whole of which the tenant was entitled to make a claim in accordance with the Agricultural Holdings (England) Act, 1883, and the Market Gardeners' Compensation Act, 1895, and that such Acts excluded the right of the tenant to claim compensation outside such Acts or otherwise than under such Acts, and that by noncompliance with the said Acts the tenant had lost his right to claim.

If the court should be of opinion that Pearson was entitled to compensation for the tenant right and all the improvements in respect of which he would have been entitled to claim under the Agricultural Holdings (England) Act, 1883, and the Market Gardeners' Compensation Act, 1895, or otherwise as though notice had been duly given under section 7 of the earlier Act, and the other requirements of that statute had been duly performed, the arbitrator awarded that I'Anson and Calvert should pay to Pearson the sum of £2,115 2s. 5d.

If the court should be of opinion that Pearson was not entitled to compensation in respect of the forcing sheds or other fixtures and buildings affixed or erected by him upon the holding for the purposes of his business as a market gardener, but that he was entitled by agreement or otherwise to a market garden valuation in respect of the plants and crops growing on the said farm at the determination of his said tenancy, the arbitrator awarded that I'Anson and Calvert should pay to Pearson the sum of £1,546.

And if the court should be of opinion that Pearson was not entitled to any sum for compensation in respect of tenant's rights or improvements, the award provided that the several parties to the reference should each bear and pay their or his own costs of and incidental thereto, and that Pearson should bear and pay the valuer's charges and the costs of the award.

The Market Gardeners' Compensation Act, 1895, which is to be read with the Agricultural Holdings (England) Act, 1883, provides for compensation for improvements in market garden buildings.

The Agricultural Holdings (England) Act, 1883, s. 57: "A tenant shall not be entitled to claim compensation by custom or otherwise than in manner authorized by this Act in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act, but where he is not entitled to compensation under or in pursuance of this Act he may recover compensation under any other Act of Parliament, or any agreement or custom, in the same manner as if this Act had not passed.

*A. T. Lawrence, Q.C.*, and *Corrie Grant*, for Pearson.—If Pearson was not entitled to compensation

under the Agricultural Holdings Act, 1883, he is entitled to the sum awarded in respect of the agreement of the 4th of May, 1887. There was good consideration for that agreement—namely, the prospective increase in the value of the holding. The agreement was one which it was within the authority of the agent to make. Secondly, Pearson was not entitled to claim compensation under the Act, because he had not complied with the requirements of the Act as to notice. *Newby* v. *Eckersley*, 47 W. R. 245, [1899] 1 Q. B. 465, supports this view of the construction of section 57. *Gas Light and Coke Co.* v. *Holloway*, 52 L. T. Rep. 434, is distinguishable, because in that case there was no agreement outside the Act.

*Danckwerts* and *R. A. Shepherd*, for the landlords, Calvert, and the executors of I'Anson.—First, the agreement of the 4th of May, 1887, was beyond the scope of the agent's implied authority (*Turner* v. *Hutchinson*, 2 F. & F. 185), and there is no evidence of any express authority. There was no consideration for the agreement if the agreement was valid. Secondly, section 57 of the Act of 1883 is a bar to the tenant's now relying on it. The tenant was entitled to claim compensation under the Act of 1883 and the Market Gardeners' Compensation Act, 1895, and therefore the only right he had was to proceed under the Act. The fact that he did not give the necessary notices does not make him a person not entitled to compensation under the Act, so as to enable him to recover under the agreement. *Newby* v. *Eckersley* is not an authority in the tenant's favour, because there the tenant could not have got compensation under this Act.

*Lawrence, Q.C.*, replied.

*Cur. adv. vult.*

July 1.—GRANTHAM, J., read the following judgment: In this case there are practically two questions we have to determine. First, whether the agent of Mr. Lane Fox had authority to enter into the agreement in question. Secondly, if he had authority, then does the Agricultural Holdings Act deprive the claimant for compensation of his rights under the agreement. I can well understand that the present landlords, having recently bought the property to which the right to a valuation attaches, bought it in ignorance of the liability of the landlord under the agreement, because it seems that the letter of the claimant to the landlord's agent had been lost, and very likely the agent had kept no copy of his letter in reply to it, which two letters formed the agreement; but we have to determine the case between the present landlords and tenant under the contractual relations created between the tenant and the original landlord, Mr. George Lane Fox, and by these rights and relations the parties are bound. Now it was contended that express authority should have been proved to show that the agent was enabled to make any other engagements for tenancy with the tenant than such as were to be found in the model leases of the Bramham estate, but as the case finds that the agent was the manager of the estate, and there is no limitation found to his powers as such manager, I think the onus was thrown on the defendants of showing some limitation of the agent's power in such transactions as these in dispute, questions, it must be remembered, purely relating to the management of an estate. As he signed these leases or agreements in his own name, without any procuration of or for his landlord, and writes, I notice, always in the first person in making the arrangements with the tenant; we must take it that he was possessed of the fullest authority an agent could have in all matters that came within the term "management of an estate," and I know of nothing so important or so thoroughly part of the good management of an estate as the judicious alteration of the style of farming or using of the land on an estate. Moreover, I think the model leases under which the agricultural tenancies were supposed to be held on this estate (leases said to be nearly one hundred years old) can scarcely have been read when it was argued that the agent could not go outside their covenants, for I find that two of the covenants are of such a character that the agent's power of altering them could scarcely be objected to on behalf of the landlords. The first is that each tenant on the estate must keep a game-cock and the other that he must keep a dog. The refusal to pay compensation to the tenant might as well be justified on the ground that the tenant had broken his agreement in not keeping either a game-cock or a dog. If the landlords could have proved as a fact the want of authority on the part of the agent they would have done so; but not having done it, I have no doubt that their contention is unfounded and that the claimant is entitled to succeed on that ground.

The next is a more difficult question—as to whether or not the Agricultural Holdings Act deprives the claimant of the rights he possessed under the agreement. Those rights turn out to be very valuable, but they do not give the claimant anything that he has not paid for; there is nothing allowed him for any profit on his outlay. The real question is whether the landlords are entitled to the benefit of the outlay of the claimant by way of improvement upon their property without paying for it. It was to provide for this repayment for improvements that the Agricultural Holdings and Market Gardeners Acts were passed, yet it was boldly contended that though without the Act the plaintiff would have received this compensation, yet that the Act has advisedly taken away rights, which in this case are worth £1,500 at least, without any compensation at all.

I am not surprised that no authority can be found for this contention; nor am I surprised that no direct authority can be found against it, for no one before has been bold enough to suggest such a proposition; but the case of *Newby* v. *Eckersley* may be read as supporting the view I am taking, though this point was not, I admit, directly before the Court of Appeal in giving their judgments. The facts of the present case seem to me to afford a very good illustration of the working of the Act. Let us assume there had been no agreement, but that the tenant had planted the farm as a market garden, and enormously improved the value, with the full knowledge and approval of the landlord, but without any agreement on his part to pay an increased valuation. He would then have been entitled to no compensation beyond the customary valuation for agricultural land, and that was justly felt such a grievance that an alteration in making valuations was desired, and the Act, therefore, states that, subject to questions of notice and approval by the landlord, the tenant shall have compensation; but as by some exceptional custom in some part of England he might have obtained some compensation for this improvement, the Act also states that if you take the benefit of the Act you must give up all other claims for compensation by custom for the same improvements; but if the tenant does not want to claim under the Act, and is not claiming under the Act, then he is entitled to what the law will give him under the custom, or under any special agreement stating what his valuation is to be. So here he was entitled by his agreement to have a valuation made in a particular way on his giving up his farm

The agreement was in writing, and made since the passing of the Act, and as he claims nothing under the Act, it binds the parties. It seems incredible that an Act which was especially intended to benefit the tenant should, by its provisions, which must be assumed to have been known to the Legislature, injure him most seriously by depriving him of rights he previously possessed. In fact, it has been argued on behalf of the landlords that English landlords and tenants are not entitled to the liberty of freedom of contract, but that all their dealings are now to be regulated by the iron-bound regulations of an Act of Parliament, which, though passed for the benefit of the tenant, is, if that argument be correct, the most iniquitous piece of legislation, of legalized robbery, that was ever introduced into the House of Commons. What do the landlords get by reason of the tenant's expenditure? Much more than pay. With an expenditure by the tenant of this money the rental value of the land has vastly increased. If the farm was worth £2 per acre before it is worth about £4 now; and if you capitalize that extra £2 at only twenty years' purchase you get a sum of about £4,800 in return for the £1,500 the landlords are asked to pay; whilst under any circumstances the landlords get another £500 or £600 worth of work for nothing, even if they pay the £1,500 now asked for, as the valuer has found by his award that, if the tenant is to be paid for the buildings, &c., he has erected, besides this disputed valuation he would be entitled to £2,000 odd instead of £1,500. I have not forgotten that some small portion of the farm is still under arable cultivation, and therefore it must not be assumed that the rental of all the farm will have increased as I have suggested; but I have given the figures just mentioned to show how the matter must be looked at to find whether or no the landlords are being treated unfairly in the matter.

For these reasons it seems to me clear that by the latter portion of section 57 of the Agricultural Holdings Act, 1883, Pearson is entitled to the valuation under the agreement entered into in 1887, and that that right is not nullified by the earlier words of the section, which, though very confused, can be interpreted logically in the way I have described; and if they are somewhat transposed and read in this way, "A tenant shall not be entitled to claim compensation in respect of any improvement for which he is entitled to compensation under or in pursuance of this Act, by custom or otherwise, than in manner authorized by this Act," there is less difficulty, I think, in interpreting them, although grammatically their present reading is more correct. For these reasons my judgment must be for the claimant Pearson.

KENNEDY, J.—In the result I agree with the judgment which has been delivered. Upon the first two points I entertain no doubt. The claimant here is the tenant. He was since 1871 tenant to Mr. Lane Fox, and the agency since 1871 was in the hands of Leatham, who is stated and found to have acted as agent in the management of the estate—in other words, he was the general manager of the estate. The tenancy of the 30th of October, 1883, was arranged and completed through Leatham, and in 1887 the tenant found that, in his words, "the farm was going from bad to worse," and he wrote the letter which has been lost, but of which parol evidence was given, stating that he wished to know whether he would be allowed a market garden valuation on quitting the farm if he were to continue tenant of the farm cultivated as a market garden. On the 4th of May, 1887, Leatham wrote, in terms, in answer to that application: "I will allow you a market garden valuation should you leave the farm you now occupy under George Lane Fox, Esq." Upon the faith of that letter the tenant expended large sums of money in carrying out the suggestion which had been accepted.

On behalf of the landlord it is contended, in the first place, that there was no sufficient proof of authority in the agent. I should be very sorry to hold, where the tenant has to deal with an agent in the same position as Leatham, who is described as the general manager of the estates, through whom the lease has been given, and a question as to the cultivation of either the whole or part of the farm arises, the tenancy still continuing, that the tenant was not entitled to place reliance on the assent in writing of the agent, but was bound, in order to be safe, to have authority produced to him that the person who is described, and also actually employed, as the manager of the estate has only power with the express consent of the landlord to make any change in the form of cultivation. Upon the faith of that letter the tenant incurred large expenditure. Mr. Danckwerts suggested that a heavy tax would be imposed on the landlord. For aught I know, the action of the tenant may have considerably increased the value of the property. However, I have nothing to do with that; the only question is whether there was an agreement for good consideration. I think there was such an agreement and that the agent had authority to make it. Both these points therefore fail.

The one point upon which I confess I have felt some hesitation is the construction of the statute. Section 57 is one which can be read over and over again without one becoming confident as to what it exactly means. It is a section which contains (and that is, I think, always an unfortunate method of construction) first of all a negative statement, and then a positive statement withdrawing part of the negative statement. [The learned judge read section 57.] That section is relied on by counsel for the landlords, but I have come to the same conclusion as my brother Grantham for these reasons: I think, as Mr. Lawrence contended, that the section is not intended to say that the compensation must be only under the Act if a man could, by taking certain steps, bring himself within it. That construction is, I think, more in unison with the obvious intention of the Act as a whole, which never intended—and section 3 goes to show this—that agreements for good consideration should be treated as valueless if the tenant wishes to avail himself of them. The marginal note to section 57 leaves one in the same difficulty as the text does, for it says: "Compensation under this Act shall be exclusive." That does not enlighten one, but rather increases the difficulty. In my opinion not only is there a possibility of construing the section according to Mr. Lawrence's contention, but, further, there is the construction which the Court of Appeal in *Newby* v. *Eckersley* have put upon the Act. I agree that that case is not a decision expressly dealing with this point, but I do not feel justified in differing from a construction of part of the words of this section, which is given in terms by A. L. Smith and Chitty, L.JJ., and which is, I think, implied in the judgment of Collins, L.J. According to those judgments the word "tenant" in section 57 must be read in the light of the prior sections and as meaning a tenant claiming compensation under the Act. If it is so read, it does not include the tenant in this case, for he is not claiming compensation under the Act, but under an agreement. He is claiming under an agreement in the same way as the tenant was in *Newby* v. *Eckersley*, and if so he is not excluded from the benefit of the agreement. Following the same

reasoning, the word "tenant" in section 59 must, I suppose, be read as meaning a tenant claiming compensation under the Act.

For these reasons I am of opinion that the claim for the lesser sum, £1,546, ought to be allowed.

*Judgment accordingly.*

Solicitors for Pearson, *Torr, Gribble, Oddie & Sinclair*, for *Stewart & Chalker*, Wakefield.

Solicitors for Calvert, *James & Mellor*, for *I'Anson, Benson & Co.*, Wakefield.

Solicitors for I'Anson's executors, *Iliffe, Henley & Sweet*, for *H. Plews*, Wakefield.

---

## Court of Appeal.

From Q. B. Div.
(A. L. Smith, Rigby, and Vaughan Williams, L.JJ.) June 16, 28, 1899.

GORDON *v.* STREET. (*a.*)

*Contract — Fraudulent inducement — Concealment of identity—Materiality—Right to repudiate.*

*The plaintiff, a moneylender whose reputation was such that the defendant would not have dealt with him, by fraudulently concealing his identity, induced the defendant to borrow money from him. On discovering the plaintiff's fraud, the defendant, within a reasonable time, repudiated the contract.*

*Held, that he was entitled so to do, the fraud being material to the inducement which brought about the contract.*

Application by the plaintiff for judgment or a new trial in an action tried before Bucknill, J., and a jury.

The plaintiff sued the defendant as maker of a promissory note for £150, dated the 19th of August, 1898.

The defence was that the defendant had been induced to make the promissory note by the fraudulent misrepresentation of the plaintiff that he was one George James Addison; that the defendant would not have given the note if he had known that Addison was in fact the plaintiff Isaac Gordon, a notorious moneylender; that the defendant had repudiated the contract within a reasonable time after discovering the fact that Addison was in reality Isaac Gordon.

The defendant paid £110 into court.

The facts of the case, which are fully set out in the judgment, were shortly as follows: The plaintiff was a moneylender who carried on business in London and elsewhere under various names, including that of Addison. In August, 1898, the defendant, being desirous of obtaining a loan, answered a moneylender's advertisement which was in the name of Addison. The defendant obtained a loan of £100 from Addison for which he gave a promissory note for £150, the £50 being for interest. The business was conducted through correspondence, and the parties never met. The note provided for the repayment of the amount by instalments, the whole to become due upon default in paying one instalment. The defendant made default in paying the first instalment. Several letters passed between the plaintiff, writing in the name of Addison, and the defendant. The defendant discovered on the 20th of December, 1898, that Addison was the same person as Isaac Gordon. On the 28th of December this action was commenced. On the 6th of January, 1899, the defendant's solicitors formally repudiated the contract.

The defendant counterclaimed for damages for libels alleged to have been written by the plaintiff in letters to the defendant. The facts as to the counterclaim are fully set out in the judgment.

The jury, in answer to questions put to them by the learned judge, found that the plaintiff intentionally concealed from the defendant that he was Isaac Gordon to induce the defendant to borrow money from him, as if from another, and that the defendant was so induced; that the plaintiff did so fraudulently; that the defendant contracted with Addison believing him to be a moneylender of that name; that the defendant repudiated the contract within a reasonable time after he knew that he could do so; that a libel had been published on the defendant. The jury assessed the damages for the libel at £400.

On these findings the judge entered judgment for the defendant on the claim and counterclaim.

*Montague Shearman*, for the plaintiff.—The fact that the plaintiff concealed his real name was not a concealment of such a material fact as to entitle the defendant to repudiate the contract. It is not illegal or against public policy for persons to trade in assumed names. On the contrary, it is an everyday occurrence. The identity of the party to a contract is only a material fact in cases of contract for personal services; it is certainly immaterial in the case of a loan, for the borrower must repay the advance, whoever may be the lender. [He referred to *Smith* v. *Wheatcroft*, 27 W. R. 42, 9 Ch. D. 223.] Secondly, the repudiation of the contract by the defendant came too late. He discovered the identity of the plaintiff with Addison on the 20th of December, and it was not until the 6th of January, after issue of the writ, that he repudiated. As to the libels, there was no evidence of publication, and the damages were excessive.

*Hugh Fraser*, for the defendant.—The concealment of the plaintiff's real name was a material fact, for the plaintiff's reputation was such that if the defendant had known he would never have contracted with him. Moreover, the jury have found in the defendant's favour on the question of materiality. The repudiation was not too late. The defendant was bound to repudiate within a reasonable time, and the jury have found that he did so. The defendant did nothing to affirm the contract after he discovered the facts. There may be repudiation after action brought: *Clough* v. *London and North-Western Railway Co.*, 20 W. R. 189, L. R. 7 Ex. 26.

*Cur. adv. vult.*

June 28.—A. L. SMITH, L.J., read the following judgment: The question in this case is whether a person whose evil reputation in business is such that no person will deal with him, can, after fraudulently concealing his identity and thus inducing another to enter into a contract which he otherwise would not have done, prevent that other, when sued by the defrauding party upon the contract, from insisting upon the ordinary defence of the defrauded—viz., that he had been induced by the fraud of the plaintiff to enter into the contract sued on. The plaintiff Isaac Gordon is a moneylender, and he sues the defendant upon his promissory note for £150 dated the 19th of August, 1898, in favour of George James Addison to secure an advance of £100, the extra £50 being for interest. Whether George James Addison is a fictitious name or that of the plaintiff's manager

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

I do not know, for although the plaintiff swore in the box that it was a fictitious name I find him writing to the defendant as late as the 28th of December, 1898, that the defendant was to address all communications to him and not again to "my manager Mr. Addison, of my London office, as the matter is entirely out of his hands, and I have given him instructions not to have anything more to do with the matter." On which side lies the truth as to this I do not know, but I will assume that the name is fictitious, as the plaintiff swore. In the view I take of this case it is immaterial whether it be so or not, for to liken this case, as it has been, to that of a person trading under a firm's name, or to that of an agent contracting in his own name for an undisclosed principal, is to liken it to that with which it has no similitude, and between which and it there is in reality nothing in common. The defence of the defendant is that he was induced to borrow the money and to sign the note sued on by the fraud of the plaintiff, and that upon discovering the fraud he repudiated the transaction.

The questions which were left to the jury by my brother Bucknill and the answers thereto were these: (1) Did the plaintiff intentionally conceal from the defendant that he was Isaac Gordon to induce him (the defendant) to borrow money of him as if from another, and, if so, was the defendant so induced?—Yes. (2) Did he—*i.e.*, Isaac Gordon—do so fraudulently?—Yes. (3) Did the defendant contract with Addison believing him to be a moneylender of that name?—Yes. (4) Did the defendant repudiate the contract so soon as, or within a reasonable time after, he discovered that Addison was really Gordon?—The defendant repudiated the contract within a reasonable time after he knew he could do so. It was argued for the plaintiff that these findings were immaterial, because the fraud proved was not material to the contract sued on; for, said he, whether the defendant contracted with Isaac Gordon or with any other lender of money to take a loan of £100 and pay £50 for it, it was the same thing to the defendant, for, when the day of payment arrived, the defendant by law would have to pay the money contracted to be paid to whomsoever he had contracted to pay it, and it mattered not to him who that person was.

In my opinion the first point which arises is not whether the fraud was material to the contract entered into, but whether the fraud was material to the inducement which brought about the contract; and, if so, the jury having found the fact of fraud, I cannot doubt that the fraudulent concealing of the plaintiff's name was that which induced the defendant to enter into the contract upon which he is now sued, and was therefore material to the inducement. On what ground is it to be said that a defendant who has been induced by fraud into signing a contract, when sued upon it, cannot set up the well-known defence that he was induced by the fraud of the plaintiff to enter into it? If the fraud be material to the inducement, it appears to me plain that he can. And further I will say that to enter into a contract for a loan with a creditor such as Isaac Gordon (I will give his own description of himself in a moment) so that, when the day for payment arrives, the borrower can have no possible chance of a day's or even an hour's grace, but on the contrary has the certainty of being pestered with writs and threats of writs and bailiffs and bankruptcy notices (see plaintiff's letter of the 19th of December, 1898, under the name of Addison, about which hereafter), whereby life is rendered unbearable, and health is often injured, is by no means in my opinion the same thing as entering into a contract for a loan with a man who, when the day of payment arrives, does none of these things, but on the contrary deals in a fair and non-oppressive manner; and to contract with the oppressive class is very much to the detriment of the borrower. I am by no means prepared to say that the fraud in this case was not material to the contract itself. But, whether it be so or not, I will refer to a passage in the judgment of the Lord Chancellor (Lord Chelmsford) in the House of Lords in *Smith* v. *Kay*, 7 H. L. Cas. 750, at p. 759, when dealing with the contention of the immateriality of a representation, which passage is very much in point. He says: "But can it be permitted to a party who has practised deception with a view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth?" I apply this to the present case. There is also a passage in the judgment of the Master of the Rolls (Sir John Romilly) in *Pulsford* v. *Richards*, 1 W. R. 295, 22 L. J Ch. 559, at p. 562, pertinent to this question, but I need not cite it at length.

It was pressed upon us in argument that, if we upheld the verdict and judgment given against Isaac Gordon in this case, no moneylender hereafter would be able to trade excepting in his own name, and that this would be most detrimental and unjust to the community. But this is not so, and in deciding this case I decide nothing of the kind, for I would point out that amongst moneylenders, as in other ranks of life, there are many given to fair dealing and others given to the most rapacious tyranny known to mankind, and, if a moneylender of the first kind honestly trades in an assumed name, that is one case, and clearly not this case, but, if a moneylender of the second class secretes his own name and uses another name for the express purpose of fraudulently inducing a man to trade with him and to get that man into his clutches, that is altogether another and a different case, and the two are entirely distinct. The defendant in this case is a gentleman who in the month of August, 1898, was desirous of borrowing £100, and the following advertisement attracted his attention: "Money promptly and privately advanced in sums of £50 to £50,000 to nobility . . . ladies and gentlemen . . . on their own promissory note . . . without any unnecessary routine, securities, or preliminary fees, at about one-tenth of the interest charged elsewhere. The strictest privacy guaranteed, and those in need of financial accommodation without any of the objectionable features of the ordinary loan office are cordially invited to apply to me personally or by letter." (Signed) "George James Addison, 3, Holles-street, Cavendish-square."

A passage from Pothier's Traité des Obligations, section 19, cited by Fry, J., in *Smith* v. *Wheatcroft*, 9 Ch. D., p. 230, in which case, however, the learned judge expressly held that there had been no fraud, seems to me to be important, supposing there was no fraud applicable to the present case, and I will cite the passage. It is this: "Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand." Now the advertisement above-mentioned points out that George James Addison, with whom the defendant thought he was contracting, was not as ordinary loan

offices were, and that he traded at one-tenth of the interest charged elsewhere, and this appears to me to afford evidence that with a man trading as Addison said he did the defendant was willing to contract, and that the consideration of the person did enter into the contract, and upon this ground apart from fraud the contract ought not to stand.

But in this case there is the additional element why the contract ought not to stand—viz., the undoubted fraud of Isaac Gordon, who is now suing upon the contract induced by his own fraud. I must here state who the plaintiff Isaac Gordon is, and, in order that there may be no inaccuracy, I will cite only from his own letters and his own admissions as to what manner of man he is. He describes himself in writing when pressing the defendant as "the extortionate and usurious moneylender with about a gross of aliases, and that he is the hottest and bitterest of creditors." He admits that he is not a British subject, but was born in Russia, and has been convicted of fraud, and has charged 3,000 per cent. interest, but would not say if he had charged 5,000 per cent., that he carried on business under six or eight different aliases at Birmingham, Bristol, Bath, Manchester, Liverpool, Oxford, London, and Leeds. I find in a letter which he wrote to the defendant that he expresses himself thus: "I will make it as hot and as bitter as I possibly can for you, upon which you may stake your life." Such is the man from his own description and admissions, and no wonder that such was the odium into which he had got in the public eye as a lender of money that he found it necessary to give instructions to his clerks when dealing with his customers, "which instructions were to be strictly observed and rigorously carried out," which amongst other things contained as follows: "(4) The greatest care must be taken that they (the customers) should not be able to smell a rat or to let them (the customers) in any way whatever get any wiser or lead them to think that the different names they are dealing with are one and the same person, or it is simply ruin." Can more cogent evidence exist of the plaintiff's own view as to the materiality of the suppression of his identity when inducing customers to enter into contracts? The defendant stated, and the jury believed him, that if he had known that Addison was Gordon he would not have answered his advertisement or signed the promissory note, and that he would have done anything rather than go to Gordon; that he had known of Gordon from what he had read and that he believed the advertisement of Addison was one by a person of that name. I have not the slightest doubt that the findings of the jury on the questions left to them upon this part of the case were absolutely accurate and should be upheld.

It was then argued for the plaintiff that, even if so, the defendant, when he found out that the person who was pressing him for payment of £150 was Isaac Gordon, did not repudiate the note in time, for he did not do so until the 6th of January, 1899, whereas he had found out that Isaac Gordon was the man upon the 20th of December, 1898. In my judgment, when a person is defrauded into making a contract under which he takes a benefit, he has upon discovering the fraud the right to elect whether he will continue to treat the contract as binding or will disaffirm it. To cite from the judgment of the Exchequer Chamber in *Clough* v. *London and North-Western Railway Co.*, L. R. 7 Ex., at p. 35, "In such cases the question is, has the person on whom the fraud was practised elected not to avoid the contract; or has he elected to avoid it; or has he made no election?" Upon the 18th of December, 1898, before the defendant had found out that it was Isaac Gordon who was pressing him upon his promissory note, given in favour of Addison, he made an offer to Addison to pay the £150 by instalments. This was answered by a letter of the 19th of December in the name of Addison, which contains the passage: "I hope to teach you and let you know that the usurer whom you are dealing with in the present instance is one of the hottest creditors you have ever had, and take it from me, Mr. Street, that before you will get out of your obligation to me you will find it a bitter task and a very hard job, and on account of your letter of this morning I will make it as hot and as bitter as I possibly can for you, upon which you may stake your life. The next you will hear from me will be a writ and bailiffs, then bankruptcy if necessary." This letter being apparently typical of Isaac Gordon, the defendant obtained information that it was his, and upon the next day the defendant wrote charging Addison with being "the notorious Gordon," and stating "you've had your offer, and as you won't take it you'll only have yourself to thank when you get nothing," and suggesting some arrangement in the matter. On the 28th of December, 1898, Isaac Gordon for the first time wrote to the defendant disclosing his identity and suggesting some amicable arrangement, and he issued a writ against the defendant; and on the next day, the 29th of December, the defendant wrote to Gordon stating that he had sent his writ on to Mr. Jekyll, his solicitor, and asking Gordon in the future to write to him. On the next day Gordon wrote a most abusive letter to the defendant, which forms one of the subject-matters of the counterclaim for libel in this action, which was answered by the defendant on the 1st of January, 1899, and on the 6th of January Mr. Jekyll wrote to the plaintiff's solicitor, Mr. Davis, stating clearly how the defendant had been defrauded into accepting the loan, and stating that he had no desire to avoid payment of the money borrowed at a reasonable rate of interest, and that he was therefore willing to repay the £100 advanced, together with £10 for interest; and he added, "If this offer is not accepted we shall defend the action."

I cannot find upon the facts of this case that the defendant elected not to avoid the contract; but, on the contrary, he clearly elected to avoid it on the 6th of January, 1899. The Exchequer Chamber in *Clough* v. *London and North-Western Railway Co.* held that though lapse of time without rescinding will furnish evidence that the person defrauded has determined to affirm the contract, and when the lapse of time is great it probably would in practice be treated as conclusive evidence to show that he has so determined, yet, as Mellor, J., said in delivering the judgment of the court, "We cannot see any principle and we are not aware of any authority for saying that the mere fact that one who is a party to the fraud has issued a writ and commenced an action before the rescission is such a change of position (of the defrauding party) as would preclude the defrauded party from exercising his election to rescind, nor do we see the principle or discover the authority for saying that it is necessary that there should be a declaration of his intention to rescind prior to plea." Under his plea the defendant paid into court £100, together with £10 for interest. In my opinion, considering what was taking place, the lapse of time between the 20th of December, 1898, or possibly the 28th of December, when Gordon first disclosed his identity, and the 6th of January, 1899, is not such as to lead to the conclusion that the defendant had elected not to avoid the contract, but on the contrary he has elected to avoid it, and the jury, in my opinion, were well warranted in answering the fourth question as they did, and there is good evidence to support it.

I now come to the counterclaim for libel contained in the letters of the 19th of December, 1898, and the 31st of December, 1898. The first letter contains the expression, "I am pretty well used to gentlemen of your sort, and I know, and only too well, how to treat them." In the letter of the 31st of December the plaintiff writes to the defendant: "Your letter may do very well elsewhere, but not for the extortionate and usurious moneylender with a gross of aliases, who is pretty well used to gentlemen of your sort and their bouncing ways, and who knows, and only too well, how to treat them. You may depend upon it that you will get the bailiffs and be made bankrupt as soon as ever possible . . . as I hope to teach you and let you see that the many-aliased Isaac Gordon is the hottest and one of the most bitterest creditors you have ever had. You can abuse as much as you like, as I treat your epistles as though they came from an impecunious dog, and hope to have you through the bankruptcy court, as well as your wife, who is equally liable to me and has separate estate in her own right. So first wait and see what the many-aliased Isaac Gordon can and will do for you." It is not said that these letters do not constitute libels, and that they do not carry some at any rate of the innuendo alleged by the defendant, but it is said, first, that there is no evidence of publication, and, secondly, that the damages given—viz., £400, were excessive. There is clear evidence of publication as to the second and more important letter, for the plaintiff admits that it was copied by one of his clerks. As regards the first evidence I think there was also evidence of publication, but it is not really material to discuss this point for the second letter is the real libel. I know of no rule which is applicable when the court is asked to say that damages in libel assessed by a jury are excessive, which has any application to this case. It is said that the jury have taken into consideration, when awarding the damages, the infamous character of the plaintiff prior to the publication of the libels, but this certainly is not proved, and, on the contrary, the insolent and vindictive conduct of the writings of the plaintiff, going no further back than the 19th of December, 1898, are ample justification to the jury in awarding to the defendant on the counterclaim £400. The argument that the defendant had lost nothing by the libels, and that the clerk's reading the letters of Gordon could not damage the defendant, are of no avail, for those are not considerations upon which damages for libel are assessed, and the points taken are no ground for holding that the damages are excessive. In my judgment the verdict and judgment must stand, and the appeal must be dismissed with costs.

RIGBY, L.J., agrees in this judgment.

VAUGHAN WILLIAMS, L.J.—I agree. I only wish to add that the case of *Moorhouse* v. *Woolfe*, 46 L. T. Rep. 374, 30 W. R. Dig. 51, shows that the issue of the advertisement by the plaintiff made the misrepresentation contained in it material to the inducement to the contract entitling the defendant to repudiate it.

*Appeal dismissed.*

Solicitor for the plaintiff, *D. Davis.*

Solicitors for the defendant, *Jekyll & Green.*

---

From Q. B. Div.
(A. L. Smith, Collins, and Vaughan Williams, L.JJ.) Nov. 30.

WOOLFE v. DE BRAAM. (a.)

*Practice—Mode of trial—Trial with jury—Leave to defend given without any condition or direction as to mode of trial—Right of defendant to trial with jury —R. S. C.,* 1883, *ord.* 14, *rr.* 6, 8; *ord.* 36, *r.* 6.

*Where on a summons under order* 14 *an order has been made giving the defendant leave to defend without any condition or direction as to mode of trial, the judge at chambers cannot on a subsequent summons deprive the defendant of his right under ord.* 36, *r.* 6, *to have the action tried with a jury.*

Appeal by the defendant from the refusal of Lawrance, J., to order that the action should be tried with a jury.

The action was brought to recover money lent with interest. The plaintiff having taken out a summons under order 14, the master gave the defendant unconditional leave to defend, and ordered that the action should be tried by the official referee. On appeal Lawrance, J., varied the master's order by directing that the action should be put into the Short Cause List. Subsequently a summons was taken out for directions, and at the hearing before the master the defendant asked that the action might be tried with a jury. The master referred the matter to Lawrance, J., who refused to make an order for trial with a jury.

The defendant appealed.

*Foote, Q.C.*, and *Scarlett*, for the defendant.—The learned judge said that, as the action had been put into the Short Cause List, it could not be tried with a jury. But it is common practice for actions in the Short Cause List to be tried with a jury. By ord. 36, r. 6, any party has a right to a trial with a jury in any cause or matter other than those specified in rules 3, 4, and 5. In this case the learned judge had no jurisdiction to refuse an order for trial with a jury.

*Hugo Young, Q.C.*, and *Lowenthal*, for the plaintiff. —The learned judge had jurisdiction to order that this action should be tried without a jury. By ord. 14, r. 6, leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the judge may think fit.

A. L. SMITH, L.J.—I think this appeal must be allowed. I am not satisfied that the learned judge, in the exercise of his discretion, came to the conclusion that this case was one which ought not to be tried with a jury. At any rate he did not make it a term of his order giving the defendant leave to defend that the trial should be without a jury. If the learned judge meant to hold that cases in the Short Cause List could not be tried with a jury, I think he was wrong. In my opinion the defendant has a right, under ord. 36, r. 6, to require a trial with a jury, and we ought to order that the case shall be tried with a jury.

COLLINS, L.J.—The order giving the defendant leave to defend did not contain a condition that the action should be tried without a jury. That being so, in my opinion the learned judge had no jurisdiction on a subsequent summons to deprive the defendant of the right given to him by ord. 36, r. 6, of having the

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

action tried with a jury. I do not think that the learned judge meant that actions put into the Short Cause List could not be tried with a jury.

VAUGHAN WILLIAMS, L.J. — It was open to Lawrance, J., on the summons under order 14 to make any condition he thought proper to his order giving leave to defend, but he made no conditions. It was open to him under rule 8 (*a*) of order 14 to give directions as to the mode of trial; he might have ordered the action to be tried without a jury. But he could only do so at that time and by that order. He gave no such directions. The defendant then had a right under ord. 36, r. 6, to a trial with a jury. It was not open to the learned judge on a subsequent summons to deprive him of that right.

*Appeal allowed.*

Solicitor for the plaintiff, *Isidore Goldman.*

Solicitor for the defendant, *G. J. Fowler.*

---

From Q. B. Div.
(Lord Russell of Killowen, C.J., and A. L. Smith and Vaughan Williams, L.JJ.) — Nov. 3, 18.

ELLIS (*Appellant*) *v.* CAMBERWELL ASSESSMENT COMMITTEE (*Respondents*). (*a.*)

*Rating—Metropolis—Quinquennial valuation—Alteration in value — Provisional and supplemental valuation—Valuation (Metropolis) Act,* 1869 (32 & 33 *Vict. c.* 67), *ss.* 43, 46, 47.

*Section* 43 *of the Metropolis* (*Valuation*) *Act,* 1869, *enacts that the valuation list as approved by the assessment committee shall last for five years subject to any supplemental or provisional list as provided by sections* 46 *and* 47.

*Held, that to justify the insertion of hereditaments in the supplemental and provisional lists on the ground of an alteration in value, the alteration must be such that if the fact relied on as constituting the valuation had been present at the time of the original valuation, it could properly have been taken into consideration in arriving at the assessment; that the fact constituting the alteration in value should affect the hereditament in question in particular; that a general rise in values would not be a fact constituting such an alteration; and that the onus of proving that the cause of the alteration in value is one which does not affect all classes is on those who make the supplemental or provisional list.*

Appeal from the Divisional Court (Lawrance and Channell, JJ.) upon a case stated by the London Quarter Sessions upon an appeal against the supplemental valuation list for the parish of Camberwell for the year 1897.

The facts were as follows: The appellant had been since October, 1896, the occupier of a public-house known as the "Adam and Eve," High-street, Peckham, in the parish of Camberwell. At the quinquennial valuation in 1895 the gross and rateable values of the public-house were fixed at £485 and £405 respectively, which values were duly entered in the quinquennial valuation list made in that year.

By a provisional list made in December, 1896, the assessment of the public-house was increased by the overseers to £600 gross and £500 rateable value, and objection was made by the appellant to the increased assessment on the ground that the said public-house had not in the course of the year in which the provisional list was made increased in value by the addition thereto or erection thereon of any building, nor had there been any increase of value from any cause within the meaning of section 47 of the Valuation (Metropolis Act) Act, 1869. At the hearing of the objection the assessment committee endeavoured to get from the appellant information as to the premium given by him for the lease of the public-house. This information the appellant refused to give, and the assessment committee, after hearing the objection and viewing the public-house, reduced the assessment to £575 gross and £485 rateable value.

In the supplemental valuation list made in 1897 the appellant's public-house was again valued and assessed at £575 gross and £485 rateable value. The appellant objected to the valuation, and, on appearing before the assessment committee, contended (*inter alia*) (1) that the public-house had been improperly included in the provisional list and therefore ought not to be included in the supplemental list, and that it was therein too highly rated; (2) that no alteration in the value of the public-house had taken place during the twelve months preceding the making of the supplemental list within the meaning of section 46, sub-section 1, of the Valuation (Metropolis) Act, 1869; (3) that the overseers were not in law entitled to consider, or in any way to act on any sum of money paid or supposed to have been paid, for the public-house either since the date of the valuation list in force at the time of the making of the provisional list or at all.

The assessment committee, after hearing the objections, refused to give the appellant any relief, and he appealed to the London Quarter Sessions.

At the hearing of the appeal counsel for the appellant objected to any questions being asked or any evidence being given about the premium paid by the appellant. The court, however, overruled the objection, and the fact was elicited by the respondents on cross-examination that the appellant had paid £16,400 as the consideration for his lease. No evidence was given as to the precise amount of the premium paid in 1895 or any time previously, but it was admitted by one of the appellant's witnesses that assuming the valuation appearing in the quinquennial list made in 1895 to have been calculated according to the method usually adopted in the parish of Camberwell the valuation must have been based on a supposed payment of a premium of about £6,400. The assessment committee, however, at the time of the revision of the quinquennial valuation list did not in fact know the precise amount of the premium which had been paid by the then occupier. Evidence was given by a valuer on behalf of the respondents that there had been since the date of the quinquennial valuation list a general appreciation of licensed premises throughout the metropolis, and that, in his opinion, the annual value of the said public-house had between April and October, 1896, increased by about £100. It was, however, admitted that there had been no structural alteration to the public-house. No evidence was given of any circumstances specially affecting the annual value of the public-house.

The respondents contended that they were not bound to give any such evidence, but that it was enough for them to show that the value had in fact increased. It was further admitted that no public-houses had been placed in the provisional or supplemental lists except such as had in fact been sold since the date of the quinquennial valuation thereof, although public-houses in the neighbourhood had generally increased in value. For the assessment committee it was contended that it was not necessary that there should be a structural alteration of the rated premises in order to warrant their insertion in a supplemental list; that the facts mentioned as to the premium

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

given for the lease of the public-house were evidence of an alteration in matters stated in the quinquennial valuation list during the twelve months preceding the making of the supplemental list under section 46 of the Valuation (Metropolis) Act, 1869; and that the payment of such premium showed that there had been such a material and unforeseen alteration of the value of the public-house as to warrant its insertion in the supplemental list.

For the appellant it was contended that the facts above mentioned were not in law any evidence of an alteration within the meaning of section 46, sub-section 1, of the Valuation (Metropolis) Act, 1869, and that all evidence as to the amount of premium paid by the appellant for the public-house in October, 1896, was irrelevant and inadmissible, and that the amount of such premium in the absence of any evidence, save as hereinbefore stated as to the premiums previously paid, would not afford any indication of any alteration in the value of the public-house.

The court of quarter sessions gave judgment in the following terms: "We find that although there had been no structural alteration in the appellant's premises between 1896 and April, 1897, there had been alteration in value in these premises by way of increase in that period. The appellant has failed to establish in our opinion that the alteration in gross and rateable values made by the assessment committee in the supplemental list is in excess of the actual increased value within the statutory period, and we confirm the alteration of the list made by the assessment committee with costs." The values in the supplemental lists were, therefore, ordered to remain as assessed by the assessment committee.

The questions for the opinion of the court were: (1) Whether the alteration in value which took place during the twelve months preceding the making of the supplemental valuation list was in law an alteration within the meaning of section 46, sub-section 1, of the Valuation (Metropolis) Act, 1869; (2) whether the amount of premium paid by the appellant in October, 1896, for the said premises ought to have been received in evidence; (3) whether the amount of such premium was in law any evidence of an alteration within the meaning of that sub-section. If the court should answer all the foregoing questions in the affirmative the order of sessions was to be affirmed, and if the court should answer all or any of the questions in the negative the order of sessions was to be quashed and the gross and rateable values of the public-house were to be reduced to £485 and £405 respectively, or the premises were to be struck out of the valuation list, or the court was to make such other or further order as to the court should seem fit. The Divisional Court answered the questions in the affirmative, and affirmed the order of quarter sessions.

The Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 43: The valuation list as approved by the assessment committee . . . shall come into force at the beginning of the year (commencing on the 6th of April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned.

Section 46: Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years . . . shall be conducted as follows: (1) In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall show all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations. If no alteration has taken place which makes a supplemental list necessary, the overseers shall send a certificate to that effect to the assessment committee in place of such list, which certificate may be in the form contained in the second schedule to this Act.

Section 47 provides that "if in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building or is from any cause increased or reduced in value," the provisions contained in that section as to making a provisional list shall take effect.

*Littler, Q.C.*, *Page, Q.C.*, and *W. Russell*, for the appellants.

*Macmorran, Q.C.*, and *Ryde*, for the respondents.

*Cur. adv. vult.*

Nov. 18.—VAUGHAN WILLIAMS, L.J., read the judgment of the Court as follows: Section 43 of the Valuation (Metropolis) Act, 1869, which, as the preamble states, was passed to secure uniformity in the assessment of rateable property in the metropolis, provides that the valuation list shall last for five years "subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned." Now, alteration is provided for in section 46 and section 47. The former provides for supplemental valuation, the latter for provisional valuation. Supplemental valuation takes place at the end of each year. The old list is then to be supplemented by making a new list of all the alterations which have taken place within the last twelve months. If there are no such alterations which make a supplemental list necessary in any of the matters in the valuation list (which, of course, includes gross and rateable value) the overseers are to send to the assessment committee a certificate to that effect. Provisional valuation deals with the alteration by increase or decrease in value of a particular hereditament "from any cause" during the twelve months. The provisional valuation takes effect immediately and remains in force till the making of the supplemental or other valuation list at the end of the year. The alterations in the supplemental list seem to be the confirmed provisional valuations. It seems to follow that whether one is dealing with the supplemental list or with the provisional list the question whether there has been such an alteration in the value of the premises as to justify an alteration in the valuation seems to be the same in either case. Now what are the conditions of such an alteration? It seems to us they are these: (1) The alteration in value must be such that, if the fact relied on as constituting the alteration had been present at the time of the original valuation, it could properly have been taken into consideration in arriving at the assessment; (2) that the fact constituting the alteration in value should affect the hereditament in question in particular. We do not think that a general rise in values would be a fact constituting such an alteration. This, it seems to us, would be inconsistent with the expressed intention of the Act that the valuation list should remain in force for five years. Moreover, we do not think that the mere proof of a rise in value of a class of hereditaments including the one sought to be dealt with by the provisional or supplemental valuation would of itself justify a new valuation under sections 46 and 47, because such a rise in no way negatives a general rise in the values of hereditaments of all classes. After all, the rise in the value of licensed houses generally depends on a general cause, such as prosperous times, which give the mass of the people more money to spend in the luxuries of life, whether drink, or bread, or meat, or clothing, or sight-seeing, or houses, or anything else. The licensed victualler will obtain a better price if he sells his

public-house; the butcher or the baker will obtain a better price if he sells his business. Theatres and music-halls will be easy to sell. Houses and leases will command good prices to let and to sell. All this flows from one cause, the prosperity of the people. We do not think sections 46 and 47 apply in such a case to any class of hereditaments increased in value as a class by a cause affecting all classes, such as general prosperity. The fact, however, that the increase in value affects a class as a whole will not exclude the increase from the operation of these sections, provided it is shown that the increase of value arises from some cause affecting merely the class, and not from the cause of general prosperity affecting all classes of the community —*e.g.*, if the taste for cycling makes factories which are conveniently situated for this manufacture command higher prices to sell or to let, this is a cause affecting a class—viz., premises suitable for cycle manufacturing which go up in value by reason of a new fashionable taste; but the cause is independent of the general prosperity of the community, and such an increase in value would justify an alteration under sections 46 and 47 during the currency of the quinquennial period of the assessment. The same would be true if war sent up the value of premises licensed for the purpose of carrying on the manufacture of gunpowder, the cause of increase of value being independent of general prosperity. But in each case it is for those who alter the assessment to prove the nature and cause of the alteration in value. It is easy to do this where the increase of value arises from some local cause affecting a class or some hereditaments in a class—for instance, when the building of a bridge sends up the value of the houses of a street thus made more accessible, or the removal of a cul-de-sac makes the houses in a street of shops more valuable from an increased traffic through the street, or the houses in a residential street less valuable from the increase of noise. Betterment or depreciation of such a character affecting all or some of the houses in a street is clearly within sections 46 and 47, and the cause of the increase in value is easy of proof. The proof is more difficult where the cause of the increase in value is not a local physical cause, but in our judgment the onus of proving that the cause of the alteration in the value of the hereditament in the preceding twelve months is a cause which does not affect all classes is clearly on those who seek to have a provisional or supplemental list made.

These being the conditions for the application of sections 46 and 47, let us see how far the facts stated in the special case show that there has been within the twelve months an alteration in the value of this public-house. Two sorts of alterations are alleged. First, a witness says in his opinion the value of the particular public-house increased by £100 a year in the twelve months in question, and he attributes this to the rise in value of licensed houses throughout the metropolis. For the reasons which we have given we do not think that the onus on those who seek to say that there has been an alteration in value within the meaning of these sections is satisfied by proof of a rise in value which is consistent with a general rise resulting from general prosperity. Secondly, it is said that the fact that this public-house has just been sold for £16,400 is evidence of an alteration in value within the twelve months. We think not. It may be that £16,400 was the very sum the vendor paid on going into possession in or prior to 1895. It is said not so, because in such a case the valuation in 1895 would have been higher than it in fact was. That, however, depends upon how much of that £16,400 the assessment committee apportioned to personal goodwill or other matters not affecting the letting value of the public-house: see *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q. B. 630, 47 W. R. Dig. 148.

The questions at the end of the special case we answer as follows: The answer to question 1 is No; there is nothing in the facts stated in the case nor in the evidence stated to have been adduced sufficient to justify the conclusion that the alteration which took place during the twelve months preceding the making of the supplemental list was in law an alteration within the meaning of section 46. It is quite consistent with such facts and evidence that the alteration in value resulted from general prosperity. The answer to question 2 is Yes, and to question 3 No; for although evidence of the amount of the premium is admissible, the amount of the premium was not in law any evidence of an alteration within section 46, unless some evidence was given of the premium previously paid beyond that which appears by the case to have been given.

*Appeal allowed.*

Solicitors for the appellant, *Maitlands, Peckham, & Co.*

Solicitors for the respondents, *Marsden & Son.*

---

From Q. B. Div.
(Lord Russell of Killowen, C.J., and A. L. Smith and Vaughan Williams, L.JJ.) — Oct. 31.

STYLES (SURVEYOR OF TAXES) *v.* THE SOCIETY OF THE MIDDLE TEMPLE. (*a.*)

*Inland revenue—Inhabited house duty—Hall—Library —Liability to be assessed—*48 *Geo.* 3, *c.* 55, *Schedule B., r.* 5—*House Tax Act,* 1851 (14 *&* 15 *Vict. c.* 36), *s.* 1.

*The dining-hall and offices of the Middle Temple, which are used and occupied during the daytime only, in which no one sleeps or resides, and which have no communication with any premises in which anyone sleeps or resides, are liable to inhabited house duty, as coming within the words "hall or office" in rule 5 of Schedule B. of* 48 *Geo.* 3, *c.* 55; *but the library is not a "hall" within the meaning of that rule, and is not liable to inhabited house duty.*

*Judgment of* Wills and Bruce, JJ. (47 *W. R.* 383), *affirmed.*

Appeal from the judgment of a Divisional Court (Wills and Bruce, JJ.) on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of the Middle Temple in the County of Middlesex, 47 W. R. 383.

The treasurer of the Middle Temple appealed to the commissioners against an assessment for inhabited house duty of £1,150 (duty £43 2s. 6d.) made on the hall and offices of the Middle Temple, and also against an assessment for inhabited house duty of £490 (duty £18 7s. 6d.) made on the library of the Middle Temple for the year ending the 5th of April, 1898.

The Middle Temple hall and offices consist of a dining-hall and kitchen for the use of the members of the inn, with the usual offices, rooms for the use of the treasurer and benchers, and two rooms fitted up and used as lecture-rooms for law students.

The premises are used and occupied during the daytime only, and are closed and locked at night. No one sleeps or resides on the premises, and they are not used or furnished as a dwelling-house or provided

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

with any sleeping accommodation, nor do they communicate in any way with any apartments or premises which are used as a dwelling-house. A fireman takes charge of the premises when they are closed at night.

The library is a separate building, some distance from the hall and offices, and is used during the daytime by the members of the inn. A librarian and porters attend during the day, but at night the premises are always closed and the doors kept locked, and no one remains in the premises or in any room or building with which it has any communication.

The commissioners were of opinion that neither the hall and offices nor the library were assessable to inhabited house duty.

The surveyor of taxes appealed to the Queen's Bench Division, and the Divisional Court held that the hall and offices were liable to inhabited house duty as coming within the words "hall or office" in rule 5 of Schedule B. of 48 Geo. 3, c. 55, but that the library was not a "hall" within the meaning of that rule, and was not liable to inhabited house duty.

The Society of the Middle Temple appealed.

The arguments are set out in the report of the proceedings before the Divisional Court, 47 W. R. 383.

*Balfour Browne, Q.C.*, and *J. E. Bankes*, for the Society of the Middle Temple.

*Sir R. E. Webster, A.G.*, and *Danckwerts*, for the Crown.

THE COURT (Lord RUSSELL OF KILLOWEN, C.J., and A. L. SMITH and VAUGHAN WILLIAMS, L.JJ.) dismissed the appeal.

*Appeal dismissed.*

Solicitors for the society, *Park, Nelson, & Co.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

## High Court of Justice.

Chan. Div. Kekewich, J. — Nov. 29.

### LADY BATEMAN v. FABER AND OTHERS. (a.)

*Settlement — Construction — Meaning of "income" — Tithes — Rent-charges under the Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114) — *Voluntary abatements to tenants — Unlet property — Personal occupation of unlet property.*

*In calculating the amount of "income," as the word is used in a popular sense, derivable from landed estates for any particular year, it is right to deduct from the gross receipts sums payable by way of tithe and of rent-charges under the Improvement of Land Act*, 1864, *and also such voluntary abatements of rent to tenants as are fairly necessitated by the circumstances of the case. The owner of the "income" is not to be credited with rent for any part of the property which happens to be unlet during the particular year, nor is he to be credited with rent even for personal occupation of the same.*

Adjourned summons.

This summons raised a question as to the construction which a court of justice will put upon the word "income" in the absence of indications in the context to fix it with a particular meaning. The hearing of the action out of which the summons arose has already been reported.

By an indenture dated the 26th of June, 1867, and made between Lord Bateman of the one part and Sir E. C. Kerrison and R. Ellice of the other part, after certain recitals from which it appeared that Sir E. C. Kerrison and R. Ellice had agreed to lend Lord Bateman the sum of £11,430 on the condition (*inter alia*) that the provision thereinafter appearing should be made for Lady Bateman, Lord Bateman in consideration of the said loan conveyed to Sir E. C. Kerrison and R. Ellice his life interest in certain freehold estates upon trust as a security for the due performance by him of certain covenants relating to the loan, and subject thereto upon further trust to pay the rents and profits of the said estates to Lady Bateman for the term of her life. The deed, however, contained a proviso that if at any time Lady Bateman should "succeed to an income in her own right of £8,000 or more per annum for her separate use, then, and in such case, the trust" thereinbefore mentioned on her behalf should "absolutely cease and determine." After such determination of such trust the property was to be held in trust for Lord Bateman. The latter subsequently mortgaged his interest in the estates to one Andrew Montagu, who died on the 8th of October, 1895, leaving the defendant G. D. Faber as his sole executor and residuary legatee.

Sir E. C. Kerrison died in 1886, and on his death Lady Bateman became entitled to a life interest in certain properties in Norfolk, Suffolk, and Middlesex. A question having arisen as to whether Lady Bateman after her succession to these estates had not become entitled to an income of £8,000 or more per annum, the present action was commenced by her against G. D. Faber and others, claiming (*inter alia*) a declaration that she had not at any time since the execution of the indenture of 1867 succeeded to an "income" in her own right of £8,000 or more per annum. On the trial of the action before Kekewich, J., on the 24th of June, 1897, it was ordered that an inquiry should be held in chambers as to whether the plaintiff had at any time since the 31st of December, 1885, succeeded to an "income" of £8,000 a year, and the further consideration of the action was reserved. An inquiry having been held in chambers, the master ultimately found that in no year subsequent to the said 31st of December, 1885, had Lady Bateman's income from the Kerrison estates exceeded the sum of £8,000. He found, however, that her income from the said estates in the year 1886-7, had amounted to £7,750·12s. The defendants thereupon issued a summons to vary the masters' certificate on certain points which sufficiently appear from the arguments of their counsel.

*Renshaw, Q.C., Swinfen Eady, Q.C.*, and *Brabant*, for the defendants. — The master has calculated this lady's "income" on a wrong conception of the meaning of the term. "Income" does not mean the actual net amount of money that comes into anyone's hands for actual spending purposes, but everything that comes into the recipient's hands after the deduction of paramount payments. Other payments—*e.g.*, rates and taxes—must not be deducted: *Reg.* v. *Commissioners of Southampton*, 18, W. R. 1171, L. R. 4 H. L. 449, *per* Lord Bramwell, at p. 472: "'Income' is that which comes in, not that which comes in less on outgoing"; *per* Lord Chelmsford at p. 483: "It appears to me that the word 'income' here means the total amount of the rates and duties receivable by the commissioners, without regard to any outgoings to which it might be subject"; *Lawless* v. *Sullivan*, 29 W. R. 917, 6 App. Cas. 373. Now as to the facts. A single year—*i.e.*, the 11th of October, 1886, to the 11th of October, 1887, has been agreed on by the parties for taking

(a.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

the account. The master finds that the lady's "income" for that year amounted to £7,750 12s. (1) He has allowed a deduction of £1,284 18s. 2d. for tithes. This ought not to be allowed. Tithes are neither a charge on the inheritance (*Bailey* v. *Badham*, 33 W. R. 770, 30 Ch. D. 84) nor a personal liability on the owner: *Griffinhoof* v. *Danbriz*, 3 W. R. 60; 6 & 7 Will. 4, c. 61, s. 67. Tithes, therefore, are payable out of "income" after it has been ascertained. (2) We object to the deduction of £342 4s. 8d. and two other sums for rent-charges. These rent-charges arise under the Land Improvement Act, 1864. Part of each must be attributed to capital, and part to interest. Only the part attributable to interest ought to be deducted from "income." (3) We object also to the deduction of voluntary allowances or abatements to tenants. Where there is a fixed rent, a voluntary allowance, however wise or prudent, ought not to be deducted. (4) The master again has only taken account of actual receipts, irrespective of rents that ought to have been received. Thus in the case of Oakley Park the property was let from the 11th of October, 1886, to the 1st of March, 1887 (when the tenancy expired), for £600 a year. The amount allowed by the master is £250. But (*a*) Lady Bateman ought to be credited with the value of the property for the whole year; and (*b*) £600 is in itself an inadequate rent. The value on the succession duty account is £1,000 a year. (5) Nothing has been credited to Lady Bateman for the personal occupation of Broome Hall. A fair occupation rent ought to be credited. Whether the house could or could not be otherwise let ought not to be taken into consideration. (6) As to copyhold fines. The figure actually allowed is the receipt for this particular year. A fair value would be for eleven years.

*Warrington, Q.C.*, and *Beaumont*, for the plaintiff.—The master has allowed us no outgoings except tithes—no land tax, repairs, &c. Nothing has been allowed for agency and estate office. The defendants are driven to substitute "rental" or "annual value" for what the deed says—*i.e.*, "income." (1) It is true that tithes are not a charge on the heritage, but on the produce of the estate. Suppose, however, that Lady Bateman were in occupation, and not merely the landlady. She would then have had to pay the tithe before she could be said to have enjoyed the income. It is the same when the property is let to tenants. Tithes, therefore, are as properly allowable as a rent-charge. (2) The whole of the rent-charges under the Land Improvement Act, 1864, must be allowed, for the parts that represent capital are as much a charge on the produce of the estate as the parts that represent interest. (3) It is not suggested that the voluntary abatements were not made in the *bonâ fide* management of the estate. Many in pursuance of agreements with tenants; some were in fact by old custom, some by way of correcting a mistake. All have been necessary for the good of the estate. We ought to call them, not voluntary allowances, but necessary deductions. (4) As to Oakley Park, the plaintiff made no profit, but a loss. But the point involves also a question of principle. Can a tenant for life be said to be in receipt of income when the property is unlet? No; the property is a burden. To credit the plaintiff with rent under such circumstances we must change "income" into "annual value." "Income" means what is actually received, not what in better times might be received. (5) Broome Hall. The evidence shows that the plaintiff tried to let it, and lived there only to save the expense of a caretaker. She ought not to be charged anything. (6) As to copyhold fines, we must take the actual amount received during this particular year. It has been agreed to exclude averages all round, and they must be excluded here.

*Renshaw, Q.C.*, in reply.—As to the parts of the property which were unlet; suppose the whole estate were "in hand." Would the plaintiff then have no income? As touching Broome Hall, she received a benefit from residence.

KEKEWICH, J.—I have to reduce to a concrete sense a phrase which has unhappily crept into this settlement. [His lordship read the proviso.] Now it has been suggested in argument that "income" means "estate." It would not be difficult to distinguish between the two, but I do not propose to attempt it. I have to deal with the phrase "succeed to an income in her own right of £8,000 or more per annum," and I must decline to construe it by importing other words. Now I have to regard the whole of the circumstances under which this proviso is found in the deed. It is intended to make provision for this lady. She was intended to have the income of certain property subject to a certain proviso. Subject to that proviso the trustees were to pay all the annual and other outgoings, and hand her over the surplus. Then, knowing that, we are almost bound to come to the proviso with the preconceived notion that the second income, which is to cause her to lose the first, is to be of the same class as the first. Now what is the popular meaning of income? I must not take income to mean the actual amount of money that remains in hand after a landlord has done his duty to the estate. To do one's duty to an estate, especially a rural estate, would involve a number of items of expenditure which would certainly be called voluntary. But, *per contra*, I must ascertain as nearly as possible not merely what passes through this lady's banking account, but what passes through it for her benefit; allowing for fair, not generous, expenditure. The fairest test would be to take an average for several years. We should not take the proceeds of a single year's practice in attempting to estimate the annual income of an eminent physician or an eminent Queen's Counsel. We should take an average. Here, however, a single year has been fixed on by agreement of the parties—a year, no doubt, which is best for the purposes of the defendants—but the parties all alike must stand or fall by it. I am precluded from taking an average. Now I must go into a few details. (1) As to tithes. It is said quite truly that these are not a charge on the land—that they are not recoverable from the landowner personally—and it is said, therefore, that they ought not to be deducted from the gross income. Without denying the theory, I feel that to all intents and purposes they have to be paid by reason of the ownership of the land. No landowner can be said to enjoy an income of £8,000 per annum when what he really has is £8,000 less a certain amount of tithe. (2) As to rent-charges under the Improvement of Land Act, 1864, it cannot be doubted that the part attributed to capital, not less than the part attributable to interest, is to be deducted in calculating "income." (3) As to voluntary abatements; there is no suggestion of any want of straightforwardness on the part of Lady Bateman. If a noble duke chooses to make a rebate of 30 per cent., when his neighbours who are owners of the same kind of land, make a rebate of only 15 per cent., that is an act of pure bounty. Such an abatement could not be allowed; but there is no suggestion of such here. Here, according to the evidence, all were made by previous agreement, or in order to retain tenants, or possibly to do what was being done by people all round. (4) As to Oakley Park; why is Lady Bateman to be credited with rent for it? She got no rent for half the year, and the

master had to look at that year alone. (5) As to Broome Hall; Lady Bateman has occupied it herself, but that does not make it income. *Non constat* that she could have let it, even though she had had to pay rent for another house. (6) As to copyhold fines. The parties have agreed to take the accounts on the basis of a single year, and they must abide by their agreement here. All this being so, I see no reason to disturb the master's finding. The defendants have, accordingly, failed to establish that Lady Bateman has "succeeded to an income of £8,000 or more per annum."

*Judgment for the plaintiff.*

Solicitors, *Greenfield & Cracknall; G. F. Hudson, Matthews, & Co.*

---

Chan. Div. } Kekewich, J. } Nov. 13, 14.

HEYL-DIA v. EDMUNDS. (a.)

*Secret process—Co-owners—Right to use invention—Injunction.*

*Each co-owner of a secret process or invention may, in the absence of contract, use the knowledge which he possesses without the consent of the other co-owners.*

G. E. Heyl-Dia, the plaintiff in this action, was the inventor of a secret process for the purpose of recovering from waste indiarubber commercial indiarubber, which process he had communicated to the defendants in the action, H. Edmunds, J. E. Baxter, and G. B. Samuelson, under certain agreements into which they had entered. Disputes having arisen between the parties as to their respective rights in the secret process, the plaintiff brought this action, by his statement of claim alleging that he was the sole proprietor of the secret process, and claiming (1) a declaration that he was entitled solely to the benefit of the secret process or invention; (2) an injunction to restrain the defendants from in any way disclosing the particulars of the secret process; (3) alternatively that the plaintiff and defendants, or some of them, were partners with regard to the secret process; (4) dissolution of the partnership; and (5) usual accounts and inquiries. The defendants Edmunds and Baxter denied that the plaintiff was sole proprietor of the secret process and alleged that they and the plaintiff were joint owners of the secret process in one-third shares and that they, equally with the plaintiff, were entitled to use the secret process. The defendant Samuelson said that he had now no interest in the secret process and disclaimed any intention of using or revealing it.

*P. O. Lawrence, Q.C.*, and *O. L. Clare*, for the plaintiff.—If the plaintiff is not absolutely entitled to the secret process he is partner with the defendants Edmunds and Baxter therein. It must be a partnership and not a co-ownership, because, if it be held to be the latter, the defendants might reveal the secret and so destroy the value of the asset.

*Warrington, Q.C.*, and *R. F. Norton* for the defendants Edmunds and Baxter.—The plaintiff and these defendants are co-owners of the secret process, and as such each can use it for his own benefit and cannot be restrained by the other co-owners. An invention is not a chattel: Lindley on Partnership (6th ed.), p. 36; *Mathers* v. *Green*, 14 W. R. 17, L. R. 1 Ch. App. 29; *Steers* v. *Rogers*, [1893] A. C. 232, 41 W. R. Dig. 159; *James* v. *James*, 20 W. R. 434, L. R. 13 Eq. 421.

*Frank Russell*, for the defendant Samuelson.

KEKEWICH, J., after considering the evidence, held that the plaintiff and the defendants Edmunds and Baxter were co-owners of the secret process, to one-third of which the plaintiff was entitled, but that they were not partners therein, and continued: I cannot give the plaintiff any relief on the ground of its being a partnership, and beyond that really no question is raised by the pleadings. But it is desirable, I think, that I should say what, in my view, their rights are. It has been argued on behalf of the plaintiff that this is a secret process, and as regards a secret process of this kind that if one of the three owners may use it without the consent of the others it will destroy the thing which was in their co-ownership, and that that cannot be, and that therefore any one of them is entitled to restrain his co-owners from using it to his detriment. That is rather a strong doctrine, but still it requires some consideration, for this being a secret process the result of the application of the general law of co-ownership might no doubt lead us into some difficulties. Mr. Warrington has called my attention to one or two cases which I think are of great assistance to me. I need not refer at length to *Mathers* v. *Green*, because in *Steers* v. *Rogers* Lord Herschell, in moving the judgment of the House of Lords, approved of the decision in *Mathers* v. *Green*. Although a secret process is not strictly analogous to patented process, because, of course, the patent is a disclosure of the invention, and you get rid of the secrecy at once, yet there is this analogy, and a very close analogy. There is no question of any right to use the invention, that each owner must have unless restrained by contract or statute law. Now, if that is true as regards a patented invention, it must be true as regards a secret invention. Lord Herschell's words in *Steers* v. *Rogers*: "Is there, then, any implied contract where two or more persons jointly obtain letters patent, that no one of them shall use the invention without the consent of the others, or, if he does, that he shall use it for their joint benefit? I can discover no principle for such a doctrine." It seems to me to be applicable *mutatis mutandis* to the case of a secret process, and to be directly in point. The answer suggested is that the right to use this secret process must be treated as a chattel. I observe in the case of *Steers* v. *Rogers* the law of co-ownership and partnership and chattels was alluded to, and that the learned counsel quoted Lindley on Partnership (5th ed.), p. 62, where he says that "as a general rule where one owner of a chattel derives gain from its use, he is, independently of any contract, bound to account to the other owners." There is nothing in the judgment of Lord Herschell to show that that is not perfectly true, but there is a great deal to show that patent rights are not chattels, and therefore I say the right to use this secret process is not a chattel. Whether this is strictly so or not I must leave to be determined on another occasion when the point arises. In the 6th edition of Lindley on Partnership, p. 36, the learned author does refer to a patent for an invention as a chattel, but he had not before him then the judgment in the House of Lords, though he had the decision of the Court of Appeal in *Steers* v. *Rogers*, because the decision of the House of Lords had not then been given. Possibly in the next edition of Lindley on Partnership some modification of the language may be introduced. It suffices for the present purpose to say that Lord Herschell's language appears to be applicable to this case, and whether you may properly

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

speak of a secret process as being a chattel or not; at any rate, there is nothing to prevent each co-owner of this secret process from using the knowledge which he possesses. I, therefore, am bound to hold that the plaintiff is entitled to no relief as against any of the defendants. There will be judgment for the defendants with costs. If the plaintiff desires to appeal, I think the defendants ought not, pending the appeal, to disclose the secret process.

Solicitors, *W. J. & E. H. Tremellen*, for *W. Hanchett*, Manchester; *Percival G. Robinson*, for *Edelston & Son*, Preston.

---

Chan. Div. } Byrne, J. } June 28, 29, 1899.

MOSTYN v. ATHERTON. (a.)

*Water—Riparian owner—Right to flow of water—Water flowing in defined channel—Artificial construction at source of spring—Local authority—Public well—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55).

*The fact that the issuing point of a spring has at some remote period been built round and over in order to improve its issuing from the earth will not justify any interference with the water at its source, whereby its natural flow will be diminished.*

Dudden v. Clutton Union, 1 *H. & N.* 627, 5 *W. R. C. L. Dig.* 242, *followed.*

Trial of action.

This was an action in which the plaintiffs, the owners of certain lands and mills near Holywell, in the county of Flint, and the lessees and occupiers of one of the said mills, claimed an injunction to restrain the defendant from diverting or abstracting water from a spring known as St. Winifred's Well, and from the Holywell stream, and from in any way interfering with the accustomed flow of water through the lands of the plaintiffs.

The facts of the case were as follow: There is at Holywell, in the county of Flint, the source of an ancient stream which flowed into the estuary of the Dee. The source of the stream takes its origin in certain holes in the rock, whence the water wells up in large quantities. It is stated by Camden (see Camden Britannia, edited by Gough, 1790, pp. 588-593) that the water issued in his time at such a rate that a mill was driven by it near the source.

In the earlier part of the sixteenth century a building was erected there by Margaret Tudor, mother of King Henry VII., to protect the ancient shrine of St. Winifred, a Welsh saint, with whose name and legend the district is associated. In the middle of this building there is a polygonal stone structure built up a few feet round the spring and above the level of the surrounding floor, which enables the water to be temporarily caught before it issues forth. The water travels thence into a well called the Lady's Well, and thence through a place which is now used as a swimming bath it flows down to the sea. The water in the well is believed to possess medicinal properties.

Prior to the Reformation this well was the most famous shrine in North Wales, and in the present time it is still the scene of pilgrimages.

For more than a hundred years prior to the action Sir Piers Mostyn and his tenants had enjoyed the free and uninterrupted flow of water from the well down the stream.

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

In 1878 the Urban District Council of Holywell purported by indenture to grant to the defendant in consideration of a rent of £500 per annum, so far as they had power to do so and without prejudice to the commonable rights, if any, of the inhabitants of Holywell, the sole and exclusive right to abstract and use water from St. Winifred's well for the purpose of storing, making up in casks, jars, and bottles and other receptacles, and treating, preparing, and selling the same, with the right to use certain existing pipes tapping the well. Under the indenture the plaintiff's rights were to be exercised between the hours of midnight on Saturday and midnight on Sunday in each week, and in the discretion of the council between the hours of 6 p.m. on every evening and 6 a.m. every morning. The defendant submitted that the source of the water before it came to the surface in the first well was unknown, and that the water did not flow in a defined channel, and that he was entitled to abstract the water before it rose to the surface and became a stream. He also submitted evidence as to acts of ownership exercised over the well and the adjacent land by the local authorities, the predecessors in title of the urban district council.

The effect of the evidence appears in the judgment.

*Neville, Q.C.*, and *W. H. Cozens-Hardy*, for the plaintiffs.—Whatever may be the position of the Urban District Council of Holywell, they cannot give to the defendant any right to diminish the flow of the water by the lands of the riparian proprietors: *Ormerod* v. *Todmorden Joint-Stock Mill Co.*, 31 W. R. 759, 11 Q. B. D. 155. The case of *Chasemore* v. *Richards*, 7 W. R. 685, 7 H. L. Cas. 349, only applies in a case when the water has not been flowing in a defined channel before it reaches the surface: *Dudden* v. *Clutton Union*, 1 H. & N. 627, 5 W. R. C. L. Dig. 242; *Bunting* v. *Hicks*, 70 L. T. Rep. 455; *Black* v. *Ballymena Township Commissioners*, 17 L. R. Ir. 459, 35 W. R. Dig. 216. The well is a public well. In any case the well is a public one, and the district council do not own the subsoil. Any acts of ownership which they or their predecessors may have exercised must be attributed to their powers under the Public Health Acts of 1848 and 1875: *Smith* v. *Archibald*, 5 App. Cas. 489, 28 W. R. Dig. 136; *Tunbridge Wells Corporation* v. *Baird*, [1896] App. Cas. 434, 45 W. R. Dig. 92.

*Rutherford*, for the defendant.—The district council are entitled to the subsoil of the well. But even if they are not, the plaintiffs have as riparian owners no right to interfere with the licensee of the council taking water from a well. There is no evidence that the water flows in a defined channel underground before it reaches the source, and therefore *Chasemore* v. *Richards* applies. The water was caught in an artificial well, and afterwards, until it reaches the Lady's Well, does not flow in a defined channel. Therefore *Dudden* v. *Clutton Union* does not apply here. The authority that the board has taken up here is an authority to regulate everything. This right it, and its predecessors in title, have enjoyed for thirty years, and, however obtained, it is not a right that can be derived under the Public Health Acts.

*Neville, Q.C.*, in reply.—Riparian owners have a right to an injunction against an owner in fee simple to restrain the obstruction of water at the source: *Dudden* v. *Clutton Union*, a case followed by the Court of Appeal in *Bunting* v. *Hicks*. There is no distinction of the rights of a riparian owner as against the owner of the stream or the owner of the land. The stream existed in ancient days and the owner of the land about the source cannot alter rights by

making an artificial construction at the source. The well is a public one and the board has done nothing to deprive the public of its rights.

Pennant's History of Whiteford and Holywell, p. 219, was also referred to.

BYRNE, J., after stating the facts.—There can be no doubt whatever that there has been the flow of a natural stream down from St. Winifred's well down to the sea for centuries, and there is no doubt but that apart from the particular questions raised in this action, the mill-owners on the stream, in fact all the riparian owners, have had the benefit of this natural flow, subject to the legal right of those above them to abstract for proper purposes and hold the water from the stream, as it flows past their land. The defendant justified claims under a licence from the district council, through which I need not travel. And he says that as the district council had a right to do this, so he has also now the right. A spring issues from the rock and the right purported to be conferred on the defendant is to take the water from the spring. Were it not for the stonework at the top of the visible source of the spring there could be no question whatever but that this case comes within the authority of *Dudden* v. *Clutton Union*. In that case there was water coming from a spring to a stream, where there was a mill. The spring was cut off at its source and the water received into a tank as it rose from the earth by the license of the owner of the soil on which the spring rose. There it was held that an action lay by the mill-owner against the person so obstructing the water, and the learned judges in the case point out that there was a natural spring, the water of which had acquired a natural channel from its source to the river, and they held that persons were not entitled to put in tank, although it might be on their own land, and so to take water at the very spring and prevent it from going down, although it had not then entered what might be called the channel from the top of the spring; and that case is a good authority, and has recently been recognized in *Bunting* v. *Hicks*. But it is said in the present case that the district council have power to do what they have done, because they are in the position of persons who have acquired a title by virtue of the Statute of Limitations, this well not having been a well vested in them under statute, and they having exercised acts of ownership up to the establishment of a local board, which was some time in 1862. Up to a certain period before the district council's predecessors in title were in existence, the well appears to have been under the management some time of a voluntary committee of the ratepayers in the parish, by which I mean the parochial division of Holywell. They had managed it, and had got some subscriptions, and employed a caretaker to look after it. At that time the well was accessible from the road by steps leading down into this ecclesiastical building where the well was. The local board acquired, by means of agreements for leases, from neighbouring owners land around. They never did acquire the site by virtue of any lease or agreement for a lease, or of any tenancy. They never did acquire the actual site of the chapel itself, or of the land underneath where the spring issues; but they have exercised certain rights or they have done certain acts in respect of this well from which their counsel, Mr. Rutherford, who has argued the case with great ability, asks me to infer that they were claiming title as trespassers, as I understood him. If this well were a public well, the local board acquired such rights as they have in it under the Public Health Act of 1875 as being a public well. They had not previously, nor had they by virtue of what their predecessors had done, nor of what they themselves had done, acquired any sort of statutory title as trespassers or as simply excluding other persons. In my opinion the whole of the evidence, so far as it goes, points to this having been a public well, and in my judgment, so far as the existing evidence before me goes, I think the true conclusion to come to is that this was a public well within the meaning of the Public Health Act of 1875. I think that such acts as were done by the local board in reference to the control and management of the well may be fairly referred to their view that they were entitled under the provisions of the Public Health Act of 1848 to take charge of and to look after public wells for the gratuitous supply of public baths, and also because all public wells and works used for the gratuitous supply of water to the inhabitants have to be continued, maintained and plentifully supplied with water. If they have in some degree exceeded those powers, I do not think that such excess in the exercise of their powers has been shown as to lead me to the conclusion that they were acting in pursuance of a title originating in illegality rather than of a title originating in legality, and I think that since 1875 the acts they have done have been intended by them to be done in pursuance of the powers conferred upon them by the Public Health Act of 1875. So that so far as the evidence before me is concerned everything points to this having been a public well, and being vested as a public well, and a public well only, in the local board or district council.

It is conceded—or at least I think it is conceded—if not, the provisions of the Public Health Act of 1875 would not in my opinion justify the local board or persons claiming under licence from them in doing what is proposed and authorized under this licence. I think, therefore, that there is no right on the part of the defendant under his licence to abstract and use water from the spring in the manner and for the purposes mentioned in this licence. It has been proved before me that this licence will, if it is acted upon, especially if it is acted upon in any considerable degree, cause a sensible diminution in the flow of the water; and I think, therefore, that the plaintiffs have established their right to the injunction in question. I ought to have said this in reference to the question whether the case of *Dudden* v. *Clutton Union* applies. It has been put to me that in this case there was this artificial erection, making in fact the well as distinguished from the spring, and that therefore that was not a natural watercourse direct from the spring past the lands of the riparian proprietors to the sea, because it first passes through this natural construction or well. I do not think that this argument is well founded, or is sufficient to distinguish this case from *Dudden* v. *Clutton Union*. This is a spring which issues, as I have said, direct as a spring from the rock. I think the true view to take is that the spring existed, and existed as a spring coming direct from the land and running on a natural course, and the fact that at some remote date someone has built round and over the issuing point, the source of the spring, in order to improve its method of issuing from the earth, will not be sufficient to distinguish this from the case above cited, which holds that you must not at the source of the spring destroy the natural flow from the spring all down the natural course of the stream. The utmost that could be said would be this—that at some remote date an artificial course had been made for a small distance from the issuing point of the spring. In my opinion this is not sufficient to justify the act complained of, or to destroy the rights which have been acquired by agrarian owners. I grant the injunction with costs.

*Judgment for the plaintiff.*

Solicitors, *Slaughter & Colegrave; Wynne, Holme, & Wynne*, for *F. J. Leslie & Co.*, Liverpool.

---

Q. B. Div.
(Darling and Phillimore, JJ.) } July 27, 1899.

THE GREAT NORTHERN RAILWAY CO. *v.* THE COMMISSIONERS OF INLAND REVENUE. (*a.*)

*Inland revenue—Stamp duty—Release or renunciation on sale—Compensation by railway company to mine owners—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *Schedule I.—Railways Clauses Consolidation Act,* 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

*Mine owners, having received from a railway company compensation under section* 78 *of the Railways Clauses Consolidation Act,* 1845, *in respect of coal which they were required to leave unworked, executed an instrument whereby, in addition to acknowledging the receipt of the compensation money, they agreed to leave the coal unworked, covenanted to do all things necessary to vest the coal in the railway company, and declared that the sum paid to them included satisfaction and compensation for all claims which, but for those presents, they might have had against the railway company in respect of the coal.*

*Held, that the instrument was a release of an interest in property within the meaning of Schedule I. of the Stamp Act,* 1891, *and chargeable with a* 10*s. stamp, but that it was not a release or renunciation upon a sale, and therefore not chargeable with* ad valorem *duty.*

Case stated by the Inland Revenue Commissioners. On the 6th of December, 1898, the Middleton Colliery Co. executed the following instrument: "We . . . hereby acknowledge to have received from the Great Northern Railway Co. the sum of £1,099 being the compensation payable to us under the award dated the 7th of June, 1898, for the whole of the Middleton Little Seam of coal under the Hunslet branch of the railway company, which said coal was required to be left unworked by a notice dated the 16th day of July, 1897. . . . And in consideration of the said payment of £1,099 we hereby undertake and agree to leave entirely unworked the whole of the said coal . . . and further undertake at the cost of the railway company to do and execute or procure to be done and executed all deeds, matters, and things necessary for vesting the same in the railway company whenever thereunto by them required. And we further acknowledge and declare that the said sum includes satisfaction and compensation for all claims which but for these presents we might have maintained either under the provisions of any statute or at law or in equity against the railway company in respect of the said coal." The document was signed with the common seal of the company in the presence of two of the directors and signed by the secretary.

This instrument was submitted to the commissioners under the provisions of section 12 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), for their opinion as to the stamp duty with which the instrument was chargeable. The commissioners, being of opinion that the instrument constituted a renunciation of a right or interest in property, assessed on it as a conveyance on sale, an *ad valorem* duty of five shillings for every £50 upon the sum of £1,099 being the consideration therein mentioned.

The railway company appealed.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Section 77 of the Railways Clauses Consolidation Act, 1845, provides that mines and minerals shall be deemed to be excepted from the conveyance of lands purchased by a railway company under the provisions of the Act. Section 78 provides as follows: "If the owner, lessee, or occupier of any mines or minerals lying under any railway, or any works connected therewith, or within the prescribed distance, or where no distance shall be prescribed forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention to do so thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

*C. A. Russell, Q.C.* (*Colville* with him) for the appellents.—It is admitted that the instrument is a "release or renunciation of" property, or of a right or interest in property within the meaning of the schedule of the Stamp Act, 1891, and that it is chargeable with a stamp duty of ten shillings. But it is not a release or renunciation "upon a sale," and is consequently not chargeable with an *ad valorem* duty. The money paid by the railway company was not the purchase-money of the coal, nor of any right or interest in it; they did not acquire the right themselves to get the coal. The money was mere compensation to the mine owners for the disability under which they became to work the coal: see *Errington* v. *Metropolitan District Railway Co.*, 30 W. R. 663, 19 Ch. D. 559.

*Sir R. Finlay, S.G.*, and *Danckwerts*, for the Crown.—The instrument is not only a "release or renunciation," but it is also a release or renunciation "upon a sale." The transaction to which it relates is practically a purchase by the railway company of the coals, the mine owners releasing their right in the coals to them. That this is the nature of the transaction is shown by *Smith* v. *The Great Western Railway Co.*, 26 W. R. 130, 3 App. Cas. 165, which lays down that section 6 and section 78 of the Railways Clauses Consolidation Act are to be read together, so that provisions in section 6 for the payment by the railway company of compensation for "lands" taken and used by them are to be extended to the "mines" dealt with in section 78. In so far as *Errington* v. *Metropolitan District Railway Co.*, which though a later case was only a decision of the Court of Appeal, conflicts with this view, it is bad law. Lord Esher, M.R., in *In re Lord Gerard and London and North-Western Railway Co.*, 43 W. R. 374, [1895] 1 Q. B. 459, expresses the same view as the House of Lords; he says at p. 465: "The purpose for which that notice is to be given is that the company may have an opportunity of compulsorily buying the coal, as it seems to me, or, at any rate, the right of preventing him from working it—it is not necessary to determine which." The test whether a release or renunciation is upon a sale or not is the giving or not of consideration: see *Foster* v. *Commissioners of Inland Revenue*, 42 W. R. 259, [1894] 1 Q. B. 516, and *Great Western Railway* v. *Commissioners of Inland Revenue*, 42 W. R. 211, [1894] 1 Q. B. 507; *Coats* v. *Commissioners of Inland Revenue*, 46 W. R. 1, [1897]. Assuming, however, that the transaction does not amount to

a sale of the coal or of a right or interest in the coal, it is, at any rate, the sale of an easement of support. [PHILLIMORE, J.—Is not renunciation a Scotch term?] Yes. In Bell's Dictionary of the Law of Scotland it is said in Scotch law to include three things: renunciation by an heir, renunciation of redeemable right, and renunciation of a lease. These transactions are, however, already dealt with elsewhere in the Stamp Act. Release is defined in Comyn's Digest as being "when a man quits or renounces that which he before had." And, in Les Termes de la Ley, as the "giving or discharging of the right or action which any hath or claimeth against another or his land."

DARLING, J. (after reciting the facts).—It is contended on behalf of the Crown that this instrument amounts to a "release of renunciation of any property or of any right or interest in any property upon a sale." I may say that I do not think that this instrument, whatever it is, is a "renunciation." I am inclined to think that the word renunciation is used in the Stamp Act because the Act applies to Scotland as well as to England, and that the term is used with regard to incidents of Scotch law; but I do not care to say more than that I do not think that this instrument can properly be described as a renunciation.

Is it a release upon a sale? I do not think it is. I do not think that what was done here amounted to a sale. It is true that the colliery company to whom the coal belonged gave up their right to work it, but I do not think that the property in the coal passed to the railway company. For authority for that proposition it is sufficient to refer to the words of Jessel, M.R., in *Errington* v. *The Metropolitan District Railway*. He says (19 Ch. D., at p. 569), referring to section 78 of the Railways Clauses Act, as follows: "Then the 78th section provides for cases where they do not purchase, and then the mine owner may work them on giving thirty days' notice, unless the company make compensation. That is not a purchase, and it does not apply to mines which the company may purchase only, but applies to all mines within a certain distance of the railway, whether they are within the limit of the land described or not. It is of much wider application than to the purchase of mines." Moreover, Brett, L.J., giving judgment in the same case, used these words on p. 575: "That 78th section applies at all times. It not only applies to the working of minerals under the land where the railway company are already owners of the surface of that land, but to the working of minerals in a man's own land near the railway. Under the 78th section, after the compensation has been paid by the railway company, the minerals do not belong to the railway company. They continue to belong to the landowner. The railway company cannot touch the minerals. If all they have done is to pay the compensation under section 78 they cannot touch them. It is true that the landowner to whom those very minerals belong cannot touch them, and it is because be cannot touch them that compensation is given to him, but the property in them remains in him."

Now, it has been pressed upon us by the Solicitor-General that we should not accept that as a decision—that these words are mere *obiter dicta*—and he relies on *Smith* v. *Great Western Railway Co.* That was a case decided before *Errington* v. *Metropolitan District Railway Co.*, and it was cited in that very case; so that it was present to the minds of the members of the court who gave the decision which I have just read. I must say that, giving the best consideration I can to the case of *Smith* v. *Great Western Railway Co.*, I do not think that it conflicts with the words used by Jessel, M.R., and Brett, L.J., in *Errington* v. *Metropolitan District Railway*. The words most strongly in favour of the Solicitor-General's position are to be found in the judgment of Lord Cairns. Lord Cairns reads the 6th section of the Railways Clauses Act and the 78th section together, and he says (3 App. Cas., at p. 181): "My lords, it is quite true that, reading the two sections in this way, there are not, in what I have read, any words of negation prohibiting the persons having the ulterior interest from ever working the mine. But it seems to me that those words are entirely unnecessary. We have a provision that the lessee shall be dealt with and compensated, and that he shall not work. We have then a provision that all other persons shall be compensated according to their interests, and the inevitable conclusion from that is, that those other persons who are so compensated, or who may be so compensated, shall not work any more than the lessee might work. It would be a matter of astonishment if any court of equity could hesitate, if that be the construction of the Act, in prohibiting those other persons who either are to be, or may be, thus compensated from working just as they would prohibit the lessee himself." Now, the Solicitor-General's construction of what Lord Cairns said is that the property passed from the colliery company to the railway company. I do not think he meant to say anything of the kind. I cannot think that he would have used the illustration contained in the words, "It would be a matter of astonishment, &c.," if the property had passed. He would have said in plain words that the property passed. Who could suppose that anyone would appeal to a court of equity to prevent a man from working coal on his own land? Therefore, I think that the decision in *Errington* v. *Metropolitan District Railway Co.* is binding on us.

Then the Solicitor-General said that if this transaction is not a sale of property, it is at any rate a sale of a right—a right of support, and that the instrument is therefore a release upon the sale of such right. I do not think that is a good argument either. It is not proper or apt language to use to speak of a sale of a right of support. To give an exhaustive definition of a sale is not necessary, but I am content to rely upon a passage in the judgment of Lindley, L.J., in *Foster* v. *The Commissioners of Inland Revenue*, [1894] 1 Q. B., p. 528, where he says: "I do not know what is necessary to constitute a sale except a transfer of property from one person to another for money or, for the purposes of the Stamp Act, for stocks or marketable securities." Well, all that a sale may be I do not profess to know; but I do not think that there is such a thing, properly spoken of, as the sale of a right to have land supported by the coal underneath it so as to bring this case within the words "release or renunciation or any right or interest in any property upon a sale."

It has been said, further, that this instrument is a release of a right or interest in property; and it has been argued against that, that the word "release" is used as an absolute term of art. That the word "renunciation" is so used I have already said. I think it is a Scotch term of art. It is said that "release" is used as an English term of art, and that it is the kind of release intended when you speak of lease and release—that it is, in fact, the kind of release of a right spoken of in the Termes de la Ley, where it says: "Also in a release of a right it is needful that he to whom the release is made have a freehold or a possession in the lands in deed or in law, or a reversion, at the time of the release made, for if he have nothing in the land at the time of the release made, the release shall not be to him available." Of course, if the word

release is used in that sense, this is not a release, because the railway company, when the instrument was made, had no interest in the land, in the coal, or in anything. But I do not think that words in the Stamp Act are always used in their strict artistic sense. I think they have a wider, perhaps looser, meaning. I agree with the Solicitor-General when he says that some of these words are used in order to sweep into the net of the Exchequer something which would very possibly escape if words were used in their strict, but limited, legal meaning, and I think that the word release is used in that sense.

Now, I think that what was done in this document amounted to a release of a right or interest in property, but I do not think that it amounted to a release of a right or interest in property upon a sale. Therefore I think the matter comes within the words release of a right or interest in property "in any other case," and that being so, the document should bear a ten-shilling stamp. It is not necessary to decide the point whether the document was chargeable as a deed.

PHILLIMORE, J.—I am of the same opinion. The commissioners have assessed duty upon this instrument as upon a renunciation on sale. I start, therefore, with the word "renunciation," and I ask myself, is there any such instrument known to the English law—any such conveyancing instrument—as a renunciation on sale? and I answer No. The word renunciation as applied to transactions is known in England. As applied to instruments it is, as far as I can gather, only applied to two instruments. One is a renunciation upon a letter of allotment, and that is specifically dealt with in the schedule of the Stamp Act, and the other is a renunciation of probate by an executor, as to which, we are told, it has been decided that it does not come under this portion of the schedule. Renunciation is, however, a term well known in Scotch law, and it applies in Scotch law to at least three classes of cases—namely, a renunciation by an heir, which is not unlike the renunciation by an executor in England, but it is not the same; a renunciation by a lessee of his lease, which is equivalent to a surrender; and a renunciation by a mortgagee or incumbrancer of certain heritable rights which he had acquired by way of mortgage or hypothecation or pledge. In this latter sense Bell's Law Dictionary and Paterson's Compendium of English and Scotch Law treat it as a translation of the English word "reconveyance," and, possibly, in some cases, of the English word "release." In the Stamp Act these transactions as occurring in English law are treated under the title "Mortgage" and again under the title "Reconveyance." In my opinion the word "renunciation" in Scotch law is an equivalent in Scotch law and language for the word "reconveyance," and in some cases for the word "release" in English law and language.

Now, I think it is very important that we should not allow words which are used as Scotch terms of art to be applied to English transactions with a view to putting a tax upon such transactions where no appropriate English words are used from which an intention to tax such transaction can be inferred.

I bear in mind here what Wills, J., said in *Coats* v. *The Commissioners of Inland Revenue*, [1897] 1 Q. B., at p. 784, on the word "excambion": "The term excambion seems to be a term known to Scottish law, and it appears there to be applied to heritable property and to heritable property only. Of course, etymologically it means nothing more than exchange; but it may very well be that in the law of Scotland it has got a definite meaning. I cannot, however, for a moment imagine that it was introduced into the Stamp Act for any other purpose than to hit Scottish instruments which went by such a name, because long before the Act of 55 Geo. 3, excambion, whatever it might have been at the time when Shepherd's Touchstone was written, had ceased to be a term of English law, or known to English law, except as a matter of antiquarian history." I decline, therefore, to consider this instrument as a renunciation on a sale.

Next, assuming it is a release, is it a release upon a sale? With regard to that I desire to adopt the language and reasoning of my learned brother. I think that the effect of the decision of the Court of Appeal in *Errington* v. *Metropolitan District Railway* is clearly to show that this transaction was not a sale. I think the decision of the House of Lords in *Smith* v. *Great Western Railway Co.* points the same way, and was so construed by the judges of the Court of Appeal; and I may add that, unaided by that decision, if I had had to decide the point for the first time I should have come to the same conclusion. The coal here was not sold. The railway company cannot work it. If they did they would be trespassers, and if they wish to work it they must go and give more money to the mine owners before they can do so.

Then it is said that the transaction is the sale of a right of support. I doubt whether any such easement can be sold. At any rate, it is not sold here. That is not the nature of the transaction. It may amount in substance to this: The railway company secures the right of support, but it is not the sale of a right of support. It is a statutory process, by which the railway company, which fears that its railway may be interfered with, secures *in invitum* against the mine owner the right to have left untouched not only the coal which is necessary for support, but also the coal which may be necessary for support. Therefore, this instrument, which is certainly not a renunciation, is also not a release upon a sale.

Then, is it a release of a right or interest in property not otherwise charged? I think it is a release. The words in the instrument—"We further acknowledge and declare that the said sum includes satisfaction and compensation for all claims which but for these presents might have been maintained"—are words of release. The word "release" is not necessary in a release. The word may be "renounce," "remit claim," "make quiet," or in earlier times it might have been the corresponding Latin words.

The only doubt I have had is whether it is a release of a right or interest in property, but on the whole I think it is. It is a release of some proprietary interest in the coal—the right to work the coal, which is, I suppose, the proprietor's right. I think, therefore, upon the whole, this instrument may be properly construed as the release of a right—or, rather, of an interest—in property, not upon a sale, nor upon a mortgage.

*Appeal allowed.*

Solicitor for the appellants, *R. Hill-Dawe.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

## IN BANKRUPTCY.

Q. B. Div.
(Wright and Channell, JJ.) Nov. 27.

*In re* FORD.

*Ex parte* THE OFFICIAL RECEIVER *v.* CRAWLEY, PARSONS, & CO. (*a.*)

*Bankruptcy—Execution—Completion by seizure and sale —Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *s.* 45—*Bankruptcy Act,* 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11.

*A creditor put in execution against a debtor, and withdrew from possession on receiving £40 in part payment of his debt and an undertaking to pay the remainder by instalments. A receiving order was made against the debtor before the remainder of the debt had been paid.*

*Held, that the creditor, not having completed the execution by seizure and sale, was not entitled to retain the £40 as against the trustee in the bankruptcy.*

Appeal from a decision of the judge of the county court at Birmingham.

In December, 1898, Messrs. Crawley, Parsons, & Co., the respondents, recovered judgment against Ford, the debtor, for £80 and costs, on which they issued execution, and the sheriff took possession of the debtor's goods and chattels under a writ of *fi. fa.* on the 31st of December. Negotiations were then entered into between the parties, and it was agreed between them that the debtor should pay £40, part of the debt, at once, and the balance by certain instalments, and that the creditors should withdraw the sheriff on payment of the sum of £40, but that they should re-enter into possession on the debtor failing to pay any one of the agreed instalments. Accordingly, on the 5th of January, 1899, the debtor paid the sum of £40, and the sheriff withdrew, having received a written authority from the debtor to re-enter on non-payment of any of the instalments.

On the 14th of January the debtor filed his own petition, he was adjudicated bankrupt, and the official receiver was appointed trustee in the bankruptcy.

The official receiver moved in the county court for an order directing the respondents to pay over to him the sum of £40 paid to them by the debtor on the 5th of January. The county court judge refused the application and this appeal was brought against his decision.

*Muir Mackenzie,* for the appellant.—By section 45 of the Bankruptcy Act, 1883, a creditor is not entitled to the benefit of execution unless he has completed it by seizure and sale before the date of the receiving order. Here there has been no sale, nor has there been a completion of the execution within section 11, sub-section 1, of the Bankruptcy Act, 1890, "by the receipt or recovery of the full amount of the levy." The creditors are therefore not entitled to retain this sum of £40 which they have obtained from the debtor by means of the execution.

*E. Cave,* for the respondents.—The sum of £40 was money paid to avoid a sale, and the creditors had no notice of any act of bankruptcy when they received it. It is not necessary that the full amount of the levy should be paid to entitle the creditors to retain the money.

He referred to *Figg* v. *Moore,* [1894] 2 Q. B. 690.

*Muir Mackenzie,* in reply, referred to *In re Follows, Ex parte Follows,* [1895] 2 Q. B. 521, 44 W. R. Dig. 12.

WRIGHT, J.—It seems to me that this appeal must be allowed. I do not think that either of the sub-sections of section 11 of the Bankruptcy Act, 1890, apply to this case, but that section 45 of the Bankruptcy Act, 1883, alone is applicable here. That section enacts that a creditor shall not be entitled to the benefit of an execution unless he has completed the execution before the date of the receiving order, and it goes on to say that execution against goods is completed by seizure and sale. In this case there has been no sale, and, to my mind, no completion in any sense whatever. The £40 paid were not allocated to any particular goods, and there would have been nothing to prevent the sheriff re-entering upon the whole of the goods. It seems hard that the creditor should have to give up money which he has actually received, but we can do no more than construe the section.

CHANNELL, J., concurred.

Solicitor for the appellant, *The Solicitor to the Board of Trade.*

Solicitors for the respondents, *Milward & Co.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

## Privy Council.

(*From the Supreme Court of St. Vincent.*)

July 22, 1899.

MCLEOD *v.* ST. AUBYN. (*a.*)

*Libel — Contempt of court — In face of the court — Publication.*

*The appellant who was neither printer nor publisher innocently and without any knowledge of the contents of a newspaper handed a copy to a friend.*

*Held, that there was no obligation on the appellant to make himself acquainted with its contents, and should scandalous matter reflecting on the court thus become known, these circumstances were not in themselves sufficient to justify a committal for contempt of court.*

*Committals for contempt of court by scandalizing the court itself have become obsolete in this country.*

This was an appeal from the Supreme Court of St. Vincent.

The facts are set out at length in their lordships' judgment.

*Blake Odgers, Q.C.,* and *Shipman,* for the appellant.

*Foote, Q.C.,* and *Groser,* for the respondent.

The judgment of their lordships (Lords WATSON, MACNAGHTEN, MORRIS, and DAVEY) was delivered by

Lord MORRIS.—This case arises on appeal from the judgment and order dated the 3rd of May, 1897, made by the Acting Chief Justice of the Supreme Court of Judicature of the Island of St. Vincent, the appellant being Charles John McLeod, and the respondent Geoffrey Peter St. Aubyn, the Acting Chief Justice of St. Vincent.

At the time of the happening of the events which led up to the order appealed from, the appellant was a barrister-at-law practising in the Supreme Court of St. Vincent, of which the respondent was the Acting Chief Justice. At the time there was a weekly newspaper called the *Federalist* printed and published in the Island of Grenada, the appellant was the agent and correspondent of the said newspaper for St.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Vincent and sent letters and articles to the said newspaper from St. Vincent which were always printed in a special column headed "St. Vincent." The *Federalist* newspapers were sent by post to subscribers at St. Vincent. The Public Library of St. Vincent was a subscriber and ordinarily received its copy of said newspaper by post. The librarian was Benjamin Stephen Wilson. The *Federalist* of the 31st of March, 1897, contained a leading article entitled "The Administration of Justice," as follows:

"The Administration of Justice.

"At the present time, more than any other, it seems to be absolutely necessary that the administration of justice in the several West Indian colonies should inspire the confidence of every class of the population with the stagnation in trade, the absence of ready money, the want and misery which prevails, the suffering inhabitants of these islands may grow reckless and desperate if on the bench they failed to find that impartial protection which a British judiciary implies. Happily for us in Grenada, the honesty, independence and impartiality of the bench is beyond the faintest shadow of suspicion. If the people in Grenada did not possess confidence in the superior courts there had been a serious state of affairs especially after the sweeping sales of the properties of the peasants for overdue taxes. This confidence and faith in the Supreme Court of the island is well founded, for no judge here has ever, within living memory, forgotten for a moment the sacred nature of the office which he fills, nor the importance of the decisions which he may pronounce.

"All the other islands do not appear to be as fortunate as Grenada. St. Vincent especially has suffered more, perhaps, than any other from maladministration of justice. In Mr. Trafford the public had no confidence, and his *locum tenens*, Mr. St. Aubyn, is reducing the judicial character to the level of a clown. Law and order will only be observed when the tribunals of justice is (*sic*) pure and impartial.

"It does not seem from the letter of 'Fairplay,' which appears in another column, that the Acting Chief Justice of St. Vincent is capable of maintaining the noble traditions of the British bench. He has apparently been too wrapped up and intermingled with personal disputes and squabbles of a questionable character to allow him to deal honestly and impartially with questions which come before him to be judicially settled. To nod and wink to counsel engaged in cases is not at all dignified in a judge; it becomes doubly criminal when he who performs these grievances and gymnastics is solemnly adjudicating questions of the utmost importance, involving the liberty, almost the life, of British subjects.

"Mr. Chamberlain having severely rebuked and censured Mr. St. Aubyn for gross partiality as a magistrate we fail to see how he could have been appointed as Acting Chief Justice of St. Vincent. If as police magistrate, with limited jurisdiction, Mr. St. Aubyn displayed in the administration of justice his violent partizanship, would he not as a Chief Justice, with absolute jurisdiction, give reins to his passions, and prostitute one of the most sacred secular positions merely to gratify his venom and his spleen? He has, it appears, done so, and thereby created a feeling of disquiet and unrest. If the people can have no faith in the findings of the Chief Justice, they may, doubtless, be tempted to redress their own wrongs, either of a private or public nature, with this result, that he who may be the chief cause of illegality will escape scathless, whilst those he has provoked to an outbreak will become the victims of martial chastisement.

"St. Vincent has suffered much from the maladministration of justice.

"Discontent, which might have culminated in riot, has only been prevented by the influence and exertion of the St. Vincent editor of this journal; we hope he may be able to assist in allaying the dissatisfaction which prevails consequent on the misconduct of the Acting Chief Justice. This ought not to be a difficult matter, especially as a strong desire is expressed that his Honour W. S. Commissiong, Q.C., Acting Chief Justice of Grenada, should be appointed successor to Mr. Trafford. A week or two ago, all classes of the community, without regard to public and political differences, presented an address to the Acting Chief Justice of Grenada, indicative of the respect and esteem in which he is held, especially from his impartial, honest, and upright demeanour as a judge, with such a man presiding over the Supreme Court of St. Vincent we are perfectly satisfied that complaints respecting the administration of justice would no longer be heard. Mr. Commissiong's experience as a practising barrister extends over a term of twenty-five years. Sir Walter Sendall, acknowledging Mr. Commissiong's ability at one time offered him the appointment of Chief Justice of St. Vincent, then vacant, ill-health prevented him accepting it at the time, but we have no doubt that his honour will not refuse to go to St. Vincent if the position of Chief Justice of that island were offered him. It would be well if a petition to this end were formulated for signatures in St. Vincent and then forwarded to the Colonial Office. There is no doubt but that the administration of justice in St. Vincent is rotten and corrupt, and that except some one be appointed to the bench who will inspire confidence and respect, the already oppressed peasantry may be goaded into madness. Mr. Commissiong, having as a judge won the confidence, the respect, and the esteem, of even his most violent political opponents, and having served the Government for a long number of years is entitled as well by his service as his ability to be successor to Mr. Justice Trafford, and we hope our fellow citizens in St. Vincent in their own interest, in the cause of the pure and impartial administration of justice in this island, will successfully press his claim upon the Colonial Offices."

It also contained a letter dated from St. Vincent of the date of the 15th of March, 1897, as follows:

"No. 4.

"A Judicial Scandal.

"To the Editor of *The Federalist*.

"Sir,—Kindly grant me space in your unfettered and fearless journal to expose the scandalous state of things that has existed here since Mr. Geoffrey Peter St. Aubyn's appointment as Acting Chief Justice in November last.

"The public career of this gentleman is interesting. A briefless barrister, unendowed with much brain, who religiously attended with his empty bag at the several courts of London in the forlorn hope of picking up a case he, after long weary years of waiting, exchanged the law for the stage (being a good amateur actor) and tried to earn an honest penny by turning his undoubted histrionic talent into account. In the meantime he had become an assiduous hanger-on at the Colonial Office and applied for every vacancy, real or imaginary, that he heard of, and it was whilst he was 'starring' in the provinces that, in an evil moment for St. Vincent, he was appointed police magistrate of the Kingstown District in May, 1891, at a salary of £450 a year. His demeanour in the Magistrate's Court has been anything but dignified, and he has indulged in

offensive expressions to the litigants before him which were discreditable to one in his position.

"A man of the Torquimada (*sic*) type, narrow, bigoted, vain, vindictive, and unscrupulous, he takes advantage of his position to vent his spleen upon those whom he hates, though, unlike Torquimada, (*sic*) fortunately, he is unable to send them to the stake.

"He distinguished himself by openly advocating that all games of chance be played at the club, when, as police magistrate, it was his duty to punish those playing games of chance. But in the case of Mr. Sheffield, late headmaster of the Grammar School, the biter got bit rather severely and his spite and vindictiveness nearly landed him into serious trouble. Mr. Sheffield when his school was prosperous and he was in easy circumstances was drawn into the Kingstown Club, that haunt of dissipation and gambling; the poor man was ruined, and had to leave the club as a defaulter, whereupon a dead set was made by a clique headed by Mr. St. Aubyn, upon the unfortunate man, and every effort was made to smash him.

"Two women had a case before Mr. St. Aubyn as police magistrate upon one of them, who had tried to blackmail Mr. Sheffield, mentioned his name, Mr. St. Aubyn pressed the woman to make scandalous accusations against Mr. Sheffield. Mr. Branch, another of the clique, wrote an anonymous letter in the *Sentry* on the matter, and after some time the administrator, egged on by the clique, ordered the Grammar School Board to institute an inquiry. At the meeting the principal witness against Mr. Sheffield was Mr. St. Aubyn, who, in a most venomous manner repeated the accusations which he had extracted from the woman in his court. Upon these facts being laid before the Secretary of State, Mr. Chamberlain took a very unfavourable view of Mr. St. Aubyn's conduct, severely censured him, told him that his conduct had been most un-English, and plainly hinted that his promotion would be stopped.

"Mr. St. Aubyn returned in November last lying under the cloud, but Mr. Thompson, who himself had taken a strong stand against Mr. Sheffield, appointed him to act as Chief Justice during the continued absence of Mr. Trafford. Mr. St. Aubyn soon showed that he was utterly unfitted for such a post. He hobnobs with two or three of the barristers, winks significantly at them in court, and in the trial of cases he has cast to the winds the ordinary principles of justice and fair-play which require a judge to keep even the scales of justice between parties.

"At the sessions in November in the case against James Jack for larceny, the prisoner was undefended and he called as a witness a woman named Emily Sirus. The Acting Attorney-General in a few questions completely disposed of the witness by showing that she was a bad character and had been to prison many times. But Mr. St. Aubyn, to the disgust of everyone present, for a full quarter of an hour closely cross-examined the witness, sneered at her, asked her such questions: 'Why do you remember such a day, is it because you had gone to jail that day,' &c., and brought all the weight of his position against the undefended prisoner in the dock.

"At the recent sessions, Mr. St. Aubyn's action on the bench was most extraordinary, more befitting a prosecuting counsel bent upon securing a conviction than a judge. In the case against James Dacon for carnal knowledge of a girl under thirteen years, the prisoner having given evidence on his own behalf, was subjected to a long and able cross-examination by the Acting Attorney-General, but Mr. St. Aubyn, satisfied, tried his persuasive powers and closely questioned the unfortunate man, putting him surprise questions clearly with a view to forcing a confession out of him, but Dacon having remained firm in his innocence, Mr. St. Aubyn threw his head back looking quite annoyed and in his summing up he said that Dacon was either very cunning or an idiot as nothing could be made out of him in cross-examination. He charged the jury strongly against the prisoner though after the evidence of Dr. Pereira for the prosecution and the evidence for the defence it was clear that the prisoner must get off. The jury in the teeth of the summing up acquitted the prisoner. Mr. St. Aubyn could not conceal his vexation at this result.

"The next day, when the case against Jack James for feloniously wounding was on, Mr. St. Aubyn exhibited feelings quite unprecedented in a British court of justice. His manner was most theatrical. He energetically fanned himself, fumed, and fretted —hardly took a note of the evidence for the defence, told the Attorney-General it was a waste of time to cross-examine the prisoner's witnesses, interrupted Mr. McLeod, prisoner's counsel, without rhyme or reason, and in his summing up told the jury that the defence was an insult to their intelligence, that they must bring in a verdict of guilty and recommend the prisoner to mercy. He added: 'Gentlemen, make up your minds in the box.' But the jury, the sole and exclusive judges of the evidence, resented this dictation, and retired, and after mature deliberation returned a verdict of not guilty. Mr. St. Aubyn's face was a picture. No judge has ever received such a humiliating snub. Jurymen who were present said that they had never seen such conduct on the part of a judge.

"Simply because Mr. McLeod was solicitor for Mr. Sheffield, Mr. St. Aubyn has shown the greatest antipathy to that gentleman. He goes out of his way to be most offensive and discourteous to Mr. McLeod, and regrettable passages at arms have taken place between the two.

"It is the general opinion that Mr. St. Aubyn has proved himself incapable of filling the important position of judge, requiring calmness and dignity and evenness of conduct towards all, and the hope is expressed that if, as is anticipated, Mr. Trafford does not return, Mr. Commissiong will be appointed judge of this colony. "Yours faithfully,

"FAIRPLAY.

"St. Vincent, 15th March, 1897."

On Friday evening, the 2nd of April, 1897, the appellant received by mail from Grenada some copies of the *Federalist* of the 31st of March, and on the same evening the appellant went, as was his habit, to the library. On arriving there he met a friend, Mr. T. R. Nairn, who in conversation mentioned that the *Federalist* newspaper had not arrived. The librarian, Mr. Wilson, stated that he had not received it as the post was late, but that he could have it in the morning. The appellant then stated that he had received his copies and offered one to the librarian, Mr. Wilson, and handed it to him to be returned the following morning. On the 17th of April the appellant appeared as counsel in a case called on before the respondent, who thereupon directed the registrar to postpone cases in which the appellant was engaged as counsel until the 24th of April. On that day the respondent made an order calling on the appellant to attend in court on the 3rd of May, 1897, to show cause why he should not be committed for contempt of court in publishing the said copy of *Federalist* by the handing of it to the librarian on the evening of the 2nd of April, 1897. On the 1st of May the appellant made and filed an affidavit as cause against the said order *nisi* and on the 3rd of May the appellant appeared in court. In his said affidavit the appellant swore that on the said 2nd of April

the steamer arrived much later than usual from Grenada and that he received a few copies of the *Federalist* near to 8 o'clock p.m., that he proceeded to the library to get some papers before it closed, the hour of closing being 8 o'clock p.m. The appellant stated in his said affidavit the circumstances under which he lent the copy of the *Federalist* to Mr. Wilson, and was corroborated in that respect by Mr. Nairn. He further swore that he did not go to the library to deliver the said copy, that he had not read the newspaper and had not the slightest idea that it contained the article headed "The Administration of Justice" or the letter signed "Fairplay." On the 3rd of May, 1897, the appellant appeared by counsel before the respondent. His counsel stated that neither the letter nor the article in the *Federalist* of the 31st of March was written by the appellant. The respondent after hearing the arguments of appellant's counsel made the order appealed from, which is as follows:

"Whereas by an order dated the 24th day of April, 1897, stating that on the letter headed 'A Judicial Scandal' dated the 15th day of March, 1897, and signed 'Fairplay,' and the article headed 'The Administration of Justice,' dated the 31st day of March, 1897 (both appearing in a certain copy of an issue of a certain newspaper called the *Federalist*, dated the 31st day of March, 1897, annexed and exhibited respectively to the affidavits of Benjamin Stephens Wilson and Herbert Horatio Holder respectively), being read and the said affidavits proving the said copy of the said issue of the said newspaper to have been published and otherwise dealt with as therein mentioned by Charles John McLeod, Esq., barrister-at-law and solicitor of the said court, being respectively read, and upon the court taking the matter thereof into consideration and deeming the conduct of the said Charles John McLeod therein mentioned and the said publishing of the said copy of the said issue of the said newspaper by the said Charles John McLeod a contempt of this court. It was ordered that Charles John McLeod, of Lot 103 in Kingstown, Esq., barrister-at-law, and solicitor of the said court, having personal notice thereof should attend this court on Monday, the 3rd day of May, 1897, at the hour of 11 o'clock in the forenoon, and should then show cause why he should not be committed for contempt of this honourable court in publishing the said copy of the said issue of the said newspaper called the *Federalist* (wherein were the said letter and article) on the 2nd day of April, 1897, and for his said conduct, and the said Charles John McLeod attending this court this day pursuant to the said order and the affidavits and exhibit filed in this matter this day being read and upon hearing Mr. Arthur Wellesley Lewis and Mr. James Eldon McCombie Salmon of counsel for the said Charles John McLeod and the honourable the Acting Attorney-General and Mr. Conrad Johnson Simmons of counsel and this court being of opinion that the said Charles John McLeod has (being agent in Saint Vincent for the said newspaper) by negligently publishing the said copy of the said issue of the said newspaper called the *Federalist* (wherein were the said letter and article containing matter scandalising the said court) on the 2nd day of April, 1897, been guilty of a contempt of this court doth order that the said Charles John McLeod do stand committed to the Kingstown prison for fourteen days for his said contempt.

"Dated the 3rd day of May, 1897.

"By the court,

"GEOFFREY P. ST. AUBYN,

"(Seal.) Acting Chief Justice."

The respondent for the purpose of giving the appellant time for apologising stayed the issuing of the committal order until the following day, the 4th of May, on which day the appellant attended and made the following statement:

"May it please the court,

"Since the adjournment of the court last night I seriously considered my position. I am aware of the grave responsibility which rests upon me. I am aware that the loss of my freedom may entail want upon those dependent on me. But I have come to the conclusion that I cannot conscientiously do what I was asked to do—viz., make an affidavit pleading guilty to and expressing contrition for a crime of which I know I am innocent.

"I am prepared to express regret that I should have inadvertently and innocently, without the knowledge that it contained matter which this court has held to be libellous and a contempt of court, lent the man Wilson a paper for his personal use for one night. But beyond that my conscience does not allow me to go.

"Should your honour unfortunately think that such an expression of regret is insufficient, I have no alternative but to submit, under protest, and under reserve of all rights as to appeal or otherwise, to the judgment that your honour has been pleased to pass upon me. "C. J. McLEOD.

"St Vincent,

"In court this 4th day of May, 1897."

The respondent would not accept that apology, which he considered insufficient, as not containing an expression of regret by the appellant of the nature of the publication itself. The appellant was arrested and committed to prison for a period of fourteen days.

Now what are the considerations applicable to the case? Committals for contempt of court are ordinarily in cases where some contempt *ex facie* of the court has been committed, or for comments on cases pending in the courts. However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself. Lord Hardwicke so lays down without doubt in the case of the *Champion* and *St. James' Evening Post* in 2nd Atk., 469. He says "one kind of contempt is scandalizing the court itself." The power summarily to commit for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of court is a weapon to be used sparingly and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism.

It is a summary process and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of court by scandalizing the court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies consisting principally of coloured populations the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of, and respect for the court. On that view was this a case in which the respondent was under the circumstances justified in making the committal order of the 3rd of May, 1897? The appellant was not alleged to be the writer or author of the article or letter in the *Federalist* of the 31st of March. He was not the printer or publisher of the newspaper. He was a

mere agent and correspondent of it at St. Vincent. On the evidence it must be assumed that he innocently and without any knowledge of the contents handed under the circumstances he stated the copy of the newspaper to Mr. Wilson. It would be extraordinary if every person who innocently handed over a newspaper or lent one to a friend with no knowledge of its containing anything objectionable could be thereby constructively but necessarily guilty of a contempt of a court because the said newspaper happened to contain scandalous matter reflecting on the court. The respondent arrived at the conclusion that the appellant was guilty of negligence in not making himself acquainted with the contents of the newspaper before the handing of it to Mr. Wilson. This assumes there was some duty on the appellant to have so made himself acquainted. That is a proposition which cannot be upheld. A printer and publisher intends to publish, and, so intending, cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish. Their lordships are of opinion the appellant was not, under the circumstances of this case, guilty of a contempt of court. Their lordships are also of opinion the apology offered by the appellant before his committal contains sufficient to have called on the respondent to stay his hand. It is an unconditional expression of regret for the act for which he was arraigned. Their lordships will therefore humbly advise her Majesty that the order of the 3rd of May, 1897, be rescinded and this appeal allowed. The respondent will pay to the appellant his costs of this appeal, but from the date on which the appellant was permitted to proceed with his appeal *in formâ pauperis* his costs will only be allowed on that footing.

Solicitors for the appellant, *Pattinson & Brewer*.

Solicitor for the respondent, *John Fawcett*.

---

## Court of Appeal.

From Q. B. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — Nov. 13, 20.

LITTLEDALE *v.* LIVERPOOL COLLEGE. (*a.*)

*Limitations, Statute of—Dispossession of land—Inference from equivocal acts—Real Property Limitation Act,* 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 3.

*In order to acquire a title to land, which has a known owner, by the Statute of Limitations, that owner must have lost his right to the land by being dispossessed of it or by having discontinued his possession of it* (3 & 4 *Will.* 4, *c.* 27, *s.* 3).

*Such owner cannot be dispossessed unless the plaintiff, who claims under the statute, obtained possession, which involves an animus possidendi—i.e., occupation with the intention of excluding the owner as well as other people.*

*When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important.*

*Many years ago the plaintiffs placed gates at the ends of a strip of land belonging to the defendants, over which the plaintiffs had a right of way only, and they did various equivocal acts on the strip of land in question, which was bounded on either side by defendants' land.*

*Held, in the circumstances of the case and upon the evidence* (Jeune, P., dubitante), *that the plaintiffs had failed to prove the acquisition of a title to the strip of land in dispute, and that the defendants had not been dispossessed for the statutory period.*

This was an appeal by the plaintiffs from a judgment of Bigham, J., dismissing the action. The action was one of trespass and was brought for the purpose of establishing the title of the plaintiffs to a small strip of land near Toxteth-park, Liverpool. The land in dispute was a narrow strip open at both ends situate between two fields belonging to a Dr. Solomon, the defendants' predecessor in title, and having hedges the whole length of the strip. The strip led from a public road called Penny-lane to a piece of land belonging to a person named Sinclair and adjoining the two fields above referred to, but separated by them from Penny-lane. In 1843 Sinclair's piece of land, which was then pasture, was conveyed to the plaintiffs or their predecessor in title, and it is hereinafter referred to as the plaintiffs' field. The strip of land was grass and was the means of access to the plaintiffs' field from Penny-lane. Formerly there did not appear to be any other access to the plaintiffs' field except along this strip; but before 1843 other roads leading to the field from other places were laid out and the strip in question became comparatively unimportant as a road to the field. The plaintiffs' conveyance of 1843, which was the only title deed produced by either side, had a plan on it, and on this plan both the field conveyed and the strip of land in dispute were coloured green, so that anyone looking at the plan alone, might infer that both were conveyed by that deed and belonged to the plaintiffs. But when the deed itself was referred to and the parcels and boundaries there described were looked at, it was plain that the land conveyed by the deed did not include the strip in dispute. That strip was nowhere mentioned in the deed. The defendants never disputed that the grantees in the deed of 1843 acquired a right of way along this strip to the land and that the plaintiffs were entitled to such right of way. But the strip itself had never been conveyed to the plaintiffs. It was admitted at the trial, and again before the Court of Appeal, that so far as the title was shown by documents the strip in dispute belonged to the defendants, and not to the plaintiffs. It was admitted that the defendants' deeds throughout showed this. This admission was in accordance with the truth in their lordships' opinion.

In 1861 Dr. Solomon conveyed part of one of his fields already referred to to the London and North-Western Railway Co; and the plans on this conveyance showed the strip as an "occupation road." The strip was of no apparent use to Dr. Solomon, and he did not appear to have used it or paid any attention to it for many years, nor had his trustees since his death. Nevertheless, unless the plaintiffs had acquired a title to it by the Statute of Limitations, the strip of land belonged to the defendants who claimed under Dr. Solomon, and did not belong to the plaintiffs. This also was conceded by the plaintiffs' counsel in argument. The plaintiffs, however, claimed to make a title to the land in dispute under the Statute of Limitations. They relied upon the several acts of user referred to by the Master of the Rolls in his judgment, and particularly upon the fact that they had erected two gates, one at each end of the strip of land, and had subsequently kept the gates locked.

*Hughes, Q.C.*, and *Briscoe*, for the plaintiffs (the appellants), referred to *Raine* v. *Buxton*, 28 W. R. 954, 14 Ch. D. 537; *Seddon* v. *Smith*, 36 L. T. Rep. 168, 25 W. R Dig. 133; *Sanders* v. *Sanders*, 30 W. R. 280, 19 Ch. D. 373.

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

*McCall, Q.C.*, and *Cochrane*, for the defendants, referred to *Leigh* v. *Jack*, 28 W. R. 452, 5 Ex. D. 264.

LINDLEY, M.R. (after stating the facts as above), said: In order to acquire by the Statute of Limitations a title to land which has a known owner that owner must have lost his right to the land by being dispossessed of it or by having discontinued his possession of it: see 3 & 4 Will. 4, c. 27, s. 3. I will consider discontinuance by the defendants first. About thirteen or fourteen years ago, when one Lewis was Solomon's tenant, Solomon told him to pull down part of the fence between the strip and his own field, asserting, as the truth was, that the strip was his. Lewis made openings in the fence accordingly. This was long after the gates were put up. The incident disproves discontinuance of possession by Solomon at the time in question. It is true that the defendants have done nothing on the strip since this time, but they had no occasion to do so. I cannot infer from the evidence any discontinuance of possession by the defendants or their predecessors either before or after this act of ownership. If the defendants have lost their right to the strip it must be, not by reason of any withdrawal or discontinuance of possession on their part, but by reason of their being dispossessed by the plaintiffs or their predecessors. I turn, then, to what the plaintiffs have done. Many years ago the plaintiffs or their predecessors put up two gates, one at each end of the strip of land in question, and they put locks on these gates, and they were kept locked until recently, when disputes arose. The plaintiffs or their tenants have kept the keys. If the plaintiffs had been strangers, having no right to or over the strip in question, the natural inference would be that they put up these gates in order to exclude everyone, and that everyone was in fact excluded. But the erection of the gates and the fact that they were locked is in this case open to a very different explanation. Let us take the gates separately. The plaintiffs had a right to put up a gate in their own field, and if they put it up there and not actually in the strip of land, they in no way dispossessed the defendants of any land of theirs nor interfered with any right of theirs, for the defendants had no right to go from the strip of land on to the plaintiffs' field. The evidence does not show where exactly this gate was. If it was in the strip of land its erection was a trespass and so far an invasion of the defendants' rights, but far short of an eviction from the strip. The gate at the Penny-lane end of the strip may well have been put up to protect the strip and the plaintiffs' right of way over it from invasion by the public, and not to dispossess the defendants. There is evidence to show that rubbish was thrown on the strip at the Penny-lane end; but there is no evidence to show that the gate was put up with the intention of dispossessing Solomon, the defendants' predecessor in title. The gate was in fact a protection to his property as well as to the plaintiffs' rights. Nor is it, I think, true to say that whatever the plaintiffs' intentions may have been the defendants or Solomon were in fact dispossessed of the land by the erection of these two gates. They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an *animus possidendi*—*i.e.*, occupation with the intention of excluding the owner as well as other people. The evidence that the plaintiffs never had any such intention is extremely strong. The correspondence shows that until quite recently they only claimed a right of way. Even when they commenced this action they claimed a right of way and no more. It was only at a later stage that they claimed the ownership of the strip. When possession or dispossession has to be inferred from equivocal acts the intention with which they are done is all-important: see *Leigh* v. *Jack*, 5 Ex. D., at p. 265. I am myself convinced that the gates were put up, not to exclude the defendants, but to protect the plaintiffs' right of way and to prevent the public from going along the strip of land now claimed by the plaintiffs. The other acts of ownership relied upon by the plaintiffs are far less important. The fact that horses or cattle lawfully on the strip, grazed more or less in it does not, in my opinion, assist the plaintiffs. It is too insignificant. So is the leave given to put a telegraph pole on the edge of the strip some three or four years ago. So is clipping the fences on the strip sides. The fact that one of the plaintiffs' tenants—viz., Peacop—let the pasturage of the strip to Carruthers some fifteen years ago, and afterwards to Boote, who was a tenant of the defendants, is more important. This, however, was an arrangement between two tenants. The reason for it as regards Carruthers is not explained. As regards Boote, he tells us he paid Peacop 5s. a year for three or four years for convenience and grazing. He wanted to go along the strip to some buildings on his land and his cattle got through the fence where Lewis had cut it down, and Peacop complained of this. There is no evidence to show that the plaintiffs knew anything about either of these arrangements. There is no evidence to show that the plaintiffs or their predecessors ever themselves let the strip of land or dealt with it as their own otherwise than by shutting it in by the two gates already mentioned and by giving leave to put up a telegraph pole. I have looked at all the decisions I can find which throw any light on this subject. *Leigh* v. *Jack* is the nearest and most instructive. *Rains* v. *Buxton* (the underground cellar case), presented no difficulty except on the point of concealed fraud. The owner of the cellar was there plainly dispossessed by the plaintiff, who took and kept possession of the cellar intending to acquire it for himself. In *Seddon* v. *Smith* and *Norton* v. *London and North-Western Railway Co.*, 28 W. R. 173, 13 Ch. D. 268, the acts of ownership were unequivocal—there was ploughing up and cultivation of a strip of land. Combining all the evidence adduced by the plaintiffs, I think Bigham, J., was quite right in holding that the plaintiffs had failed to prove the acquisition of a title to the strip of land in dispute. The evidence is not enough to prove that the defendants or their predecessors have been dispossessed for the statutory period of the strip which unquestionably was theirs. The appeal fails, and ought to be dismissed with costs.

JEUNE, P.—I have had the opportunity of reading the judgment of the Master of the Rolls, and I am not prepared to differ from it. But I am bound to say that I have arrived at that conclusion with great hesitation. That hesitation of course does not arise from anything connected with the paper title to the property, because it is clear, as the Master of the Rolls has said, that the paper title is in the defendants and not in the plaintiffs. My difficulty has been that, although I am inclined to agree with what has been said as to the *animus possidendi*, the facts as to the possession of the plaintiffs appear to me extremely strong. Putting the matter broadly, it is hardly too much to say that every act of user has been on the part of the plaintiffs, and that there has been no real user, for the last twelve years or a much longer period, on the part of the defendants. No doubt some of those acts are of no great importance. The putting up of the telegraph pole and the clipping of the hedges are matters of no great importance. But the erection of the gates and the grazing are matters

which assume a graver aspect. It is true also to say that there has been really no user on the part of the defendants or of their predecessors in title. It is true that there was no temptation to them to use the lane, except so far as they used it for grazing, and that matter cannot be quite lost sight of when we find that their tenants actually thought it worth while to pay something, though not much, for the grazing. These are the undoubted facts, and if they stood alone, I confess that, where we find on the one side acts of user and on the other side none or practically none, I should be much inclined to say that there had been a dispossession—that is, that legally the plaintiffs have been in possession. And if the defendants during the last twelve years had sought to bring an action of trespass against anyone who had trespassed on the land, I think they would have found it difficult to prove that, although they had a legal paper title, they were in possession sufficiently to maintain such an action. These facts have impressed me very strongly, and it is with considerable difficulty that I agree with the judgment of the learned judge in the court below. But on the whole I am not prepared to take the responsibility of differing from him because all through there has been an undoubted right of way in the plaintiffs as against the defendants, and it is very difficult to distinguish the acts done by the plaintiffs from acts which they would do and would have a right to do in exercise of their right of way. That observation is particularly applicable with regard to the gates. If there had been no right of way I should have thought that when a man puts gates at each end of a strip of land and locks them he has done as strong an act as he could do to assert his right to the ownership of the land. Such an act has always been held to be one of the strongest things that can be done to assert ownership, but when you find that a man who has done this had a right of way over the land, that one end of the piece of land runs out into a public road and the other into his own land, and that along each side of the piece of land are hedges which either were practically not used at all or were used for a short time only, and the user then disappeared, the erection of the gates and the locking and keeping them locked would appear referable rather to the exercise of the undoubted right of way than to acts of user such as to constitute dispossession.

In the same way the grazing, though to a less extent, admits, in my view, of explanation. It is very necessary to keep down the grass in order to make the right of way practically exerciseable by the person entitled to it. Of course he would not like the grass to grow to such a length that there remained no path over it.

Under the circumstances I am not prepared to differ from the judgment of the learned judge in the court below.

ROMER, L.J.—As has been pointed out by the learned President, the case is one of difficulty, but I agree in the judgment of the Master of the Rolls, and in the reasons given by him, to which I cannot usefully add.

*Appeal dismissed.*

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Stone, Fletcher, & Co.*, Liverpool; *Wynne, Holme, & Wynne*, for *F. J. Leslie & Co.*, Liverpool.

---

From Q. B. Div. (A. L. Smith, Collins, and Vaughan Williams, L.JJ.) Nov. 14.

WEIR & CO. v. GIRVIN & CO. (a.)

*Ship—Charter-party—Advance freight—Destruction of part of cargo before sailing—Liability to pay advance freight on cargo destroyed.*

*By a charter-party it was provided that the charterers should load a full and complete cargo at a certain rate of freight per ton on the quantity to be delivered to the consignees, the freight to be due and paid "two-thirds in cash three days after sailing, ship lost or not lost, and the balance on unloading and right delivery of the cargo." A portion of the cargo which had been loaded on board was destroyed by fire—a peril mutually excepted in the charter-party—before the sailing of the ship. Three days after sailing the shipowners claimed two-thirds advance freight on the whole cargo, including the part destroyed.*

*Held, that the shipowners were not entitled to the advance freight on the part of the cargo which had been destroyed.*

*Judgment of* Lord Russell of Killowen, C.J. (47 *W. R.* 365, [1899] 1 *Q. B.* 193), *affirmed.*

Appeal from the judgment of Lord Russell of Killowen, C.J., reported in 47 W. R. 365, [1899] 1 Q. B. 193.

The action was to recover advance freight. A charter-party, dated the 31st of March, 1898, was made between the plaintiffs, who were the owners of ship *Olivebank*, and the defendants, as agents for Girvin & Eyre, of San Francisco, the charterers; but although the defendants contracted as agents only, they agreed to undertake responsibility in the present action.

The following were the material clauses of the charter-party: "The said vessel shall proceed to a loading berth in the River Tyne or Tyne Dock, and there load a full and complete cargo of coke and lawful merchandize (excluding coals, subject to stipulations in margin, scrap iron, acids, gunpowder, and explosives), the cargo being of such a nature as will load vessel to Lloyd's freeboard (subject to provisions of side clause) not exceeding what she can reasonably stow and carry, and being so loaded, shall proceed to San Francisco and deliver the same. The captain to sign bills of lading for the weight of cargo taken on board as presented, without prejudice to the tenor of this charter, provided same equal the amount of the chartered freight. Charterers' liability with respect to this charter to cease, except for freight as provided, on the vessel being loaded, the captain and the owner to have an absolute lien on the cargo for all unpaid freight and demurrage. Freight for the said cargo to be paid on final discharge at the rate of 16s., except on cargo shipped in Hull, as hereinafter provided, per ton of 2,240 lbs. on the quantity to be delivered to the consignees. The freight to be due and paid as follows: Two-thirds in cash, less 6 per cent. for all charges, three days after sailing from Tyne, ship lost or not lost, and the balance on unloading and right delivery of the said cargo, to be paid in United States gold coin at the exchange of 4 dols. 80 cents. per £ sterling. The act of God . . . fire, &c., mutually excepted." The charter-party contained in the margin the following clause: "Charterers undertake to ship, and owners to load, 1,000 tons of dead-weight cargo (of which 500 tons may be cannel coal in charterers' option) in manner

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

which mines and minerals can be reserved is in a mining lease, which is provided for by section 17. The best rent for the property demised has not been reserved as required by section 7 (2). Therefore the lease is invalid.

*C. H. Lindon*, for the vendor.—*Buckley* v. *Howell* does not apply to a lease under the Settled Land Act. Moreover, the Confirmation of Sales Act, 1862 (25 & 26 Vict. 108), authorized trustees to sell minerals apart from the surface. Section 17 of the Settled Land Act, while expressly giving power to reserve mines and minerals in a mining lease, does not prohibit it being done in other leases. Section 13 allows grants "of any part of land" upon surrenders. If the lease is otherwise invalid it is cured by section 20 (2) of the Act, and also by the Act 12 & 13 Vict. c. 26, which makes valid leases which would otherwise be invalid owing to deviation from the powers under which they are granted: *Walsh* v. *Lonsdale*, 21 Ch. D. 9, 30 W. R. Dig. 109. If the reservation of minerals is wrong, the lease is otherwise valid, and the reservation only fails.

KEKEWICH, J.—In my judgment the objection taken by the purchaser is a sound one. The person from whom the vendor derives his title is a tenant for life having power of leasing conferred upon him by the Settled Land Act, 1882, including the power to grant building leases for a term of ninety-nine years. The Act, however, also provides for his granting them for a longer term with the sanction of the court, and that sanction the tenant for life has obtained. But the order of the court which he has obtained only gave him power to lease under the Act for building purposes for a longer terms than he could otherwise have done, so that in other respects he derives no assistance from the terms of the order, but is thrown back on the Act.

The powers conferred on a tenant for life with respect to granting leases is contained in section 6 of the Settled Land Act, 1882, which provides that "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding (1) in case of a building lease, ninety-nine years; (2) in case of a mining lease, sixty years; (3) in case of any other lease, twenty-one years." It is therefore clearly shown that under this section a lease of minerals—that is to say, what is beneath the surface, may be granted, but the question here is whether a building lease of the surface can be granted reserving the minerals. The section provides that the tenant for life may lease the land "or any part thereof," and it is said that these mines and minerals below the surface are necessarily "a part of" the land. According to the old rule, it is said, a grant of land comprises everything from the sky to the centre of the earth, and a grant of the surface being a lateral division of the land must therefore be a grant of "a part of" the land. But as I understand the law as laid down by Lord Romilly in *Buckley* v. *Howell*, which has received sanction by the consequent and subsequent passing of the Confirmation of Sales Act, 1862, it is not right to speak of "a part of" land where the division is lateral; and that view is supported by the decision in the case of *Dayrell* v. *Hoare*, cited by Mr. Micklem, where Littledale, J., says: "I think the grant bad on the simple ground that the entirety in the particular part is not demised." I need not go into the rest of that; the case dealt with the reservation of sporting rights—but apply here the phrase I have just quoted. Here you have taken part of the land measuring so many square feet on the surface, and having taken it you have demised it all, but you have reserved the minerals—that is to say, you have divided it by a lateral section—viz., the minerals, and that is not permitted, as there is no special power here given to the tenant for life enabling him to do so. It is not demised otherwise than as a building lease, and I do not see that the words "whether involving waste or not" makes any difference. I expect that in this particular lease the leasing must involve waste, but that does not extend the power of leasing or make any alteration in the Act.

Then there are other provisions of the Act which require consideration, and the first is section 17 (1), which provides that: "A sale, exchange, partition, or mining lease may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals." That shows that the Legislature saw that it was necessary to separate mines and minerals from the surface where mining leases are granted, but it does not assist the vendor to say that a building lease may be granted reserving the mines and minerals; on the contrary, so far as pertinent at all, it tends to show that the Legislature knew it was necessary in certain cases to insert a special power to enable the mines and minerals to be reserved at all. Then there is section 13 which which provides that (1) "A tenant for life may accept . . . a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them"; and (2) "On a surrender the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases, in lots."

There are difficulties of construction in this section which may some day require decision, but I will not dwell upon them here further than to say that the section only contemplates the necessity, which is one that constantly occurs, of accepting surrenders and granting new leases, and, to effect that, larger powers are given, and the Legislature provides that where mines and minerals alone, which were demised under an old lease, are surrendered, a new lease may be granted reserving the mines and minerals, having reference to the particular circumstances, and these provisions do not affect building leases.

Then if I am right so far, the present lease is bad; but it is said that there are two Acts of Parliament which cure it. One is the Settled Land Act, 1882, itself, by section 20, sub-section 2, which provides that a deed of conveyance under the Act "to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed." To say that that helps the vendor is to beg the question, because if the lease operates under the Act there is no need to come here, and if it does not so operate the section does not help him. Then it is said that there is another Act—12 & 13 Vict. c. 26—which assists to cure defective powers in leases, but that Act only applies to defects in forms and ceremonies, and does not refer to the substance of the powers given. Were I to hold that that Act made this lease good, you might neglect every provision of the Settled Land Act, and a tenant for life might make any kind of lease he pleased, and neglect all forms and ceremonies if he acted honestly. That cannot be the meaning of the Act in question, and I do not think it at all affects the present case, where the court is dealing with the substantial question whether a tenant for life can grant a building lease reserving the mines and minerals.

Then there was an objection taken by Mr. Micklem, which at first I thought might be of some importance. He suggested that if land was demised for building purposes, but the mines and minerals were reserved, you cannot say that the best rent has been reserved for the building lease as required by section 7 of the Act, sub-section 2 of which provides that, "Every lease shall reserve the best rent that can reasonably be obtained," because some part of the rental value must necessarily be attributable to the mines and minerals. But on reflection I do not think there is anything in that point, because if the land is demised reserving the mines and minerals, the reason that the full best rent is not reserved is that something has been reserved out of the demise itself; if, therefore, the vendor is right in saying that a demise of the surface with a reservation of the mines and minerals is good, then there is no real ground for saying that the tenant for life has not got the best rent for the thing he has demised. If on the other hand the tenant for life has no power to make such a demise, the objection is of no force. I do not therefore think that the argument that the tenant for life has not reserved the best rent obtainable is of any importance.

But for the reasons stated above I think that the demise is bad, and there should be a declaration to that effect against the validity of the lease in accordance with the terms of the purchaser's summons.

Solicitors, *Sewell, Edwards, & Nevill*; *C. P. Eaton Taylor*, for *H. A. Matthews*, Shanklin and Sea View.

---

Chan. Div.
Cozens-Hardy, J. } Dec. 1.

*In re* GOULDING'S SETTLEMENT.
DOBELL *v.* DUTTON. (*a.*)

*Will—Residuary devise and bequest—Settlement—Power of revocation and new appointment—Wills Act* (1 *Vict. c.* 26), *s.* 27.

*The principle that a general devise and bequest does not operate under section* 27 *of the Wills Act*, 1887, *as an exercise of a power of revocation and new appointment applies to the case where the power of revocation and new appointment is that contained in the instrument originally creating it, as well as to the case where the power is that reserved by an appointment made in exercise of the original power.*

Originating summons.

This summons was for the determination (among other things) of the question of the operation of a residuary devise and bequest upon property previously settled with powers of revocation and new appointment of the uses and trusts.

By his will made in 1869 George Goulding devised certain houses in Navigation-road, Northwich, to his wife in fee, and he gave the residue of his real and personal estate to trustees for sale and conversion, and to pay the income to his wife for life, and after her death (in the events which happened) to his sister, the wife of the defendant John Dutton, and his brothers John Goulding and Thomas Goulding, in equal shares.

In 1888 the testator conveyed the houses in Navigation-road and other freehold houses, and a leasehold house and the furniture therein, to the plaintiff Dobell, to the use of himself, the settlor, for life, and after his death upon trusts in favour of certain persons therein mentioned. And it was by the settlement declared that the settlor might at any time by deed or will revoke the said uses and trusts, and declare such other uses and trusts as he should think fit.

In 1890 the testator made a codicil to his said will, which recited that his sister Mrs. Dutton had died in 1879, and declared that her share should be paid to her husband, and that in all other respects the testator confirmed his said will. The testator had a few months previously destroyed the settlement. He died in 1891, leaving no property except a small amount in cash and what was comprised in the settlement.

The plaintiffs were the trustee and the persons entitled under the settlement; the defendants were the persons claiming under the will and codicil; and the question was whether they were entitled to any part of the property comprised in the settlement.

*Rutherford*, for the plaintiffs.—The residuary gift cannot affect the property comprised in the settlement. Section 27 of the Wills Act only makes a general devise or bequest operate as an exercise of a power of appointment, not of a power of revocation of trust: *Pomfret* v. *Perring*, 3 W. R. 81, 5 De G. M. & G. 775, *In re Brace*, 39 W. R. 508, [1891] 2 Ch. 671, *Charles* v. *Burke*, 43 Ch. D. 223*n*, 37 W. R. Dig. 137. If it is contended that the devise of the residuary real estate is specific, at any rate the bequest of personalty is general.

*J. Rotch*, for the defendant Dutton.

*Cochran*, for other defendants.—The codicil revives the will as of the date of the codicil, and the residuary devise consequently operated as an appointment of uses under the settlement. *Pomfret* v. *Perring* and *In re Brace* are cases where an appointment reserving power of revocation and new appointment had been made under the power in the original instrument, and it was held that a subsequent general bequest did not operate as a revocation of the existing appointment. That principle does not govern this case where there has been no appointment. The express devise of the houses in Navigation-road shows the intention of the testator to deal with the settled property: *Reid* v. *Reid*, 25 Beav. 469, 7 W. R. Ch. Dig. 104. [COZENS-HARDY, J., referred to *Palmer* v. *Newell*, 3 W. R. 333, 20 Beav. 32.] *In re Wait*, 33 W. R. 930, 30 Ch. D. 617.

*Durandu*, for other defendants, referred to the observations of North, J., in *In re Gibbes' Settlement*, 36 W. R. 429, 37 Ch. D. 143.

COZENS-HARDY, J.—The destruction of the settlement by the settlor did not operate as an exercise of the power of revocation so as to make the property his own. The testator had power to revoke the trusts of the settlement, and appoint fresh ones. These two things might have been done by one and the same instrument. Now, if I can find an intention on the part of the testator in his will to dispose of his settled property, I should desire to give effect to it. I find a specific bequest of the houses in Navigation-road followed by a residuary devise and bequest. It is admitted by Mr. Rutherford that the will operates to dispose of the houses in Navigation-road. But I cannot hold that it disposes of the rest of the property comprised in the settlement. The case no doubt comes under the new law. It has, however, been decided by cases binding upon me that there is nothing in the Wills Act which makes a residuary devise and bequest operate as an exercise of a power of revocation and new appointment. It is argued that the principle of these authorities does not apply to a case where the powers of revocation and new appointment were in the original

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

instrument, but only where there has been an appointment under the original power which itself has reserved power of revocation and new appointment. I think that that is too narrow a view of the principle. The decision of the Master of the Rolls in *Reid* v. *Reid* has been pressed upon me, but it appears from the case of *Palmer* v. *Newell* that he considered that the doctrine of *Pomfret* v. *Perring* applied to a case such as this before me. It is said that I ought to find an intention to revoke and appoint because the testator had in his will expressly mentioned and devised part of the settled property, but that only shows that he did not intend to deal with the rest.

Declaration that the houses in Navigation-road were, but that the residuary real and personal estate was not, appointed by the will.

Solicitors, *J. W. Thompson*, Liverpool, for *J. J. Dixon*, Northwich, and for *A. & J. E. Fletcher*, Northwich; *W. H. Draper*, Liverpool, for *Arthur Browne*, Warrington.

---

Chan. Div. }
Farwell, J. } Nov. 2.

HEPWORTH v. PICKLES. (*a*.)

*Vendor and purchaser—Covenant not to use as an inn or beerhouse—Acquiescence in sale—Waiver.*

*Acquiescence for a long period of years in the use of freehold premises in a manner inconsistent with the purpose of a restrictive covenant contained in the conveyance will amount to a waiver or release of the covenant.*

Gibson *v.* Doeg, 6 *W. R.* 107, 2 *H. & N.* 615, *followed.*

Action for the rescission of a contract for the sale of a freehold shop and for the return of the deposit on the ground of misrepresentation by concealment of a restrictive covenant against the sale of beer on the premises.

By a contract dated the 23rd of September, 1898, the plaintiff agreed to purchase a shop in Lilycroft-road, Bradford, from the defendant for the sum of £1,050. The agreement contained a statement that the shop was licensed for the sale of beer and spirits to be consumed off the premises, and information to this effect was given to the plaintiff by the defendant's solicitor. No information was given as to the existence of the restrictive covenant, which was contained in a conveyance to the defendant's predecessor in title in 1874, and its existence did not become known to the plaintiff until the abstract was delivered. The covenant prohibited the user of any shop as an inn, or the sale of any beer or intoxicating liquors in any shop, built on the land conveyed. On making the discovery the plaintiff refused to complete, and demanded the return of his deposit, which the defendant then claimed that he was entitled to forfeit.

At the trial evidence was produced which showed that there was no general building scheme affecting the property in question, and that beer and spirits had been sold in the shop under an off-licence, of which a notice was duly set up over the door, and that this proceeding had been going on continuously ever since the year 1874. It was also proved that the solicitor acting for the defendant at the sale had no knowledge of the existence of the covenant, although he had the means of ascertaining it, the title deeds of the property being in the hands of a mortgagee.

(*a*.) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

*Badcock, Q.C.*, and *C. Church*, for the plaintiff.—The plaintiff will not be safe in taking the shop; he wishes to use it for the sale of beer and spirits, and does not wish to be entangled in a lawsuit. [FARWELL, J., referred to a case of *In re Summerson* before Romer, L.J., when he was a judge of the Chancery Division, in which *Gibson* v. *Doeg*, 6 W. R. 107, 2 H. & N. 615, was followed.] *Gibson* v. *Doeg* can be distinguished, because it is a case between landlord and tenant. It is not sufficient to show acquiescence by the original covenantee; it must be shown that the other persons who might claim under him, his lessees of adjoining property, for instance, have also acquiesced. It is the duty of the vendor's solicitor to know of the existence of the covenant, and his silence on the subject amounts to a misrepresentation sufficient to avoid the contract: *Flight* v. *Barton*, 3 My. & K. 282; *Power* v. *Barrett*, 19 L. R. Ir. 450, 36 W. R. Dig. 214.

*Hughes, Q.C.*, and *Clayton*, for the defendant, were not called upon except as to costs.

FARWELL, J.—In this case the plaintiff entered into a contract on the 23rd of September, 1898, for the purchase of a dwelling-house and shop in Lilycroft-road, Bradford, the shop having an off-licence for the sale of beer and spirits. The house in question was conveyed in 1874 to the defendant's predecessor in title by a conveyance which contained a covenant by him that "no shop or other building to be erected on the said plot of land, or any part thereof, shall at any time hereafter be used as an inn, tavern, or beer-house, nor for any other purpose than as a dwelling-house or shop as aforesaid, nor shall any wine, beer, or other intoxicating liquors be sold on the said plot of land or in any shop or other building thereon." I find, as a fact, that very shortly after the date of the conveyance, beer, and afterwards spirits, were sold, and have continued to be sold for upwards of twenty years, on the premises, the fact of the licence appearing in large letters over the door. That being so, I hold that the shop is no longer bound by the restrictive covenant. I think the case is covered by the case of *Gibson* v. *Doeg*, and by the unreported case of *In re Summerson* before Romer, L.J. I apprehend that the law as regards the question of waiver by acquiescence is well stated by Pollock, C.B., in the former case. I take his statement of the law to mean that if you find a long course of usage extending, as in the present case, over more than twenty-four years, which is wholly inconsistent with the continuance of the covenant, the court will infer some legal proceeding which has put an end to the covenant in order to hold that such usage is now lawful, and not wrongful. This case was followed by Romer, L.J., in the case which I have mentioned, which was in some respects a stronger case. It was a case in which there was a sale under the order of the court, the Corporation of Newcastle being the lessors. There was a similar restrictive covenant. The actual lease was anterior to the root of title. The covenant was very stringent, but it was shown that the house in question had in fact for thirty years been used as a beerhouse. Romer, L.J., considered that he was bound by the decision in *Gibson* v. *Doeg*, and held that there must be presumed to have been an actual waiver or release. I propose to follow these authorities, and I find that in this case the covenant has been waived or released, and that there is no longer any actual doubt or question about it. Mr. Badcock has argued that the present case differs from those to which I have referred, because it is a case of a covenant between grantor and grantee. But in the circumstances I am unable to appreciate the difference between the case of a

grantor or grantee and the case of a lessor and lessee. He has also suggested that there might be other persons who would be able to enforce the covenant besides the original grantor. As at present advised, I think it very unlikely that there can be any such person. I hold, therefore, that a good title can be made.

[His lordship then proceeded to deal with the alleged misrepresentation, and ultimately dismissed the action, but made no order as to costs.]

Solicitors, *Prior, Church, & Adams*, for *J. H. Milner*, Leeds; *Jaques & Co.*, for *George Turnbull*, Leeds.

---

Chan. Div.
Wright, J. } Nov. 1.

*In re* NATIONAL STORES (LIMITED). (a.)

*Company—Winding up—Order for public examination—Summons to discharge order—Time—Evidence of not being concerned in promotion of company—Admissibility.*

*A summons to discharge an order for public examination under section 8 of the Companies (Winding-up) Act, 1890, must be made with promptness to be in time. Thus, an application made two months after the order was served is too late.*

*Evidence that the applicant did not take part in the formation or promotion of the company cannot be admitted in support of a summons to discharge the order, as that is the very question which it is the object of the examination to ascertain.*

Summonses to discharge an order for the public examination of the applicants.

On the 17th of June, 1898, a compulsory winding-up order had been made against the company. The official receiver made his further report under section 8 of the Companies (Winding-up) Act, 1890, in which he stated that, in his opinion, fraud had been committed in the promotion or formation of the company by the applicants Willett and Taylor, among other people.

This report was filed on the 8th of May, 1899, and an order was made *ex parte* for the public examination of Willett and Taylor and others, and on the 17th of May notice was sent to them that the order had been made, and on the 26th of May they were served with a copy of the order.

The examination was fixed for the 7th of June, and was adjourned to the 17th of July and the 7th of August. On the second occasion counsel appeared on behalf of Willett and Taylor, and cross-examined one of the other persons ordered to attend for examination, but Willett and Taylor were not themselves examined.

On the 26th of July the applicants served the present summonses on the official receiver to have the order for their examination discharged, on the ground that they were not persons who had taken part in the promotion or formation of the company. The applicants filed affidavits in support of their application. The summons was ordered to be heard before the judge in court.

*Ingle Joyce*, for the official receiver.—The application is out of time. It should have been made within the time limited in the rules for appealing from an interlocutory order: *In re Giles*, 38 W. R. 273, 43 Ch. D. 391.

*Muir Mackenzie*, for Willett.—A judge of the Chancery Division is not tied as to the time within which he may discharge such an order: *Dickson* v. *Harrison*, 26 W. R. 730, 9 Ch. D. 243. He can enlarge the time if he think fit: *In re Johnson*, 37 W. R. 765, 42 Ch. D. 505. The applicant produces evidence by affidavit that he never took part in the promotion of the company. He therefore objects to the jurisdiction, as he is not a person who has taken part in the promotion or formation of the company: *In re New Travellers' Chambers*, 43 W. R. 282, [1895] 1 Ch. 395; Buckley on the Companies Act (7th ed.), p. 684.

*John O'Connor*, for Taylor.

WRIGHT, J.—It seems to me that this application ought not to be assented to. First of all, as regards the time, the applicant seems to me to be too late. He did not take out his summons till two months after he had been served with the order for his public examination, and he was during a part of that time represented in court by counsel, who cross-examined a witness, so that it is impossible for him to say that his attention was not called to the subject-matter of the examination. No special ground is shown for allowing an extension of time, and so I do not think I ought to allow it in any case of this kind. What the time is I will not attempt to lay down. The concensus of authority in the text books on the subject seems to be that it was formerly twenty-one, but that now it is fourteen days. I suppose the period runs from the time when the person ordered to be examined is served with the order. At any rate, the applicant ought to have come with reasonable promptness. Then on the merits I do not know if I ought to hear the statements which his counsel made on behalf of the applicant, though one is always anxious to hear statements of this kind if they can be allowed. He rightly admits that on the face of the report there was enough to justify the order. The applicant now seeks to show by affidavit that he did not take part in the promotion of the company, and it was urged that this evidence ought to be admitted, because it is an application going to the jurisdiction of the court to make the order, and that according to the judgment of Romer, J., in *In re New Travellers' Chambers* if the court has gone beyond its jurisdiction the party aggrieved can set it right, but I do not think this is an objection to the jurisdiction in any sense. The question whether the person named did take part in the promotion of the company or not, is one of the very things which it is the object of the examination to ascertain. It seems to me impossible to hold that there is no jurisdiction to order that the true facts as to whether the applicant did take part in the promotion or formation of the company shall be ascertained, if the official receiver has made a proper finding in his report on that point; and as I understand it that is the view which is taken in the very passage in Buckley to which the applicants' counsel referred, as the language there is, "To give the court jurisdiction to proceed under sub-section 3 it is essential . . . (*d*) That that individual is in the words of sub-section 3 one who has taken part in the promotion or formation of the company," *i.e.*, "who according to the findings of the report is 'reported to have taken' such a part or who 'has been a director or officer of the company,'" so that I think that even if these statements are authoritative as to the meaning of the section, they do not help, but are rather against the contention that has been put forward for the applicant. The application must therefore be dismissed with costs.

Solicitors, *S. A. Clench*, for Willett; *Tottenham & Co.*, for Taylor; *Solicitor to the Board of Trade*, for the Official Receiver.

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

Chan. Div.
Wright, J. } July 26, 1899.

*In re* W. Blackburn & Co.
Buckley's case. (*a*.)

*Company—Winding-up—Fraudulent preference—Discharging legal obligation—Payment to satisfy conscience—Companies Act*, 1862 (25 & 26 *Vict. c*, 89), *s*. 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c*. 52), *s*. 48.

*If a company make a preferential payment to a creditor within three months of winding-up (which by section* 164 *of the Companies Act*, 1862, *is equivalent to an act of bankruptcy), not from a sense of legal obligation, but from a sense of moral obligation, such payment is a fraudulent preference.*

Motion by voluntary liquidators for a declaration that the payment of certain sums of money by the directors to Edmund Buckley & Co. was a fraudulent preference of that firm and for an order for the repayment with costs.

Buckley & Co. had entered into a contract with the company now in liquidation for the purchase of wool at the Liverpool sales for the sum of £900. The wool was purchased by Buckley & Co. from other people, the firm merely getting a brokerage fee. The wool was delivered on the 17th of January, payment being due on the 27th.

On the 24th of January the directors met—they then knew that the company was insolvent. They had, however, a large sum of money in their hands with which they determined to pay the smaller creditors of the company and exclude the larger ones. After paying they then had in hand customers' bills having five to seven months to run amounting to £790 19s. 2d. These bills they determined to hand over to Buckley & Co. The bills were accordingly sent on the 25th.

The judge found as a fact that they did this, not because they considered that they were under a legal obligation to pay the money back, but because they thought it hard on Buckley & Co. that they should have to pay the vendors of the wool, they being only brokers.

On the 24th of January they also passed a resolution to call a meeting of the shareholders to pass an extraordinary resolution to wind up the company voluntarily This was done, and the extraordinary resolution was passed on the 2nd of February. The company was in consequence wound up voluntarily. The voluntary liquidators now moved for a declaration that this payment to Buckley & Co. was a fraudulent preference within the meaning of the statute.

*Herbert Reed, Q.C.*, and *P. F. Wheeler*, for the liquidators.—This payment to Buckley & Co. is an undue fraudulent preference, and we are entitled to an order for repayment of the sum with costs.

*P. O. Lawrence, Q.C.*, and *A. J. Ashton*, for Buckley & Co.—This payment was not made with a view to giving Buckley a fraudulent preference, but to satisfy the debtors' conscience: *Ex parte Taylor*, 35 W. R. 148, 18 Q. B. D. 295; *New, Prance, & Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19, affirmed in the House of Lords as *Sharp* v. *Jackson*, [1899] A. C. 419.

They also referred to *In re Fletcher*, 9 Morrell 8.

[Wright, J., referred to *In re Vingoe and Davies*, 1 Manson 416.]

Wright, J., after stating the facts of the case, continued: The question is whether the preference is a fraudulent one within the meaning of the statute. Now, that depends primarily, at any rate, upon the state of mind of the directors when they authorized the payment which was made by handing over to the firm of Buckley & Co. certain bills accepted by other customers. Mr. Blackburn, who is the chairman, or at any rate the principal director of the company, said in his examination in chief that the directors paid the firm because they thought it hard on them, they being mere brokers and only getting a small commission out of the business, and yet standing to lose a large sum of about £900. Then Mr. Blackburn said that he, at any rate, did not at the time of ordering the bills to be handed over to the firm know or think at all about whether the money was then due from the company to the firm. Clearly, therefore, if that is correct, the directors did not make the payment to the firm because they thought they were under any legal obligation to do it. Then what was their view in paying the money? According to Mr. Blackburn's evidence in chief, their dominant view and their only view in preferring the firm was because they thought non-payment would be hard on the firm. In cross-examination he said: "We knew we were in difficulties, we paid Buckley & Co. because I did not feel easy about the way the Buckleys had been treated by my son and secretary. The payment was made to satisfy my conscience." Now, is a payment like that a fraudulent preference? I have no doubt that according to the recent authorities it is. For a long time it was almost impossible for anybody to know what a fraudulent preference was. Ever since the decision in *New, Prance, & Garrard's Trustee* v. *Hunting*, which has since been affirmed by the House of Lords, so little difficulty has been felt by gentlemen who practice in bankruptcy matters, both barrister and solicitor, that questions of fraudulent preference comparatively seldom now arise. But, having regard to *New, Prance, & Garrard's Trustee* v. *Hunting*, I do not think there is any doubt that this was a fraudulent preference, exactly because the payment was made with a view to prefer—because it was not a payment made merely for discharging a legal obligation. It was made, according to the evidence of the witness, because he thought it was hard on Buckley & Co. not to be paid, and it was in order to satisfy the directors' own conscience. In two cases to which I have referred—*In re Fletcher* and *In re Vingoe and Davies*—it was held, by very high authorities in these matters, that exactly what has been done in this case was a fraudulent preference—that if a debtor paid a creditor in advance of others, not from a sense of legal obligation, but from a sense of moral obligation or duty, that was a fraudulent preference. I entirely agree with those decisions, and I think, therefore, that the money must be paid back, however hard the case may be.

*Van Sandau & Co.* for *Mills & Co*, Huddersfield, solicitors for liquidators.

*Wynne, Holme, & Wynne*, for *Whitley & Co*, Liverpool, solicitors for Buckley & Co.

(*a*.) Reported by C. W. Mead, Esq., Barrister-at-Law.

---

Q. B. Div.
(Darling and Channell, JJ.) } Dec. 6.

Pullen (*Appellant*) *v.* The Assessment Committee of St. Saviour's Union (*Respondents*). (*a*.)

*Metropolis — Rating — Small tenements—Gross value—Sum paid for cleaning, &c., of common staircase—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c*. 67), *s*. 4.

(*a*.) Reported by C. G. Wilbraham, Esq., Barrister-at-Law.

*The owner of a building in the metropolis containing a large number of tenements, separately occupied as artizan's dwellings, and having staircases common to several tenements, employed P. as his agent to collect the rents. Each tenant, in addition to the rent, paid to P. a weekly sum for the cleaning, lighting, and watching of the common staircase, and for removing the dust.*

*Held, that the weekly sum so paid was properly taken into account in arriving at the gross value of the tenements under section 4 of the Valuation (Metropolis) Act, 1869, for the purpose of rating the owner in respect thereof.*

Case stated by justices of the County of London.

The appellant, who was the owner of buildings containing 616 separate tenement properties occupied as artizans' dwellings, known as Pullen's-buildings, in the parish of St. Mary, Newington, appealed to the quarter sessions against the supplemental valuation list for the parish on the ground that he was over-assessed in regard to thirty-two of the tenements. The tenements opened upon a common staircase which lay open directly, without doors, to the public footway.

The rents of the tenements, amounting to 8s. 6d. or in some cases 10s. per week, were paid to and collected by a man named Parker, an agent of the appellant, who was paid a commission on the rent so collected. A further sum of 6d. a week was paid to Parker by each of the tenants in respect of the cleaning, lighting and watching of the common staircase and for removing the dust. The persons employed in the carrying out of these services were not engaged or paid or dismissed by the appellant, but by Parker. If all the 616 tenements were occupied there would be a profit of about £1 per week accruing to Parker from the payment of 6d. a week by each tenant. Any loss in respect of the services fell upon Parker. No portion of the 6d. a week reached the pocket of the appellant.

The gas burnt for lighting the staircases was supplied through a separate meter, and was paid for in the following way. The gas company sent a bill once a quarter to the appellant for the amounts due in respect of these and other properties; the appellant sent them a cheque for the whole amount, Parker merely recouping himself for the gas burnt on the staircases. The 6d. a week was never entered in the tenants' rent-books nor was it included in the amount for which distress was levied. On the taking of the tenement there was no agreement in writing, but each tenant was given to understand that he would have to pay the 6d. a week.

The overseers in making out the supplemental valuation list included the sum of 6d. a week as though the same were paid to the appellant as part of the rent of each of the tenements, and the amount of the gross and rateable value was arrived at by means of such inclusion.

The appellant contended before the assessment committee, and subsequently before the quarter sessions, that the 6d. a week did not part of form the gross or rateable value of each of the tenements within the meaning of section 4 of the Valuation (Metropolis) Act, 1869. The assessment committee upheld the valuation, and the quarter sessions dismissed the appellant's appeal. Subject to this case, they held that the rents, so called, of 8s. 6d. and 10s., were not really rents but lump sums in return for which the tenants got water and had their taxes paid, and that the 6d. a week ought to be added to the lump sum.

Section 4 of the Valuation (Metropolis) Act, 1869, provides that in that Act "the term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenants' rates and taxes and tithe commutation rent-charge, if any, and if the landlord undertook to bear the cost of repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

*Wheeler, Q.C.* (*Ryde* with him), for the appellant.—The 6d. a week paid to Parker was not properly included in arriving at the value of the buildings. It was in effect money paid for services, which in other ranks of life would be done by domestic servants. The services for which the payment was made were not things done to the hereditament as such, nor were they in any way analogous to repairs or painting: *Smith* v. *Churchwardens, &c., of Birmingham*, 22 Q. B. D. 211. It is conceded that the payment was not rent for which distress could be levied. The annual value of premises is equivalent to the rent paid for them.

*Marshall, Q.C.* (*Corrie Grant* with him).—The question whether the 6d. a week was properly included as part of the rent paid for the tenement is one of fact and not of law. The justices found that the payment was part of the rent. The true view is that the landlord is obliged to provide a staircase, properly cleaned and lighted, and, as a matter of convenience, the payment has been made direct to the man who sees after those matters, and it constitutes a part of his wages.

DARLING, J.—I think that this appeal must be dismissed. What we have to arrive at is the value to the landlord upon which the property becomes rateable. In order to arrive at that we have to ascertain what is the rent which the landlord gets for the property. Now, here the landlord actually himself receives for each tenement 8s. 6d., but the tenant pays 9s., 8s. 6d. to the landlord and 6d. to Parker, who is the landlord's agent, and who also cleans and lights the staircase and removes the dust. It is said that only the sum which the landlord receives direct, is the rent and that the other sum which is paid to Parker is in no sense rent. I think that in order to ascertain what is the rent you must look at section 4 of the Valuation (Metropolis) Act, 1869. Picking out the words which refer to this case we have it laid down for us in that section that gross value means the annual rent which the tenant might reasonably be expected to pay if the landlord undertook to bear the expenses necessary to maintain the hereditament in a state to command that rent. It seems to me here that what a tenant would be expected to pay is the whole of what the tenant does pay directly to the landlord, or indirectly through Parker, because the tenant takes a tenement among many tenements, and he cannot get there unless he goes up the staircase, unless it is lighted and unless it is cleaned. At all events he would not, I think, undertake to pay 8s. 6d. a week to the landlord and 6d. a week to Parker except he was assured that he would be able to go up that staircase at all hours of the night safely, because it was lighted, and at other times with decency, because it was cleaned. Therefore it seems to me that the rent which he might be expected to pay would be 9s. if the landlord undertook to bear the expenses necessary to maintain the hereditament in a state to command that rent. I think, therefore, that that is the value on which the landlord ought to be rated.

CHANNELL, J.—I am of the same opinion. I do not think the case is quite free from difficulty, but, on the whole, I have come to a pretty clear conclusion that this sum, although on the facts stated it is

not a sum which, according to the bargain, made between the landlord and the tenant, could be distrained for, and is not, therefore, rent, nevertheless is a sum that must be taken into consideration in arriving at what we have to arrive at here—namely, what rent a tenant might reasonably be expected to pay for this tenement.

One of the elements of the value of a tenement is its position and the means of access to it, and that is a matter which would have to be considered when you inquire what is the annual rent which the tenant might reasonably be expected to pay for the tenement, and it does not signify if, in the bargain that is in fact made between the parties, the landlord chooses to split the thing up and say in substance, "You shall pay so much for the room and, in addition, instead of adding something on to the rent I shall expect you to pay some additional sum for keeping in order the means of access to this place which you are to use in common with other tenants of the same building." The landlord might expect that the keeping the means of access in order was something for which he could get his tenant to pay a higher rent and it does not signify that, in point of fact, the bargain between the parties is made in such a way that the sum so paid is not rent which could be distrained for. Consequently I think that the quarter sessions were right. But I am bound to say that the case is much complicated by the fact that the sessions gave some wrong reasons—reasons which would have led to a conclusion the other way.

*Appeal dismissed.*

Solicitor for the appellant, *W. Bramwell Watkins.*

Solicitor for the respondents, *Howard C. Jones.*

---

Q. B. Div.
(Ridley and Darling, JJ.) Nov. 6.

REG. *v.* NASH. (*a.*)

*Election law—Registration—Parochial electors—Separate list—Ownership parochial electors—Claims to be on parochial electors' list — Jurisdiction of revising barrister to revise separate list and claims—Local Government Act,* 1894 (56 *&* 57 *Vict. c.* 73), *ss.* 2 (1), 44.

*The Local Government Act,* 1894, *gives the revising barrister, in the revision of the voters' list for counties, jurisdiction to revise, and imposes upon him the duty of revising, the separate list of parochial electors, being the list of persons entitled to vote as parochial electors only in respect of the ownership of property in the parish, also, the parochial electors' lists of claimants who claim as ownership claimants to be entered on the separate list of parochial electors in respect of the ownership of property in the parish; and the parochial electors' lists of claimants who claim to be entered on the separate list of parochial electors in respect of the occupation of property in the parish.*

Rule *nisi* for a *mandamus* to the Revising Barrister for the Tewkesbury and Stroud Parliamentary Divisions of the County of Gloucester, commanding him to revise the parochial electors lists in the said divisions, and hear and determine the claims of persons to have their names entered in the parochial electors' lists in respect of the ownership and occupation of property in those divisions, and to hold a court for that purpose.

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

The lists which the revising barrister refused to revise were these three: (1) Separate list of parochial electors, being persons entitled to vote as parochial electors only, in respect of the ownership of property in the particular parish; (2) list of ownership claimants, being the list of persons claiming to be entitled to have their names entered in the parochial electors' lists in respect of the ownership of property in the particular parish; and (3) list of claimants (parochial electors' list), being the list of persons claiming to have their names entered in the parochial electors' list as parochial electors only, in respect of the occupation of property in the particular parish.

Objection was taken before the revising barrister by one of the political agents that he had no jurisdiction to revise these lists. The other political agent contended that the revising barrister had jurisdiction to revise these lists, and requested him to revise them. The revising barrister was of opinion that he had no jurisdiction to revise these lists, and accordingly declined to do so; and upon the clerk of the peace formally applying to him to revise the lists he again refused, and returned the lists unsigned.

The above rule for a *mandamus* was then obtained by the clerk of the peace for the county of Gloucester acting on behalf of the county council of the county. There were about 193 names affected by the decision, and no objection was made to any of these names by the overseers or any other person.

*Sutton*, for the Treasury, showed cause.—The Local Government Act, 1894, which brought into existence these parochial electors, did not provide for the revision by the revising barrister of any separate lists of parochial electors. It neither gave jurisdiction to, nor imposed any duty upon, the revising barrister to revise any lists of parochial electors. The Act of 1894 did not direct the overseers or any other officials to prepare a list of any kind to be placed before the revising barrister for revision by him; and in the second place, before the Act of 1894 was passed the only lists which the revising barrister could revise—leaving out the lodgers' lists—were these: (1) the ownership lists relating to parliamentary and local government votes, being the lists of those who were entitled to or who claimed a parliamentary or local government vote in respect of an ownership qualification; and (2) the lists of those who were entitled to or who claimed similar votes in respect of an occupation qualification. Then came the Act of 1894, which created parish meetings; and section 2, sub-section 1, is most important as showing who composes the parish meeting, and who are parochial electors. It says that the parish meeting shall consist of parochial electors only, and it goes on to define who these parochial electors are; they are "the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish." By that section the parochial electors are to be taken from the local government and parliamentary registers so far as they relate to the parish. Then we come to section 44, which in sub-section 1 says that the local government register of electors and the parliamentary register of electors, so far as they relate to the parish, shall together form the register of the parochial electors of the parish, and that any person whose name is not in that register shall not be entitled to vote as a parochial elector. By sub-sections 5 and 6 the separate list of parochial electors is to be arrived at as follows—namely, by the revising barrister placing a mark opposite the names of those entitled to vote as parochial electors only; then the names so marked are not to be printed in the parliamentary register,

but are to be printed in a separate list of parochial electors. Those sub-sections show that the only lists the revising barrister has to revise are the parliamentary and local government lists, and it is from these two lists that the separate list of parochial electors is arrived at when the clerk of the county council comes, under sub-section 10, to print the lists. Sub-section 9, which provides that any person may claim for the purpose of having his name entered in the parochial electors' list, has to be read in conjunction with the other sub-sections. If a person claims to be on the list of parochial electors only, he claims on the parliamentary or local government list, and the revising barrister is then to place a mark opposite the name, if the claim is sustained, and by this means the separate list of parochial electors is got; and if a voter already on the separate list of parochial electors wishes to be on the list again he again claims on the parliamentary list, and thence his name is transferred to the parochial list. There is, therefore, under the Act of 1894, no provision for the separate revision either of the separate list of parochial electors or of the claims to be on such separate list, whether in respect of an ownership or an occupation qualification. The revising barrister was therefore right in refusing to revise the three lists in question.

*Macmorran, Q.C.* (*Roskill* with him), in support of the rule.—With regard to the ownership list, which must be distinguished from the occupation list, prior to the Act of 1894 if a person owned property sufficient to entitle him to a parliamentary vote in more than one parish in a parliamentary division, the revising barrister retained the name of such person on the ownership list for one of the parishes, and struck out his name for the other parishes. Then the Local Government Act, 1894, was passed, and under section 44 of that Act—upon which we rely—sub-section 1, the register of parochial electors is to consist of the local government register and the parliamentary register so far as they relate to the parish. Then sub-section 4 provides that nothing in any Act shall prevent a person, if duly qualified, from being registered in more than one register of parochial electors. By sub-section 6 the revising barrister, instead of striking out the name in all except one parish, is to put a mark opposite the name signifying that the person is entitled to be registered as a parochial elector, and those names so marked are afterwards taken out and are printed by themselves in the separate list of parochial electors. At this point, therefore, we have two lists —namely, the parliamentary register of electors and the separate list of parochial electors. When in the following year the ownership list of the parish is sent for revision to the revising barrister it is sent in two parts: the first part being those entitled to vote as parliamentary voters, and the second part those entitled to vote as parochial electors only. Sub-section 8, which is important, provides that "such separate list," that is, the separate list of parochial electors, "shall form part of the register of parochial electors of the parish, and shall be printed at the end of the other lists of electors for the parish, and the lists shall, for the purposes of this Act, be deemed to be part of such register." This sub-section is clear to show that the separate list of parochial electors entitled to vote in respect of an ownership qualification is to form part of the register, and the revising barrister is bound to revise that part as being a part of the register. He is bound to revise the register—that is, the whole register, and if he does not revise this part he does not revise the register. Then sub-section 9 shows that any person entitled can claim to be on the list of parochial electors without being on any other list; and by the form of precept of the clerk of the county council to the overseers (Registration Order, 1895, Schedule I., Part I., r. 2 (*d*), Rogers, p. 625) the list of ownership claimants means the list of persons who have claimed to vote either as parliamentary or parochial electors in respect of an ownership qualification in the parish; and that a person may claim to be on the separate or parochial list in respect of the ownership of property is shown by the forms as to ownership claims to be given by the overseers and claimants (Registration Order, 1895, forms 1 and 2, Rogers, pp. 630-1). As to claims to be on the parochial electors list in respect of the occupation of property, sub-section 9 gives the right to claim in such cases as well as in the cases of ownership claims; and the form for making such a claim is expressly given in the order of 1895 (Form K, No. 5, Schedule II., Rogers, p. 666), which therefore recognizes the right to make such a claim. The revising barrister was therefore wrong in refusing to revise these claims, and he was also wrong in refusing to revise that portion of the register of ownership voters which related to the parochial list only. If the contention of the revising barrister were right, it would follow that a person would not be able to make such a claim at all, and would thus be disfranchised; or, if he were once placed on the register he could not be removed from the list.

RIDLEY, J.—This is a matter of first impression and it is a matter of some importance, and possibly if there were no urgency about it we should have taken time to consider it, not for the reason that there is any doubt in the mind of the court on the subject, but for the purpose of putting in writing, more accurately probably than one would be likely to express it in words, what the view of the court is concerning it. The question is whether the revising barrister for a particular district is bound to revise first of all, the ownership list relating to parochial electors only; secondly, the ownership claimants list relating to parochial electors claims only; thirdly, the claimants list relating to occupiers claiming as parochial electors only. We are of opinion that the intention of the Local Government Act, 1894, is that he should do so. The Act contains in the first place section 2, upon which reliance might be placed as having a contrary effect, where it says that the parish meeting shall consist of the parochial electors and no others, and that the parochial electors are to be such persons as are registered in such portions of the local government and parliamentary registers of electors as relate to the parish. I can well understand that upon this Act coming into operation that provision might be used as an argument that there was nothing else to be considered by the revising barrister because it says that the persons registered are to be in the local government register of electors or in the parliamentary register of electors as regards the parish. Those words in that section are, however, certainly subject to the other provisions of the Act, and when we come to look at those other provisions we can see that those words cannot have been intended to be used in that sense, because there is a special provision in section 43 which shows that some other persons at all events may be entitled to be parochial electors who are not upon the parliamentary register or upon the register of voters for the county council—that is to say, married women—and there are others no doubt who are entitled to be parochial electors for each parish who are not entitled to vote for the county by reason of the other provisions of the Act which prevent a person from voting for more than one division of a county for Parliament or for a county council at the same election. There may be

others also to whom it is unnecessary to refer. I think, therefore, section 2 has not the effect contended for in that sense, and although *primâ facie* one might be taken by an argument based upon it, it is not the real meaning of that section. When we come to consider the question as to whose duty it is, if it be the duty of any one, to revise the list of parochial electors, it seems to me that section 44 of the Act of 1894, and the Registration Order, 1895, are the matters which have to be considered. Let us see generally without referring specially to the words of that section what is the duty cast upon the revising barrister in this respect. Dealing for the present with county voters and omitting borough voters, the revising barrister has put before him a list of county voters for Parliament and county voters for the county council; and these lists were put before him in former years before the passing of the Local Government Act of 1894. These he had to revise, and no question ever arose on that subject, but when the new lists of parochial electors had to be made, either there had to be machinery provided from the very beginning under which such list was to be formed separately by the overseers or by the clerk of the peace, according to whether they were owners or occupiers; or else they had to be formed from the materials already provided to be sent before the revising barrister with such alterations as were necessary. The former method was not possible without, as it appears to me, passing over to the clerk of the peace or to the overseers duties with regard to which the discretion of the revising barrister ought to be exercised. The revising barrister therefore had to form under the new law a parochial list by consideration of the former lists, and it was only by the marking of the parliamentary ownership list and by cutting out of it those who were not entitled to vote because their names were on the list for other divisions, that he arrived at the ownership list of the parish, and in arriving at the ownership list of that parish that was the form relied upon. That is clearly part of the history of this matter, and it results from what the revising barrister does at the hearing upon the ownership list, which has been formed and put before him. With regard to that part of the case next year that ownership list comes before him, as furnished to him by the overseers with indications and marks showing that certain names represent those who are dead and those who have removed, and that the list requires rectification. It is argued by Mr. Sutton that the revising barrister took the right view in declining to consider that list because there is no part of the Act which expressly brings it within his jurisdiction. But it appears to me, when we consider the wording of section 44 and its various sub-sections, that that part of the list is made a portion of the register, and that the old ownership list comes within sub-section 8 because it is the portion of the list that is intended to be the list for parochial voters. It appears to me therefore that when the revising barrister has got that list brought before him it is a part of the register, and it is as such that he has to consider it. He has to rectify it in point of fact according to what his discretion may be as to the evidence, whether by marks or obliterations put before him by the overseers. If he does not do so it appears to me that there is no machinery at all provided for so doing, and the result would be that it would remain and would continue to be the list of former years. Surely it is not in accordance with the general intention of this Act of Parliament to say that such a conclusion must be drawn from it. It was intended to put all the lists, including that of parochial electors, upon the same basis and under the same authority—that is to say, that they should all come within the discretion of the revising barrister. In addition, I also think that it also comes within the special words of sub-section 8. So much as regards the list of voters which results from former years. With regard to claims, both as to owners and occupiers, it appears to me that the case is perfectly clear, and in fact it is hardly capable of argument. The provisions of the Act are simply these: that whereas there may be persons whose names do not appear on either the parliamentary or the local government voters lists, those persons may claim in respect of a vote in the parish only, and sub-section 9 meets that very case, as it says that any person may claim for the purpose of having his name entered in the parochial electors list, and that the law relating to claims to be entered in lists of voters shall apply. If a person enters a claim to be on the parochial list it is provided that he shall enter it in the forms which are given in the Registration Order, 1895; if he claims as an owner he follows the form in that order, form No. 2, Schedule I. (Rogers, p. 631), and if he claims as an occupier then he follows the form in the order, form K, No. 5, Schedule II. (Rogers, p. 666), being the form for the "List of Claimants (Parochial Electors List)." There the person is claiming to be put on the parochial electors list, and that form adds in a note: "Form No. 5 applies to persons who claim to have their names entered in the parochial electors list as parochial electors only"; and it also adds that "A copy of the claim must be entered in this form." Then the claims on either owners or occupiers list are put before the revising barrister and are supposed to form part of the complete list which will ultimately be made up under sub-section 10 by the clerk of the county council, or by the town clerk as the case may be. The question which is argued by Mr. Sutton is raised in this way. He says, "True it is that the claimants list is to come before the revising barrister with a provision that the law relating to claims to be entered in lists of voters shall apply"; but he says it is not proper to consider that list unless it is put forward as a portion of the other lists which, according to the general law, are to be dealt with by the revising barrister. I think that is not in accordance with the general spirit of the Local Government Act, 1894, on this subject, which intends that the revising barrister shall revise all the lists, including the separate list of parochial electors. Apart, however, from that, the form I have alluded to and sub-section 9 are precise to this effect, that a person so claiming is to claim in the form as belonging to the parochial electors list also, and if he does so in accordance with the form provided by the Act then "the law relating to claims to be entered in lists of voters shall apply." I do not see how we could properly read these words unless it gives the revising barrister the duty of revising, and I gather from Mr. Sutton that he would not have contended to the contrary if the claims had been made as a part of the two general lists. That objection seems to me not to have much weight because of the words of the Act of Parliament itself, and the form in which it is provided that claims shall be made. When all has been done by the revising barrister, then it becomes the duty of the authorities to make out a separate list of parochial electors, which includes, of course, the list of claims as revised, and the list of those who have been on the list for former years. Under these circumstances—although the matter is one which I can well understand might upon argument take a different shape in the mind of the revising barrister—it seems to me that the better and the right course to pursue according to law is to deal with the separate lists as if they formed part of the register to

be put before the revising barrister; and it is his discretion upon which the Legislature relies, and his is the duty to see that the lists are correctly drawn up. For these reasons I am of opinion that the rule ought to be made absolute.

DARLING, J.—I am of the same opinion. It is perfectly clear that it is the duty of the revising barrister to revise the parochial register. He did revise the list so far as it related to parochial electors who were also parliamentary voters, persons described as ownership voters, and persons entitled to vote as parliamentary voters and as parochial voters. So far as the list consisted of those owners who were entitled to vote both ways, he revised the register, but when it came to revising the register as regards persons who were described as owners, but entitled to vote as parochial electors only, he came to the conclusion that he had no jurisdiction. I think he was wrong in that. That which he declined to revise was a portion of the register, and, therefore, if he did not revise that portion he did not revise the register. He only revised a portion of the register, but he was bound to revise the register, that is, all portions of the register. It appears to me, therefore, that he was distinctly wrong in refusing to revise any portion of the register. With regard to his refusal to revise the claims, I think the case is hardly arguable, having regard to the provision where it is distinctly enacted in sub-section 9 that any person may claim for the purpose of having his name put on the parochial electors list, and that the law relating to claims to be entered in the list of voters shall apply. He is bound to revise those claims, and if there were any doubt about the matter there is the Order in Council—the Registration Order of 1895—which gives the form in which persons are to send in these claims. These claims must be revised in some way, and there is no person other than the revising barrister who could revise them. I think the case is a very clear one.

*Rule absolute.*

Solicitors for applicant, *Field, Roscoe, & Co.*, for *E. T. Gardom*, Gloucester.

Solicitors for the respondent, *The Solicitor to the Treasury.*

---

Q. B. Div. (Mathew, J.) July 29, 1899.

BARON AND ANOTHER *v.* PORTSLADE URBAN DISTRICT COUNCIL. (*a.*)

*Local government—Public health—Sewers—Cleansing—Local authority—Neglect to cleanse—Damage to adjoining occupier—Liability of local authority—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 19, 299.

*If a local authority knew that a sewer vested in them requires cleansing and neglect to cleanse the same as required by section* 19 *of the Public Health Act,* 1875, *and damage is thereby caused to the occupier of adjoining land by sewage coming on his land, such occupier can maintain an action against the local authority in respect of the damage, and the remedy of the person so injured is not by complaint to the Local Government Board under section* 299 *of the Act.*

Further consideration by Mathew, J.

The action, which was tried before Mathew, J., with a jury, at the summer assizes at Lewes, was brought by the plaintiffs, who were occupiers of certain premises at Portslade, consisting of a dwelling-house and agricultural land, against the defendants, who were the local authority for the district, to recover damages for a nuisance on the plaintiffs' land alleged to have been caused by the negligence of the defendants as such local authority in not properly cleansing an open sewer belonging to and vested in them, whereby large quantities of sewage was brought on to the plaintiffs' land so as to cause a nuisance and damage to the plaintiffs.

It was admitted that there was a nuisance on the plaintiffs' land caused by the defendants, and that the defendants were guilty of a breach of their statutory duty in not properly cleansing and emptying the sewer, as required by section 19 of the Public Health Act, 1875, and the learned judge at the trial was of opinion that there was negligence on the part of the defendants in not cleansing and emptying the sewer after notice of its condition.

The question of damages alone was left to the jury, and they found for the plaintiffs for £75. The question of law was reserved as to whether the plaintiffs could, under the circumstances, maintain the action against the defendants.

Section 19 of the Public Health Act, 1875 (38 & 39 Vict. c. 55) enacts: "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied."

*Witt, Q.C.* (*Sinclair-Cox* with him), for the plaintiffs.—The plaintiffs are entitled to maintain this action. It was admitted that there was a nuisance caused by the defendants, and it was found that this was owing to the negligence of the defendants in not properly cleansing this sewer after notice of its condition. There was a clear breach by the defendants of the duty imposed upon them by section 19. The defendants as the local authority were bound under section 19 to cleanse and empty this sewer, and although they had notice of its condition they failed to carry out their duty, and damage has resulted to the plaintiffs. For this damage the plaintiffs are entitled to maintain this action: *Hammond* v. *Vestry of St. Pancras*, 22 W. R. 826, L. R. 9 C. P. 316; *Bateman* v. *Poplar District Board of Works*, 36 W. R. 501, 37 Ch. D. 272. These cases clearly show that if you prove negligence in cleansing and keeping the sewer an action can be maintained. It is said, however, that the remedy for this damage is not by action, but by an application to the Local Government Board under section 299 of the Act, and that that section provides the remedy for any breach of duty under section 19. Both upon the construction of the sections and upon the authorities this is not so. Section 299 is correlative to section 15 and not to section 19. Section 15 means that the local authority shall make and afterwards maintain such sewers as are necessary to drain their district—that is, that they shall have a proper scheme of sewers, and it contemplates the case where there are not sufficient sewers for the district. The remedy for that state of things and for any breach of duty on the part of the local authority under section 15 is by an application under section 299. Section 19, however, deals with a different state of things; it deals with the case where there is a sufficient sewer, but where this sufficient sewer is not kept in proper order; and where there is a sufficient sewer, but the local authority do not keep this sewer properly cleansed as required by section 19, then an action will lie for the damage caused thereby. That this is the true construction of the sections is shown by the two cases decided by the Court of Appeal upon

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

section 15, the cases of *Robinson* v. *Workington Corporation*, 45 W. R. 453, [1897] 1 Q. B. 619, and *Peebles* v. *Oswaldtwistle Urban District Council*, 45 W. R. 454, [1897] 1 Q. B. 625.

*Macmorran, Q.C.* (*Thorn Drury* with him), for the defendants.—This action cannot be maintained. The duties imposed upon the defendants under sections 15 and 19 are statutory duties, and are two-fold—namely, to provide sufficient sewers for their district, and to keep them in repair and cleanse them so as not to be a nuisance or injurious to health. The defendants have merely neglected to cleanse the sewer; they have done nothing to increase the flow of the sewage, and have not otherwise contributed to the nuisance, and upon that ground they are not liable in an action for the damage: *Attorney-General* v. *Dorking Union*, 30 W. R. 579, 20 Ch. D. 595, a case which has been recently followed by Cozens-Hardy, J., in *Brown* v. *Mayor of Dunstable*, 47 W. R. 538, 80 L. T. Rep. 650. This is a case of insufficient sewage arrangements, and, as in the *Dorking case*, there was a neglect on the part of the defendants to make provision for receiving the sewage. There, as here, the authority did not cleanse the sewer they had, and instead of the sewage being carried away through the sewer it was carried into the plaintiff's stream and caused a nuisance. There it was held that no action would lie for the nuisance, and that really covers the present case. The second ground of defence is that for a breach of the statutory duty imposed by section 19 of cleansing the sewer, as well as for a breach of the statutory duty imposed by section 15 of providing sewers, there is a specific remedy pointed out by the Act—namely, an application under section 299 to the Local Government Board asking the board to put in force the provisions of that section and require a sufficient sewer to be made. That is the remedy pointed out by the Act, and that is the exclusive remedy to be followed. That section (section 299) applies not only to the case of providing the district with sufficient sewers, but also to the case of the "maintenance of existing sewers." The maintenance of existing sewers includes their cleansing, and therefore that section applies to this case. Although the cases of *Robinson* v. *Workington Corporation* and *Peebles* v. *Oswaldtwistle Urban District Council* arose under section 15, the principle there laid down—namely, that for a breach of these statutory duties the remedy was under section 299, applies equally to the breach of the statutory duty under section 19. Here there was at the most a mere act of non-feasance, and these and other cases show that for an act of non-feasance the defendants would not be liable.

*Witt, Q.C.*, in reply.

MATHEW, J.—In this case there was abundant evidence at the trial of negligence. Before the present local authority was constituted the former one had, in the first instance, made an arrangement with the plaintiffs that the sewer in question, which was an open sewer, should be cleansed by the plaintiffs, and that a payment should be made in respect of that. At the time when the transfer of authority took place an alteration had shortly before been made by the local authority and they had taken the duty of cleansing this sewer upon themselves. When the new authority was constituted the sewer was the same as it had been—an open sewer—and if properly cleansed an adequate sewer for the requirements of the locality. But for some reason or other, although the attention of the local authority was called to the condition of this open sewer, and to the fact that it was a nuisance, nothing was done in time, and months were allowed to pass by, while considerable damage was done by reason of the neglect of the local authority.

Then there was cleansing, and the sewer was set right by the local authority; the work being done, as I have said, after injury had been inflicted on the plaintiffs.

Now, in those circumstances, it is said there is no cause of action against that local authority, and reference was made to section 19 of the Public Health Act, 1875, which, if it had stood alone and had to be construed according to plain language, clearly would involve an obligation on the local authority of the district. It says: "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied." The state of things contemplated by that section is a sufficient sewer, but no necessity for new works, and an obligation to keep that sewer in working order. But it is said there is no right of action if we look at the other sections of the statute, and that the proper remedy was to proceed by an application to the Local Government Board to obtain an order for the cleansing of the sewer. I am satisfied that the Act of Parliament, when it is looked at, never contemplated anything of the sort. I think section 299 is to be read with section 15, which provides that: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." How has that to be secured? We now come to section 299, which says: "Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers or in the maintenance of existing sewers, or that a local authority has made default in enforcing any provisions of this Act which it is their duty to enforce, the Local Government Board, if satisfied after due inquiry that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint." What does that clearly refer to? It clearly refers to the case where the existing sewers are insufficient, and where it is necessary that further provision should be made. That has no bearing whatever upon a case like the present, where the sewer is sufficient and all the injury that has been done is the result of the neglect of the local authority to cleanse it. This construction of the Act seems to me to be borne out by the cases referred to. It is borne out in the case of *Hammond* v. *The Vestry of St. Pancras*, where the necessity of reasonable care and diligence on the part of the local authority is pointed out, and again in the case of *Bateman* v. *Poplar District Board of Works*, where the same point presented itself in the same way, and in the two very important cases of *Robinson* v. *Workington Corporation* in the year 1897, and the case that follows it of *Peebles* v. *Oswaldtwistle Urban District Council*. None of these cases is any authority for the contention of the defendants in this case, that the exclusive remedy for failure on their part to discharge their statutory duty under section 19 was by an application to the Local Government Board under section 299. When we look at section 299 it is clear that it does not apply to the case of cleansing a sewer. The word "maintenance" in section 299 was relied on for the defendants, and it was said that here there was an existing sewer which was not "maintained" because it was not cleansed. Maintenance does not seem to me to be equivalent to cleansing, and that construction of the section cannot be adopted. Then there was the further argument that where there was a remedy pointed out by the Act that remedy must be followed; but the remedy pointed out by the Act is

section 299 is not applicable to this case. I come to the conclusion, therefore, that the plaintiffs have established their case, and that the defendants have no answer in law to the action, and I think that judgment must be given against them with costs here and elsewhere.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Rodgers & Gilbert.*

Solicitors for the defendants, *C. R. Sawyer & Ellis*, for *J. C. Buckwell & Berkeley*, Brighton.

## Court of Appeal.

From Q. B. Div.
(A. L. Smith, Collins, and Vaughan Williams, L.JJ.) Dec. 20.

ATTORNEY-GENERAL *v.* DE PREVILLE. (*a.*)

*Inland revenue—Estate duty—Property passing on death—Settlement—Surrender of life estate to remainderman—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 2 (1) (*c*).

*Where a tenant for life of settled property surrenders the life estate to the remainderman and dies within twelve months of the surrender, estate duty is not payable under the Finance Act,* 1894, *on the death of the tenant for life.*

*Decision of the* Divisional Court (Day *and* Lawrance, JJ.), [1899] 2 *Q. B.* 238, *reversed.*

Appeal from the judgment of a Divisional Court (Day and Lawrance, JJ.) on the hearing of an information by the Attorney-General claiming estate duty: [1899] 2 Q. B. 238, 47 W. R. Dig. 73.

The question was whether, where a tenant for life of settled property surrenders the life estate to the remainderman and dies within twelve months of the surrender, estate duty is payable under the Finance Act, 1894, on the death of the tenant for life.

George Thomas Mowbray, of Grangewood House, in the parish of Seals, in the county of Leicester, deceased, by his will, dated the 4th of February, 1892, devised and appointed all the real estate to which he should be entitled at the time of his decease, or over which he might have any disposing power, to the use of his sister, Georgiana Anne, the widow of the late Pierre Richaud de Preville, for her life, and after her decease to the use of his nephew, the defendant, André George Richaud de Preville, the son of his said sister, and the heirs of his body, and in default of such issue to the testator's own right heirs.

The said George Thomas Mowbray died on the 29th of February, 1892.

By an indenture of settlement dated the 10th of October, 1845, the manor or lordship of Overseal, in the county of Leicester, and certain freehold messuages, lands, and hereditaments, therein described, were limited to the use of trustees in trust to permit the said Georgiana Anne Richaud de Preville, then Georgiana Anne Mowbray, during such part of her life as she should be single and unmarried, to receive the rents and profits of the said hereditaments, and during any coverture of the said Georgiana Anne Richaud de Preville to pay the said rents and profits to her for her separate use, and from and after her decease to the use of her first and other sons successively, according to seniority in tail male, with remainders over.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

By an indenture dated the 5th of February, 1896, made between the said Georgiana Anne Richaud de Preville, widow, of the first part, the defendant, André George Richaud de Preville, of the second part, and David Hale of the third part, reciting *inter alia* the said indenture of the 10th of October, 1845, and the said will of George Thomas Mowbray, and his death, and reciting (as the fact was) that the defendant, André George Richaud de Preville, was the eldest and only son of the said Georgiana Anne Richaud de Preville, and that they were desirous of barring the estate tail of the defendant in the hereditaments comprised in the said settlement and devised by the said will, and of limiting the said hereditaments as thereinafter expressed to the intent that the life estate of the said Georgiana Anne Richaud de Preville therein should be absolutely released in favour of the defendant, it was witnessed that the said Georgiana Anne Richaud de Preville as settlor, and the defendant, André George Richaud de Preville (with the consent of the said Georgiana Anne Richaud de Preville as protector of the settlement and will), thereby granted unto the said David Hale, first, all the manor or lordship, freehold messuages, farms, lands, tenements, and hereditaments situate in the parishes of Overseal and Netherseal, or elsewhere, in the county of Leicester, comprised in the indenture of the 10th of October, 1845; and, secondly, all the freehold messuages and hereditaments devised by the said will of the said George Thomas Mowbray, and also all other freehold hereditaments which had become subject to the uses or trusts of the said indenture of settlement or of the said will concerning the said testator's real estate and all moneys, stocks, funds, and securities (if any) which were subject to be invested in the purchase of hereditaments of which the defendant would be tenant in tail male or in tail, and the hereditaments to be purchased therewith; to hold the same unto the said David Hale and his heirs discharged from all estates in tail male or in tail of the defendant at law or in equity, and all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estates in tail male or in tail, to the use of the defendant, André George Richaud de Preville, his heirs and assigns, for ever absolutely released and discharged from the life estate therein of the said Georgiana A. R. de Preville. The indenture also witnessed that the said Georgiana A. R. de Preville thereby absolutely released unto the defendant the power of appointing a life interest to any husband with whom she might intermarry and of charging portions for her children by the said indenture of the 10th of October, 1845, given to her.

The lastly stated indenture was enrolled on the 11th of February, 1896. The said Georgina A. R. de Preville died within twelve months after the execution of the said indenture—namely, on the 11th of December, 1896—intestate. Letters of administration to her personal estate were granted to the defendant on the 9th of August, 1897.

The information alleged that on the death of Georgiana A. R. de Preville estate duty under sections 1 and 2 of the Finance Act, 1894, became payable in respect of the hereditaments and property comprised in the said indenture of the 5th of February, 1896 (or alternatively in respect of the life interest at the date of the last mentioned indenture of the said Georgiana A. R. de Preville in the said hereditaments and property), as property passing on her death within the meaning of the Act.

The defendants answered that estate duty under sections 1 and 2 of the Finance Act, 1894, did not become payable on the death of the said Georgiana A. R. de Preville in respect of the hereditaments and

property comprised in the said indenture of the 5th of February 1896, or in respect of her life interest at that date, inasmuch as such property was not property passing on her death within the meaning of the said Act.

The Divisional Court gave judgment for the Crown, [1899] 2 Q. B. 238.

The defendant appealed.

*Butcher, Q.C.*, and *Ashton Cross*, for the appellant.

*Sir R. E. Webster, A.G., Sir R. B. Finlay, S.G.*, and *Vaughan Hawkins*, for the Crown.

*Cur. adv. vult.*

Dec. 20.—A. L. SMITH, L.J., read the following judgment: The real point upon which the decision of this case turns is whether section 2 of the Finance Act, 1894, imposes estate duty on a life estate which prior to the passing of that Act would not have had to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, upon the death of the tenant for life. The facts are peculiarly short. On and prior to the 5th of February, 1896, Georgiana Anne de Preville was tenant for life of real property situate in the county of Leicester, of which her son, the present appellant, was tenant in tail, and upon the day above named the mother and son executed a disentailing deed, by which the estate tail was barred, and the son thereupon became owner in fee of the property. On the 11th of December, 1896 —*i.e.*, ten months after the execution of this deed—the mother died. The question is whether the life estate of the mother, which had passed to her son ten months before her death, is liable to estate duty upon her death. It has been held in this court, affirmed in the House of Lords in *Attorney-General* v. *Beech*, 47 W. R. 257, [1899] A. C. 53, that where the owner of a life estate has conveyed that estate to a donee more than twelve months before the death of the donor, estate duty upon the life estate is not payable by the donee upon the death of the donor, for the reason that by the Finance Act it is only the estate which passes upon death which is liable to estate duty, and that when the donor, the tenant for life, died nothing passed upon which the estate duty could operate, for the life estate had already passed to the donee before the death of the donor. It is now said by the Crown that *Beech's case* does not apply, because in the present case the tenant for life died within twelve months of the gift, and not after twelve months of the gift, as in *Beech's case*, and it is argued that upon this ground, by reason of the provisions of the remarkable section 2 (1) (*c*) of the Finance Act of 1894, this case is different from *Beech's case*, and that estate duty is leviable upon the life estate upon the death of the tenant for life. The Crown admits that, if section 2 (1) (*c*) of the Finance Act, 1894, does not impose this duty upon the life estate upon the death of the tenant for life, there is no other section which does. Section 2 (1) (*c*) is as follows: "Property passing on the death of the deceased shall be deemed to include property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, as if those sections were in this Act enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom." In the case of *Attorney-General* v. *Earl Grey*, 47 W. R. 37, [1898] 2 Q. B. 534, I expanded this composite section, and I will do so again so far as material to this case. It then reads as follows: "Property passing on the death of the deceased shall be deemed to include property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, which, as amended, enacts that real or personal property to be included in an account shall be property of the following description—viz., any real or personal property taken under a disposition by a person dying on or after the 1st of June, 1881, purporting to operate as an immediate gift *inter vivos*, which shall not have been *bonâ fide* made twelve months before the death of the deceased." This section 38 of the Act of 1881 is one of a group of sections under the heading "Stamps," which relates to the taking out of probate and letters of administration to the estate and effects of deceased persons — *i.e.*, of property which deceased persons die possessed of, or leave behind them—and it seems to me that this group of sections has nothing to do with property a deceased person has not left behind him, excepting cases in which a deceased person would have left property behind him had he not given it away before he died. It is only as regards such cases that an account is to be rendered. Section 38 being one of the sections in this group, what is its true reading? Does it mean that a life estate—which of necessity comes to an end on the death of the tenant for life, and which never, under any circumstances, can come into an account upon the death of the tenant for life—is nevertheless to be brought into an account if the deceased has given it away less than twelve months before death, or is its true reading that, if there be property which would come into an account upon death if it had not been given away, that property must be brought into an account if the deceased has given it away less than twelve months before death? Considering that the group of sections in the Act of 1881 is dealing with the property of which deceased persons in fact die possessed, or should have died possessed if they had not given it away, in my opinion it is not the true reading of section 38 that property must be brought into an account no matter whether it would or would not have had to be brought into an account if it had not been given away within twelve months of the death. It is only to be brought into an account if it would have had to be so brought but for the gift. In my judgment this section is to prevent persons giving away property less than twelve months before death which otherwise would have to be included in an account, and thus escaping the duty. It is not disputed by the Crown that the life estate in the present case could never have been included in an account, for upon the death of the owner of this life estate, even if it had not been given to the son, it *ipso facto* came to an end, and there was therefore nothing whatever to bring into an account. For those reasons section 2 (1) (*c*) in my judgment does not bring about what is contended for by the Crown, and, as before stated, there is no other section which does so. I need not discuss *Lord Cowley's case*, 47 W. R. 525, [1899] A. C. 198, for it has no bearing upon the point I have to decide. I think the Crown is wrong, and I cannot agree with the Divisional Court, though upon what ground that court decided in favour of the Crown I do not know, for it has not told us. I think this appeal must be allowed, with costs.

COLLINS, L.J., concurred.

VAUGHAN WILLIAMS, L.J., read the following judgment: The decision in this case depends, it seems to me, upon the meaning of the word "property" in sub-section 2 (*a*) of section 38 of the Act of 1881, 44 Vict. c. 12. Does property there mean any property irrespective of the interest of the deceased therein? Or is it limited to property in which the deceased had

an interest which by its nature might continue after the death of the deceased—*i.e.*, property capable of devolution as estate of a deceased—or, in other words, an interest not limited to determine with the life of the deceased? Now, Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, at p. 122, 17 W. R. H. L. Dig. 1, says, speaking of the construction of revenue statutes: "The principle of all fiscal legislation is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. . . . In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." On the other hand, a taxing Act is to be construed upon the same principle and by the same rules as any other Act: *Mersey Docks and Harbour Board* v. *Lucas*, 51 L. J. Q. B. 114 at p. 118, 30 W. R. Dig. 96 per Brett, L.J. For instance, I suppose that, if upon the ordinary rules of construction general words would be limited on the *ejusdem generis* doctrine by preceding particular words, this construction would be applied in a taxing statute equally with any other statute. Now in the present case there is nothing to be found in the statute itself limiting the ordinary legal meaning of the word "property"; but the statute refers to antecedent legislation, that is to say, to the statutes beginning with 55 Geo. 3 and coming down to 43 Vict. c. 14, granting the Crown certain duties in respect of the value of the estate and effects of deceased persons, and provides for an inventory or account being made by the executor or administrator of such estate and effects, and section 38 deals with what shall be included, and says in effect that it shall include not only property forming part of the estate and effects of the deceased at his death, but also property which he has parted with within three (now twelve) months before his death. Now, must not this mean, according to the ordinary rules of construction, property of the same kind as that dealt with in the antecedent legislation? That is to say, property in which the deceased had such an interest that if he had not parted with it by a gift within twelve months before his death, it would have been estate and effects of a deceased, and therefore have been included in the property on the value of which the duty was granted? It is clear in the antecedent legislation that no duty was granted in respect of property the interest of the deceased in which terminated with his life, for the duty was in respect of property as being estate and effects of a deceased; and must not the word "property" in subsequent legislation be read in the same sense? On the whole I think it must, and I find nothing in the Finance Act generally or in section 2 (1) (c) to enlarge the sense in which the word "property" is used in the probate duty legislation and the account to be rendered thereunder. The Probate Duty Acts prior to 1881 dealt with property capable of devolution as part of the estate and effects of a deceased at death; for it dealt with property which in fact devolved as such estate at death. Then comes the statute of 1881, which says that the tax shall apply to property which does not in fact devolve at death but shortly before death is transferred by what purports to be a gift *inter vivos*, but which property, the statute says, shall be taxed in the same manner as property in fact devolving at death. Surely, according to the ordinary rules of construction, the word "property" in the statute of 1881 must be limited to property in its nature capable of devolution as part of the estate and effects of a deceased. Thus to construe the word "property" in sub-section 2 of section 38 of 44 Vict. c. 12, is only to apply the ordinary rule of construction, that words in the same and in cognate connected lists must be presumed to have the same meaning.

*Appeal allowed.*

Solicitors for the appellant, *Kingsford, Dorman, & Co.*, for *Smith, Mammatt, Hale, & Quarrell*, Ashby-de-la-Zouch.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

---

From Q. B. Div. (A. L. Smith, Collins, and Vaughan Williams, L.JJ.) — Dec. 16.

LONDON AND WESTMINSTER BANK v. COMMISSIONERS OF INLAND REVENUE. (a.)

*Inland revenue—Stamp duty—Receipt—Scrip certificate of stock—"Consideration money therein expressed"—Instalments—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 3, *sub-section* 2; *Schedule I.*, "*Receipt*," *exemption* 11.

*A duly stamped scrip certificate for* £100 *stock was issued upon payment of the allotment money, the balance being payable by two instalments of* £40 *each at fixed future dates. Payment in full might be made at any time subject to discount, and upon default in payment of the amounts at their due dates the previous payments were liable to forfeiture. At the foot of the certificate two blank forms of receipt for payment of the two instalments respectively were printed. The instalments were duly paid and the receipts filled in.*

*Held, that the receipts were exempt from stamp duty within exemption* 11 *under the heading "Receipt" in Schedule I. to the Stamp Act,* 1891, *as they were written upon the duly stamped certificate, and acknowledged the receipt of the consideration money therein expressed.*

Appeal by the Commissioners of Inland Revenue from the judgment of the Divisional Court (Day and Lawrance, JJ.) upon a case stated by the Commissioners of Inland Revenue, pursuant to section 13 of the Stamp Act, 1891 (reported in 68 L. J. Q. B. 787, 47 W. R. Dig. 82).

On the 10th of May, 1899, two receipts, partly in print and partly in writing, appearing upon the face of a duly stamped scrip certificate of the Cape of Good Hope Consolidated Three per Cent. Stock, were presented on behalf of the London and Westminster Bank to the Commissioners of Inland Revenue under section 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which they were chargeable.

The scrip certificate and the receipts respectively were in the following form:

"Cape of Good Hope Consolidated Three per Cent. Stock.

"Issue of £3,107,400.

"Scrip Certificate for £100.

"The bearer of this scrip certificate is entitled to £100 Cape of Good Hope Consolidated Three per Cent. Stock, 1933-1943, after payment to the London and Westminster Bank (Limited), Lothbury, of the instalments due thereon as under, viz.:—£40 on April 10, 1899, £40 on May 10, 1899.

"Payment in full may be made at any time, under discount at the rate of 2 per cent. per annum. If default be made in payment of the amounts at their

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

due dates, the previous payments will be liable to forfeiture.

"This scrip certificate, when fully paid, must be lodged at the London and Westminster Bank (Limited), Lothbury, for inscription in the books of the 'Cape of Good Hope Consolidated Three per Cent. Stock, 1933-1943,' in such name or names (not exceeding four) as may be desired. The interest on the stock will be payable at the London and Westminster Bank (Limited) on February 1 and August 1 in each year, and the principal will be repayable there on February 1, 1943, the Government of the Cape of Good Hope having the option to redeem the stock at par on or after February 1, 1933, on giving 12 calendar months' notice to the stockholders. Six months' interest on the stock will be paid on August 1, 1899.

"The revenues of the colony of the Cape of Good Hope alone are liable in respect of this stock and the dividends thereon, and the Consolidated Fund of the United Kingdom, and the Commissioners of her Majesty's Treasury are not directly or indirectly liable or responsible for the payment of the stock or of the dividends thereon, or for any matter relating thereto (40 & 41 Vict. c. 59, s. 19).

"For the London and Westminster Bank (Limited), J. A. BAKER, London, March 14, 1899.

"Received the 10th day of April, 1899, £40, being the instalment on the above scrip certificate, due April 10, 1899.—For the London and Westminster Bank (Limited), J. L. OVINGTON."

"Received the 10th day of May, 1899, payment in full.—For the London and Westminster Bank (Limited), H. E. BILLINGE."

The scrip certificate was duly stamped as such with the duty of 1d., and the London and Westminster Bank contended that by reason of exemption 11 under the head "Receipt" in Schedule I. to the Stamp Act, 1891, the receipts were exempt from duty.

The commissioners, being of opinion that the exemption was not applicable, assessed each of the receipts with the duty of 1d.

The questions for the opinion of the court were—(1) Whether the receipts or either of them were chargeable with the duty of 1d. in accordance with the assessment of the commissioners; (2) if not, with what duty they were respectively chargeable.

The Divisional Court held that the receipts were exempt.

The Inland Revenue Commissioners appealed.

The material provisions of the Stamp Act, 1891, are set out in the judgment.

*Sir R. B. Finlay, S.G.*, and *Danckwerts*, for the commissioners.—The receipts come within section 101 of the Stamp Act, 1891, and are not within exemption 11 under the heading "Receipt" in Schedule I. to the Act. The "consideration money" for the scrip certificate, which was only a provisional certificate, was the sum paid upon allotment when the certificate was issued. The subsequent instalments of £40 each did not constitute the consideration money. The receipts do not acknowledge "the receipt of the consideration money therein expressed" within the meaning of exemption 11, because the two sums of £40 were not any part of the consideration money for the certificate. Nor is there any "principal money secured" by the scrip certificate within the exemption. There is nothing secured by the scrip certificate. Again, section 3, sub-section 2, of the Act applies, as there is more than one instrument written upon the same paper, and by that section each instrument must be separately stamped.

*McIntyre* (*Joseph Walton, Q.C.*, with him), for the London and Westminster Bank.—The scrip certificate is duly stamped, and the consideration money is the full sum mentioned therein, and not merely the sum paid on allotment. The scrip certificate contains a bargain with the bearer to give him £100 worth of stock if he pays two instalments of £40 each in addition to the sum already paid on allotment. The £80 is therefore part of the consideration money, and exemption 11 applies. The £80 is also "principal money therein mentioned" within the exemption.

*Sir R. B. Finlay, S.G.*, replied.

*Cur. adv. vult.*

Dec. 16.—The judgment of the court was read by

COLLINS, L.J.—This is an appeal by the Crown from the decision of Day and Lawrance, JJ., allowing an appeal from the commissioners. The question is whether certain receipts indorsed on a scrip certificate for £100 Cape of Good Hope Consolidated Three per Cent. Stock are liable to a duty of 1d. each under the Stamp Act, 1891, First Schedule, or whether they fall within the exemption (11). The scrip certificate, so far as material, is in these terms. [His lordship read the scrip certificate and the receipts, and continued:] The following is the provision of the Stamp Act, 1891, Schedule I.: "Receipt given for or upon the payment of money amounting to £2 or upwards, 1d." Exemption 11 is as follows: "Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned." The scrip certificate had been duly stamped as such, and on the date of its issue the first instalment, a sum under £20, had been paid in respect of it.

We are of opinion that the decision of the Divisional Court was right. The scrip certificate is duly stamped, and the receipts are indorsed respectively or otherwise written upon it. Therefore if they "acknowledge the receipt of the consideration money therein expressed," they fall within the exemption. What then is meant by the "consideration money therein expressed" of which the receipt is to be acknowledged? We think it is the money which it appears from the terms of the instrument is the consideration for the obligation undertaken by the issuer of the instrument—*i.e.*, the Government of the colony. It is in return for the payment not of one, but of all the instalments, that the Government undertakes this obligation, and it can make no difference whether the consideration is paid in a lump sum, or by instalments, or with conditions of forfeiture on non-payment of an instalment or not. Neither is it material that the instrument can be transferred pending the payment of the instalments, so that each may be paid by a different person. The money consideration is the same by whomsoever it is paid, and whatever may be conditions to which it is made subject. The point made by the Crown in the court below, that the scrip certificate is not "an instrument" within the exemption, was not taken before us; but it was argued by the Solicitor-General that the consideration for the certificate was not the sums of £40, or either of them mentioned in the receipts, but the first instalment paid on the issuing of the certificate. We think, with deference, that there is a fallacy in this argument, in that it confounds that which is payable as a condition precedent to getting the custody of the certificate with that which is expressed in the certificate as the consideration, not for the handing over of the certificate with the inchoate rights arising therefrom, but for the acceptance of the final obligation which is only assumed when all the instalments are paid. Is the

consideration expressed in an instrument as the total sum in return for which the obligation is accepted any the less the consideration because it is made payable by instalments, and the custody of the instrument is handed over in exchange for the first instalment? In our opinion the receipts on this instrument acknowledge the payment of the full sum in return for which, by the terms of the instrument, the Cape Government undertake to treat the holder as entitled to £100 Cape of Good Hope Consolidated 3 per Cent. Stock. The Crown also relied upon section 3, sub-section 2, which enacts that "if more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable"; but this only applies if the instruments do not fall within exemption 11 above set out. We cannot say whether our reasons coincide with those of the Divisional Court, for they have given none; but on the grounds above stated, we are of opinion that this appeal should be dismissed.

*Appeal allowed.*

Solicitor for the commissioners, *Solicitor of Inland Revenue.*

Solicitor for the bank, *Travers-Smith, Braithwaite, & Robinson*

---

From Q. B. Div. (A. L. Smith, Collins, and Vaughan Williams, L.JJ.) — Dec. 6.

SWAYNE v. COMMISSIONERS OF INLAND REVENUE. (*a.*)

*Inland revenue—Stamp duty—Conveyance on sale—Assignment of leaseholds—Consideration—Rent—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 57.

*The lessee of land with three houses thereon conveyed, in consideration of a sum of money, two of the houses for the residue of the term subject to a duly apportioned part of the rent reserved by the original lease. The assignee covenanted to pay the rent and to observe and perform the covenants contained in the original lease.*

*Held, that the rent payable by the assignee was not part of the consideration in respect whereof the conveyance was chargeable with* ad valorem *duty under section* 57 *of the Stamp Act,* 1891.

*Judgment of the* Divisional Court, 47 *W. R.* 300, [1899] 1 *Q. B.* 335, *affirmed.*

Appeal from the judgment of the Divisional Court (Wills and Bruce, JJ.) upon a case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891, for the opinion of the court as to the amount of duty with which an indenture of assignment of leasehold property dated the 27th of December, 1897, was chargeable: reported in 47 W. R. 300, [1899] 1 Q. B. 335.

By an indenture of lease bearing date the 16th of October, 1893, Rowell demised to Mills a parcel of ground and three dwelling-houses then in course of erection thereon for a term of ninety-nine years at the yearly rent of £3 16s. 6d., and by the said indenture Mills covenanted to complete the three houses, and expend on the building of each of such houses the sum of £100 at the least, and he also entered into numerous other stringent covenants such as are often inserted in building leases. The three houses were erected, and were numbered 6, 7, and 8, Bowden-hill-terrace.

Rowell, by another indenture of lease bearing date the 10th of March, 1894, demised to Mills a parcel of ground and two dwelling-houses then in course of erection thereon for a term of ninety-nine years at the yearly rent of £2 11s. The covenants in this indenture were similar to the covenants in the indenture of the 16th of October, 1893. The two houses were erected, and were numbered 9 and 10, Bowden-hill-terrace.

By an indenture bearing date the 27th of December, 1897, made between Mills of the one part and Annie Penelope Swayne (the present respondent) of the other part, Mills in consideration of the sum of £503 to him paid by Swayne assigned and conveyed unto Swayne—first, the two houses 7 and 8, Bowden-hill-terrace, being two of the three houses demised by the indenture of the 16th of October, 1893; and, secondly, the two houses 9 and 10, Bowden-hill-terrace, being the two houses demised by the indenture of the 10th of March, 1894, to hold the same for the residue then unexpired of the terms of ninety-nine years subject as to Nos. 7 and 8 to the apportioned yearly rent of £2 11s., part of the yearly rent of £3 16s. 6d. reserved by the indenture of the 16th of October, 1893, and to the observance and performance of the covenants and conditions therein contained, and subject as to Nos. 9 and 10 to the payment of the yearly rent of £2 11s. reserved by the indenture of the 10th of March, 1894, and to the observance and performance of the covenants and conditions therein contained. Swayne covenanted with Mills to pay the several sums of £2 11s. and to observe and perform the covenants and conditions in the leases to Mills respectively contained and to keep Mills indemnified, and Mills covenanted with Swayne to pay the apportioned rent of £1 5s. 6d., the residue of the rent reserved by the indenture of the 16th of October, 1893.

The indenture of the 27th of December, 1897, was submitted to the commissioners under section 12 of the Stamp Act, 1891, for their opinion as to the amount of duty chargeable thereon.

The commissioners were of opinion that the instrument fell to be charged under the head "Conveyance on Sale" in the schedule to the Stamp Act, 1891. In accordance with their practice they did not assess duty upon the capitalized value of the yearly rent of £2 11s. payable in respect of the houses numbered 9 and 10, Bowden-hill-terrace. They were of opinion, however, that duty was chargeable upon the rent of the same amount payable in respect of the houses numbered 7 and 8, Bowden-hill-terrace abovementioned, and they assessed duty upon the said sum multiplied by twenty under section 56, sub-section 2, of the Stamp Act, 1891. They also assessed duty upon the sum of £503, the premium payable under the instrument.

It was admitted that the houses 6, 7, and 8, Bowden-hill-terrace were of equal value.

Section 56 (2) of the Stamp Act, 1891, enacts that "Where the consideration or any part of the consideration for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument."

Section 57 enacts that "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not,

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty.

The Divisional Court held that the duty was not chargeable upon the rent payable in respect of either set of houses.

The commissioners appealed.

*Sir R. B. Finlay, S.G.*, and *Danckwerts*, for the commissioners.—Where the parties have themselves apportioned the rent to be paid by the assignee on the assignment of part of a property, the rent so apportioned must be capitalized under section 56, sub-section 2, of the Stamp Act, 1891, and *ad valorem* duty is payable on the capital value under section 57. The property is conveyed subject to the payment of money within the meaning of section 57. If the parties do not apportion the rent the law will do it: *Stevenson* v. *Lambard*, 2 East, 575. Where the term is assigned subject to the payment of the rent, the assignee is liable to the assignor by privity of estate and not by contract, the lessee becoming a surety to the lessor for the assignee during the continuance of the assignee's estate: *Wolveridge* v. *Steward*, 1 Cr. & M. 644. The payment of the rent is inherent in the possession of the property, and not something outside it. But where the parties apportion the rent, and there is a covenant to pay the apportioned rent, the liability to pay the rent is not inherent in the possession of the property; it depends upon the covenant, and extends beyond the continuance of the assignee's estate. The covenant is part of the consideration for the assignment. The capitalized value of the yearly rent of £2 11s. for Nos. 7 and 8, Bowden-hill-terrace is therefore liable to duty under section 57.

They also referred to *Inland Revenue Commissioners* v. *City of Glasgow Bank*, 8 Ct. Sess. Cas., 4th series, 389.

*Vaughan Hawkins*, for the respondent, was not called upon.

A. L. SMITH, L.J.—In my opinion this appeal fails. It seems to me that the judgment of Bruce, J., is right. A person of the name of Mills was the lessee of three houses in Bowden-hill-terrace, numbered 6, 7, and 8, at the yearly rent of £3 16s. 6d. He was also lessee of two houses, 9 and 10, Bowden-hill-terrace, at a yearly rent of £2 11s. Mills, in consideration of a sum of £503, conveyed to the respondent Swayne Nos. 7 and 8, subject to the yearly rent of £2 11s. part of the yearly rent of £3 16s. 6d., and also Nos. 9 and 10, subject to the yearly rent of £2 11s. It was admitted that the rent of £2 11s. in respect of the former houses was a proper apportionment. With regard to Nos. 9 and 10 the commissioners say that in accordance with their practice they did not assess duty upon the capitalized value of the yearly rent payable in respect thereof. For the reasons which have been given by Bruce, J., I think that the commissioners were quite right in that view, and I agree with Bruce, J., that there is no distinction between those houses and Nos. 7 and 8. When once it is remembered that the liability to pay the rent is inherent in, or in other words arises out of, the nature of the estate conveyed, I cannot see any difference between the two sets of houses. The principles applicable to the one set apply equally to the other.

COLLINS L.J.—I am of the some opinion, and can add nothing to the reasons so well given in the court below.

VAUGHAN WILLIAMS, L.J., concurred.

*Appeal dismissed.*

Solicitor for the appellants, *Solicitor of Inland Revenue.*

Solicitors for the respondent, *Bridgman & Willocks*, for *Baker, Watts, Alsop, & Woollcombe*, Newton Abbot.

---

From Q. B. Div. (A. L. Smith, Collins, and Vaughan Williams, L.JJ.) — Dec. 6.

KNIGHTS DEEP (LIMITED) v. COMMISSIONERS OF INLAND REVENUE. (*a*.)

*Inland revenue—Stamp duty—Debenture—Option to redeem on paying premium—Sum secured—Stamp Act.* 1891 (54 & 55 *Vict. c.* 39), *s.* 86; *Schedule I.*, "*Marketable security.*"

*A limited company issued a series of debentures of* £100 *each, each debenture stating that the company would, as and when the principal moneys thereby secured become payable, pay to the registered holder the sum of* £100. *By one of the conditions indorsed thereon, a certain number of debentures were to be redeemed by annual drawings on the* 1*st of July*, 1902, *and on the* 1*st of July in each succeeding year up to the* 1*st of July*, 1917, *when the balance outstanding was to be redeemed. By another condition the company might at any time after the* 1*st of July*, 1900, *redeem the debentures at* £103 *on giving six months' previous notice in writing, and upon the expiration of such notice the sum of* £103 *was to become payable as if the same was the amount of the principal moneys secured. The debentures were "marketable securities," not transferable by delivery within the meaning of Schedule I. to the Stamp Act*, 1891.

*Held, that each debenture was a security for* £100 *only, and was, therefore, liable to* ad valorem *duty upon that amount, and not upon* £103.

*Judgment of the* Divisional Court (47 *W. R.* 415, [1899] 1 *Q. B.* 345) *reversed.*

Appeal from the judgment of the Divisional Court (Wills and Bruce, JJ.) upon a case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891: reported in 47 W. R. 415, [1899] 1 Q. B. 345.

A debenture was presented on behalf of the issuers thereof—the Knights Deep (Limited) (the apellants)—to the Commissioners of Inland Revenue for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The instrument in question was a first debenture for £100 issued by the Knights Deep (Limited), incorporated under the laws of the South African Republic. The share capital was £550,000, divided into 550,000 shares of £1 each, the debenture being one of an issue of £400,000 in 4,000 debentures of £100 each, carrying interest at the rate of £5 10s. per cent. per annum, all ranking equally in security.

The debenture stated that "for valuable consideration already received the Knights Deep (Limited) (hereinafter called the company) will, as and when the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon, pay to the Simmer and Jack Proprietary Mines (Limited), of 8, Old Jewry, E.C., or other the registered holder for the time being hereof, the sum of £100. The company will in the meantime until such payment pay interest thereon at the rate of

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

£5 10s. per cent. per annum by half-yearly payments on every 1st day of July and 1st day of January. This debenture is subject to the conditions indorsed hereon which are to be deemed part of it."

The conditions indorsed on the debenture showed that the debenture was one of a series of debentures for securing principal sums amounting in the aggregate to £400,000, carrying interest at the rate of £5 10s., and that they were all to rank *pari passu* in point of charge without any preference or priority one over another.

Condition 8 provided that debentures of the nominal value of £26,000 would be redeemed by the company on the 1st of July, 1902, and on each succeeding 1st of July up to and including the 1st of July, 1917, when the balance then outstanding would be redeemed; that the debentures to be redeemed would be determined by annual drawings, which the company would cause to be made at its branch office in London or at such other place as the company should determine; and that such drawings would be made not less than twenty-one or more than sixty days before the respective yearly days on which the debentures were to be redeemed, and the principal moneys thereby secured would become payable on the 1st of July next after this debenture should have been drawn for redemption.

Condition 17 indorsed on the debenture provided: "The company may at any time after the 1st of July, 1900, redeem this debenture at £103 on giving six calendar months' previous notice in writing so to do to the registered holder, and upon the expiration of such notice the said sum of £103 shall become payable as if the same was the amount of the principal moneys secured, and shall thereupon cease to carry interest. Provided always that the company shall not without the consent of the registered holder be at liberty to give such notice unless concurrently it shall give due notice to redeem in like manner all the then outstanding debentures of the said series."

The appellants were a foreign company, and the debenture, which bore date the 8th of October, 1898, was made and issued by them in the United Kingdom and was capable of being sold in a stock market of the United Kingdom. In these circumstances it was admitted that the debenture fell within division (*b*) of the following head of charge in the first schedule of the Stamp Act, 1891—namely, "Marketable Security. (1) Marketable security (*a*) being a Colonial Government security, or (*b*) being a security not transferable by delivery, or (*c*) being a security transferable by delivery and bearing date or signed or offered for subscription before or on the 6th of August, 1885.

| | |
|---|---|
| "For or in respect of the money thereby secured. | "The same *ad valorem* duty according to the nature of the security as upon a mortgage." |

The commissioners were of opinion that the money thereby secured withing the meaning of the said head of charge was the sum of £103, and accordingly assessed the instrument as liable to a duty of 3s. 9d., being the duty payable on a mortgage of that amount.

The appellants contended that the money thereby secured was £100 only, in which case the duty under the said head of charge was 2s. 6d. only.

The questions for the opinion of the court were—(1) whether the instrument was chargeable with the duty of 3s. 9d. in accordance with the assessment of the commissioners; (2) if not, with what duty the instrument was chargeable.

The Divisional Court affirmed the order of the commissioners.

The company appealed.

*Joseph Walton, Q.C.*, and *Scrutton*, for the appellants.—The money secured by the debenture is £100 only. When the debenture was presented to the commissioners for their opinion as to the duty, the company had not and could not then have exercised the option given by condition 17. Until the 1st of July, 1900, no more than £100 can possibly become payable. The company may at any time after that date, at their own option, give notice to pay off the debenture before its due date. If they elect to do so, they will have to pay a sum of £3 beyond the £100 secured by the debenture as the price payable for the privilege of redeeming at the earlier date: per Vaughan Williams, J., in *Rowell* v. *Inland Revenue Commissioners*, [1897] 2 Q. B. 194, at p. 198, 45 W. R. Dig. 71. By section 86, sub-section 1, of the Stamp Act, 1891, a mortgage is defined as a security for the payment of any definite and certain sum of money. The only definite and certain sum here is the £100.

They also referred to *Barker* v. *Smark*, 7 M. & W. 590.

*Sir R. B. Finlay, S.G.*, and *Danckwerts*, for the commissioners.—The debenture contains a promise to pay £103 upon the contingency of the company giving notice to redeem at the earlier date. Money secured on a contingency is chargeable: *Dickson* v. *Cass*, 1 B. & Ad. 343; *Canning* v. *Raper*, 1 E. & B. 164; *Maxwell* v. *Inland Revenue Commissioners*, 4 Ct. Sess. Cas., 3rd series, 1121. Upon the notice being given the company becomes liable to pay off the debenture at £103 under the covenant in the debenture. The moment the notice is given the obligation to pay £103 attaches, and from that moment the debenture gives a charge for that sum, condition 17 providing that upon the expiration of the notice £103 shall become payable as if the same was the amount of the principal moneys thereby secured. It is not the case of a mere option to pay off the debenture at a premium, without any charge being given for the premium, as was the case contemplated in the *dictum* of Vaughan Williams, J., in *Rowell* v. *Inland Revenue Commissioners*. If, however, that *dictum* is supposed to cover a case like the present, it cannot be supported. The actual decision in that case is in favour of the view now taken by the commissioners. It makes no difference that the fulfilment of the condition is at the option of the obligor.

They also referred to *City of London Brewery Co.* v. *Inland Revenue Commissioners*, 47 W. R. 216, [1899] 1 Q. B. 121.

A. L. SMITH, L.J.—I am of opinion that this appeal must be allowed. The sole point is whether or not within the meaning of Schedule I., heading "Marketable Security," in the Stamp Act, 1891, £103 or £100 is the money "secured" by this debenture. It is admitted that the debenture is a "marketable security." The same *ad valorem* duty is payable as in the case of a mortgage, and therefore if the sum secured is £100, the duty is 2s. 6d.; if £103, the duty is 3s. 9d.

Now, upon the face of the document the debenture is for £100 and no more. By clause 17 of the conditions indorsed on the debenture, the company has the option at any time after the 1st of July, 1900, of redeeming the debenture at £103 on giving six months' notice in writing. That gives the company the option, if they choose to adopt that course, at any time after the 1st of July, 1900, of paying off the £100 debentures before the time stipulated therein for payment—that is to say, two years before any of the debentures become due. The question we have to consider is, What sum does each debenture secure?

In my opinion the debenture secures the sum of £100 only, and not £103, because the obligors—that is, the company, need never, except of their own free will and pleasure, give notice to redeem the debentures at £103. I cannot agree with Wills, J., in the court below, that the decision in *Rowell* v. *Inland Revenue Commissioners* covers the present case. In that case a company had issued debentures of £100 each, each debenture containing an undertaking by the company to pay to the registered holder on a specified date the sum of £100, together with a premium thereon of £7 10s., and it was held that such debenture was a security for the payment by the company of £107 10s. I think that the court was right in so holding. In the present case Wills, J., said: "If there were no absolute covenant to pay the £3 in a certain event, but only a stipulation that if the company chose to pay the £3 they were to have the privilege of paying off the principal should they be called upon to do so, the case would be different." To my mind, with great respect for the learned judge, that passage exactly covers the present case. There is no absolute covenant to pay the £103. There is only a stipulation that if the company elect to pay off the debentures after the 1st of July, 1900, and before their due date, they will pay £103 upon each debenture For these reasons I think that £100 is the sum secured by the debenture, and not £103, and the duty chargeable is 2s. 6d.

COLLINS, L.J.—I am of the same opinion. Though we are differing from the conclusion arrived at in the Divisional Court, I think we are really giving effect to the opinion expressed by Wills, J., in the passage which has been read by my lord. I therefore claim the authority of the learned judge in support of our decision, and for this reason: when the case is stripped of its fringe in the nature of the machinery as to giving notice, there is merely a stipulation to the effect that if the company choose to pay £3 they are to have the privilege of paying off the principal sum of £100 at a date prior to its maturity. It is true that before the company can exercise that option there are certain formalities which they must conform to. But whether they do or do not conform to these formalities depends entirely upon their own will and pleasure. Simply stated, the £3 is a liquidated sum which the company undertakes to pay in the event of their thinking it worth their while to pay off the debentures before their maturity and thereby to deprive the debenture-holder of the right to receive the stipulated rate of interest thereon up to maturity. A bond cannot be said to be a security for that which is only payable at the option of the obligor.

VAUGHAN WILLIAMS, L.J.—I agree. The £3 is a premium payable if the option given to the company of paying off the debenture before it would otherwise mature is exercised by the company. It is, to my mind, no part of the sum secured, and does not alter the amount of £100 secured by the debenture.

*Appeal allowed.*

Solicitors for the appellants, *Julius & Thomas.*

Solicitor for the respondents, *Solicitor of Inland Revenue.*

## High Court of Justice.

Chan. Div. Kekewich, J. — Dec. 15.

*In re* TRENCH TUBELESS TYRE CO. (LIMITED). BETHELL *v.* TRENCH TUBELESS TYRE CO. (LIMITED). (*a.*)

*Company — Winding up — Liquidator — Invalid appointment.*

*Even assuming that it is competent for a company, after passing a resolution for voluntary winding up, to proceed forthwith, without previous notice of intention, to the election of a liquidator, yet the company will be taken to have abrogated this general power in cases in which notice has been given of intention to elect a particular person as liquidator, and will not be at liberty, in case such person is rejected, to proceed forthwith to the election of some other person.*

Motion.

This was a motion in an ordinary debenture-holders' action asking, on behalf of the defendant company, that the receiver already appointed in the action by Kekewich, J., on the 1st of December, 1899, might be ordered to hand over to Mr. Marreco, the liquidator of the company, certain books and documents belonging to the company and not comprised in the debenture-holders' security.

It appeared from the affidavit of the receiver in the debenture-holders' action that he was perfectly willing to hand over the books in question as the court might direct, but that in the meanwhile he was informed by his solicitors that they had grave doubts as to whether Mr. Marreco had been properly appointed liquidator of the company. It appeared from an affidavit of the secretary of the defendant company that at an extraordinary meeting held on the 1st of November, 1899, the defendant company had duly passed the following resolutions: (1) That the company be wound up voluntarily; (2) That Mr. W. Walker be appointed as liquidator.

On the 6th of November notices were sent out to the shareholders convening an extraordinary general meeting for the 16th of November, 1899, for the purpose of confirming the above two resolutions. On the meeting being held on the 16th of November, the first of the above two resolutions was confirmed; but the appointment of Mr. Walker was not confirmed, and Mr. Marreco was appointed in his place.

*Ward Coldridge*, for the defendant company.—The liquidator is properly appointed. Liquidators may be appointed, without special notice, at the general meeting at which a resolution for voluntarily winding up is passed: *Oakes* v. *Turquand*, 15 W. R. 120, 2 H. L. Cas. 325, *per* Lord Chelmsford, at p. 355; *In re Welsh Flannel and Tweed Co.*, 23 W. R. 558, L. R. 20 Eq. 360. Here, it is true, notice was given to appoint a particular liquidator; but that resolution having been lost, it may be treated as though no notice had ever been given of it, and an effective resolution to wind up having been passed, the company was thereupon free to elect whatever liquidator it chose: *In re Indian Zoedone Co.*, 32 W. R. 481, 26 Ch. D. 70.

*Warrington, Q.C.*, and *Martelli*, for the receiver.—This is not a case of a company being wound up simply, and of its then proceeding to appoint a liquidator without previous notice. Here a meeting has been expressly called to confirm the appointment

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

of a particular gentleman, and to substitute another in his place at the last moment is practically to amend the previous resolution. That, however, is impossible.

*Ward Coldridge* replied.

KEKEWICH, J.—This point arises in a peculiar way, and has, I think, never been decided before. I take it that what Lord Chelmsford meant by his *dictum* in *Oakes* v. *Turquand* is nothing more than this, that where a resolution to wind up requires confirmation, and there has been no resolution as to liquidators at all, then, if liquidators be appointed without notice at the confirmatory meeting, their appointment is perfectly good. I should have thought, indeed, that where a meeting is called for the express purpose of confirming a certain resolution, it would be open to argument that the meeting could do no more than confirm or reject that resolution. But even assuming that it could do more, that is not the case we have here. Here we have a liquidator actually appointed at the previous meeting; and then, at the confirmatory meeting, he finds himself rejected and another man appointed in his place. That seems to me to be wrong. I go on the ground that it is not possible to do more, in the case of any particular resolution of which notice has been previously given, than affirm or reject it as it stands—that it is not possible to amend it. A shareholder is entitled to know whether or not it is worth his while to attend a particular meeting. He may have no particular objection, for instance, to the appointment of a proposed person as liquidator, and so may decide not to be present. It would be unfair if some different and objectionable person were then to be appointed behind his back. It seems to me, for the reason indicated, that the liquidator in this case has not been properly appointed.

*Motion refused.*

Solicitors, *Phillips & Boyle; Francis & Johnson.*

---

Chan. Div.
Kekewich, J. } Dec. 1, 12.

TITCHMARSH v. ROYSTON WATER CO. (LIMITED). (a.)

*Easement—Way of necessity—Vendor and purchaser—Land sold not entirely "landlocked" by other land of vendor—Implied grant.*

*Where land is sold which is surrounded, partly by other land of the vendor, but partly by the land of a stranger, a grant of a right of way, as of necessity, will not be implied over the other land of the vendor.*

**Motion.**

By an agreement in writing dated the 5th of June, 1896, the directors of the defendant company entered into a contract with Lord Hampden for the sale to them of a certain plot of land measuring in extent about six acres. and then forming part of the Flint Hall Farm, the property of Lord Hampden.

By another agreement in writing dated the 27th of November, 1897, the Flint Hall Farm was let to the plaintiff upon a yearly tenancy at an annual rent of £252 11s. 6d.

The plaintiff had notice at the time of this latter agreement of the previous agreement of the 5th of June, 1896, and it was agreed between him and Lord Hampden that, on the execution by the latter of the conveyance to the defendant company of the aforesaid six acres, the plaintiff's rent should be reduced by £6.

The said conveyance was ultimately executed on the 25th of June, 1898.

It appeared from the affidavits read on the hearing of the motion that the plot of land then conveyed to the defendant company was bounded on three sides by an unsold portion of Flint Hall Farm, and on the fourth side by the public highway, which latter, however, ran at this point through a cutting in the chalk twenty feet deep, and with perpendicular sides, so as to be extremely difficult of access from the plot in question. There was, however, an existing accommodation road running over the unsold portion of Flint Hall Farm, by which the defendant company would be enabled to get to the six acres they had purchased. There was, however, no direct and regular connection between this road and the six acres in question. The defendant company having claimed a right of way over this accommodation road, broke open a lock on a gate kept fastened by the plaintiff, and made an opening on to their property through the plaintiff's hedge. The plaintiff now sought to restrain them by injunction from further trespassing on the land in his occupation.

It was agreed between the parties to treat this motion as the trial of the action.

*R. J. Parker*, for the plaintiff.

*Warrington, Q.C.*, and *Methold*, for the defendant company.—A right of way over this road is an easement of necessity, and must accordingly be taken to have passed to us by an implied grant under the agreement of the 5th of June, 1896, and the conveyance of the 25th of June, 1898: *Brown* v. *Alabaster*, 36 W. R. 155, 37 Ch. D. 490.

*R. J. Parker*, in reply.—To imply the grant of a right of way as of necessity, it is incumbent on the purchaser to show not merely that these six acres are land-locked, but also that they are land-locked entirely by other land of the vendor.

KEKEWICH, J.—In this case a right of way over the accommodation road is claimed by the defendants as a way of necessity. In *Brown* v. *Alabaster*, Kay, J., decided in favour of the right of way there claimed on the ground that there was an implied grant of a continuous and apparent easement; and about that nothing more need be said. But on the claim of a way of necessity he made the following observations, p. 500: "Now as a way of necessity I think it is difficult to support it, for the following reason. A way of necessity is not a defined way. A way of necessity is a way which is the most convenient access to a land-locked tenement over other property belonging to the grantor, and it is quite clear that a grantor has a right himself to elect in which line, in which course, the way of necessity should go. Here there is no case of election. The claim is to a way over this particular road, without any right of election at all on the part of the grantor. That of itself would be enough to show it is not a way of necessity."

I venture to doubt the soundness of this ruling, which if accepted would be fatal to the purchaser's claim here. It may hold good in a large majority of instances, but if there be only one possible mode of access—one line, that is, or one course—it would, I think, be going too far to say that this alone excludes a way of necessity when the other circumstances of the case are strong to establish it. The peculiar circumstances here are that the land in question is not blocked on all sides, though it is blocked on three sides, by land of the vendor. The question arises, Is the doctrine which calls into existence a way of necessity applicable to such a case? Many statements of that doctrine are to be found in

(a.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

the books, but there is none better than that in Williams' Saunders. In the notes in *Pomfret* v. *Ricroft* (vol. 1, p. 570) it is thus stated: "Where a man having a close surrounded with his own land grants the close to another in fee for life or years, the grantee shall have a way to the close over the grantor's land as incident to the grant, for without it he cannot derive any benefit from the grant." "A way of necessity," it is said on p. 571, "when the nature of it is considered, will be found to be nothing else but a way by grant. It derives its origin from the grant." This statement, by the use of the words "surrounded with his own land," excludes such a case as this, where the granted premises are not surrounded by land of the vendor, but abut on one side on land of a stranger. There is no authority for extending the doctrine to such a case as that. In Gale on Easements (5th ed.), p. 133, the doctrine is stated in almost precisely the same language, with this addition: "So, too, if the close be not entirely inclosed by my land, but partly by the land of strangers, for he cannot go over the land of strangers, *quære*." For this reference is made to Rolle's Abridgment and Viner's Abridgment. I have referred to these volumes, and have ascertained that the quotation is accurate, including the *quære*, which is to be found in both works; but I have not come across any comment on either the statement or the *quære*. It seems to me that this statement is inconsistent with the doctrine as above explained, and with the principle on which it is founded. No such excrescence is justified by the old and often quoted case of *Clarke* v. *Cogge*, in Cro. Jac., 170, where the extension of the doctrine to a reservation in favour of the vendor, as against the purchasers, is established.

Some argument was addressed to the peculiar feature of this case—*i.e.*, that the boundary on the fourth side is a highway, and the fact that such highway runs in a cutting which would make connection with the granted land difficult. There is, however, no occasion for me, having regard to the view that I have taken in this case, to discuss the right of a man whose land adjoins a highway to make a road into it, if he has not already got access thereto.

*Motion granted.*

Solicitors. *Buxton, Ashton, & Co.; A. Jonas*, for *Wortham, Nash, & Co.*, Royston.

---

Chan. Div.
Farwell, J. } Nov. 2, 3, 7.

ROGERS v. HOSEGOOD. (*a.*)

*Vendor and purchaser—Restrictive covenant—Covenant running with the land—Intention—User—Private dwelling-house—Residential flats.*

*Covenants entered into by a purchaser for the benefit of the vendor's adjoining land are annexed to and the benefit of them passes with such land to the vendor's assignees, if the intention that they should do so is expressed in the conveyance to the original purchaser.*

*An express assignment of the benefit to the assignee is not necessary.*

*The erection of a block of flats is a breach of a covenant to construct only one private residence.*

Action with witnesses.

The action was brought by William Rodrigues Rogers and the trustees of the will of the late Sir John Millais, as owners of property in Palace-gate, Kensington, for the purpose of enforcing restrictive covenants, to which the defendant's adjoining land was alleged to be subject.

On the 31st of May, 1869, William Duke of Bedford purchased from the firm of Cubitt & Co., of which the plaintiff Rogers was one of the partners, a piece of land situated at the corner of Palace-gate and Kensington-gore, which formed part of the property to which the action related, and covenanted to erect thereon no more than one messuage or dwelling-house, with such suitable outhouses and stabling (if any) as it might be thought fit to erect in connection therewith, and that such messuage should be adapted for and used as and for a private residence only, and that no trade or business should be carried on in or upon such plot. This covenant was expressed to be entered into with intent that it "might so far as possible bind the premises conveyed and every part thereof into whosesoever hands the same might come and might enure for the benefit of" Messrs. Cubitt & Co. "their heirs, assigns, and others claiming under them to all or any of their lands adjoining or near to the" land in question.

On the 31st of July in the same year an adjoining plot was conveyed to the Duke by Messrs. Cubitt & Co., and the conveyance contained a covenant by him that the messuage and buildings on the plot conveyed should be used as and for a private residence and necessary outbuildings and stables only, and that no trade or business should at any time be carried on, in, or upon the plot. This covenant was expressed to be entered into with the same intent as that in the earlier conveyance. Subsequently a third adjoining plot was conveyed to the Duke by the firm, but the conveyance contained no covenants of the like nature.

On the 25th of March, 1873, Messrs. Cubitt & Co. conveyed to Sir John Millais a plot in Palace-gate near those conveyed by them to the Duke of Bedford. The conveyance to him contained no express assignment of the benefit of the covenants entered into by the Duke of Bedford, but only general words conveying "all the rights, easements, and appurtenances belonging, or reputed to belong," to the plot of land.

The Duke of Bedford erected on the plots conveyed to him a large mansion known as Thorney House; the plot belonging to Sir John Millais was occupied by the house known as No. 2, Palace-gate.

William Duke of Bedford died in 1872, and was succeeded by Francis Charles Hastings, who became entitled as devisee under his predecessor's will to Thorney House and the adjoining land, which had been purchased from Cubitt & Co.

On the 30th of October, 1876, indentures were executed by Cubitt & Co., and by Francis Duke of Bedford, by which the former released the latter, so far as they lawfully could, from the restrictive covenants contained in the indentures of the 31st of May and the 31st of July, 1869, with respect to the number of messuages to be built on the land, and the latter covenanted to indemnify the firm and its members in respect of the release and its consequences.

Sir John Millais died in August, 1896, and by his will the plaintiffs—the trustees—became entitled to the plot of land conveyed to him by Cubitt & Co., and to the mansion erected on it. The plaintiff Rogers had, after the date of the release above-mentioned, purchased from the firm two other plots upon which were built the houses known as Nos. 7 and 11, Palace-gate.

The defendant had acquired from the devisees of Francis Duke of Bedford the plots acquired by him from Cubitt & Co., and proposed to pull down Thorney House and to build a large block containing

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

from thirty to forty residential flats, eight on each floor.

The plaintiffs thereupon brought this action, claiming an injunction to restrain the defendant from erecting on the land any building other than a private residence and from carrying on any trade or business thereon; and the plaintiffs, the trustees, also claimed an injunction to restrain the defendant from erecting on either of the plots any building which, by reason of its consisting of flats or groups of flats or otherwise, should consist of more than one messuage or dwelling-house with suitable outhouses and stabling.

The evidence showed that the proposed flats were to be built round an open courtyard, which, with the corridors, lifts, and staircases communicating with it, was to be the only part of the building devoted to the common use of the tenants. None of the flats was to communicate directly with the street.

*Haldane, Q.C.*, and *Christopher James*, for the plaintiffs.—The cases dealing with the devolution of the benefit of restrictive covenants fall into three classes: (1) Those where there is a general building scheme, (2) those where there is an express assignment of the benefit of the covenants, and (3) those where there is an expression of intention that the covenants shall enure for the benefit of the assignee. The present case falls into the last of the three classes. [FARWELL, J., referred to *Eastwood* v. *Lever*, 12 W. R. 195, 4 De G. J. & S. 114.] The deeds of May and July, 1869, contain the express intention which is necessary: *Renals* v. *Cowlishaw*, 28 W. R. 9, 11 Ch. D. 866, approved by the House of Lords in *Spicer* v. *Martin*, 37 W. R. 689, 14 App. Cas. 12. [FARWELL, J.—Is it enough to show that the vendor might have assigned the benefit of the covenants if he has not done so in fact?] This covenant is expressed to be intended to enure for the benefit of a subsequent purchaser, and it will so enure even if he is not aware of its existence. The benefit of the covenant is distributed, and is thus, as it were, become part of the land. It is like the case of a building scheme where the benefit of the covenant is said to be annexed to the land. *Master* v. *Hansard*, 25 W. R. 570, 4 Ch. D. 718, is distinguishable as being a case of lessor and lessee; but in *London and South-Western Railway* v. *Gomm*, 30 W. R. 620, 20 Ch. D. 562, the late Master of the Rolls said that in such cases a covenant is enforced on the analogy of an easement. Like an easement, the covenant is, as it were, a piece reserved out of the property. [FARWELL, J.—Where there is no building scheme there is not the same basis of knowledge among all the occupiers. It seems that the cases rest upon the common agreement among all the purchasers.] There is the same substratum here of the annexation of the covenant to the land. In *Nottingham Patent Brick and Tile Co.* v. *Butler*, 34 W. R. 405, 15 Q. B. D. 261, 16 Q. B. D. 778, 33 W. R. Dig. 231, it was held that covenants forming part of a general building scheme were binding upon a subsequent purchaser who had no knowledge of their existence. This is not a creation of a new estate but a restriction of the user of land. There is no reason why the benefit of this covenant should not run with the land at law, as well as in equity; it is within the first resolution in *Spencer's case*, 5 Rep. 16, see also the notes to the case in 1 Sm. L. C. 52. *Austerberry* v. *Corporation of Oldham*, 33 W. R. 807, 29 Ch. D. 750, and *Western* v. *Macdermot*, 15 W. R. 265, L. R. 1 Eq. 499, L. R. 2 Ch. App. 72, show that where the benefit of the covenant runs with the land at law the assignee is bound in equity, and there is no question of notice. *Child* v. *Douglas*, 2 W. R. 461, Kay 560, and *In re Birmingham and District Land Co. and Allday*, 41 W. R. 189, [1893] 1 Ch. 342, show that since *Nottingham Patent Brick and Tile Co.* v. *Butler* the real question is that of intention. From *Morland* v. *Cook*, 16 W. R. 777, L. R. 6 Eq. 252, and other cases already cited, it is clear that Sir John Millais' trustees are entitled to the benefit of the covenants. The covenant is threefold: (1) To erect on the land only one messuage; (2) to use the messuage as a private residence only; (3) to carry on no trade or business there. What the defendant proposes to do is to construct a large number of messuages, which is a breach of the first part of the covenant; but if the proposed block is only one messuage then it cannot be said that it is used for a private residence only, but the trade of a lodging-house keeper will be carried on there, which would be a breach of the second and third parts of the covenant. *Hobson* v. *Tulloch*, 46 W. R. 331, [1898] 1 Ch. 424, shows what is meant by a private residence. Since *Doherty* v. *Allman*, 26 W. R. 513, 3 App. Cas. 709, it is clear that the real question is what the parties to the covenant intended by it, and not whether the act intended to be done will be for the benefit of the property. Nor is this like *Attorney-General* v. *Mutual Tontine Westminster Chambers Association*, 24 W. R. 996, 1 Ex. D. 469, a case of the construction of a statute.

*Hughes, Q.C.*, and *A. J. Allen*, for the defendant.—There has been some confusion as to the meaning of covenants entered into for the benefit of the covenantee and other persons. They are primarily entered into with the covenantee only, and he is given the power of transferring the benefit to his assigns, but he is, except in the building scheme cases, under no obligation to do so. The plaintiff is compelled to say that a restrictive covenant is of the nature of an interest in the land. *London and South-Western Railway* v. *Gomm*, which was cited for this purpose, was a case of an option to purchase, as was pointed out in *Mackenzie* v. *Childers*, 38 W. R. 243, 43 Ch. D. 265. No one can have a right unless he claims through the covenantee; the assign has no *locus standi* of his own. There are two questions which have not always been kept distinct:—(1) Did the vendor acquire the right to give the benefit to other persons? There is no question that in the present case he did; and in the building scheme cases this is implied by the court. (2) Has he given the benefit to his assignee? We submit that in this case it has not been shown that the benefit was assigned to Sir John Millais. The deed of conveyance to him contains a partial recital of the conveyance to the Duke of Bedford, but stops short before getting to the restrictive covenants. This is strong evidence that it was not intended to give Sir John the benefit of them, and so is the fact that the covenants entered into by Sir John himself are different. This is merely a personal right, and does not touch or concern the land, and therefore cannot run with the land at law; if it did, much of the discussion in cases like *Keates* v. *Lyon*, 17 W. R. 338, L. R. 4 Ch. App. 218, and *Spicer* v. *Martin* would be idle. The benefit of the covenant was not a right "belonging or reputed to belong" to the land: *Austerberry* v. *Corporation of Oldham* and *Thomas* v. *Hayward*, L. R. 4 Ex. 311, 17 W. R. C. L. Dig. 73. If this covenant ran with the land *Renals* v. *Cowlishaw* must be wrong. In *Western* v. *Macdermot* there were mutual obligations. The covenants cannot be construed so as to enure to the benefit of the assignee: *Child* v. *Douglas* and *Master* v. *Hansard*. There is nothing to show that Sir John Millais purchased or intended to acquire the benefit of the covenant. As for the plaintiff Rogers, he has no power to object to the erection of any number of messuages. But in any case this is not more than one messuage; a house does not become several

houses because it is occupied by several families: *Attorney-General* v. *Mutual Tontine Westminster Chambers Association*. The fact that a house has several entrances or several staircases does not make it more than one house. It is a fair interpretation to the covenant to hold that a messuage means a block of buildings under one roof. As far as the London building laws are concerned a block of flats is treated as a dwelling-house.

*Haldane* in reply.—It has never been held to be a necessary condition for the covenant to run with the land at law that it should be reciprocal: 1 Sm. L. C. 87 (9th ed.). All that is necessary is that there should be a covenantor and a covenantee and that the covenant should "touch or concern" the thing transferred. As to the meaning of this see *Vernon* v. *Smith*, 5 B. & Ald. 1, and *Vyvyan* v. *Arthur*, 1 B. & C. 410.

*Cur. adv. vult.*

Nov. 7.—FARWELL, J., after stating the facts, continued as follows: In this state of facts three questions arise for determination: (1) Whether the building proposed to be erected by the defendant is a breach of the covenant in the indenture of the 31st of May, 1869; (2) of that in the indenture of the 31st of July, 1869; and, if so, (3) whether the plaintiffs or any of them are entitled to sue in respect of such covenant. In considering the first two questions I have to determine three points: (1) Whether the building proposed to be erected is one messuage or dwelling-house; (2) if it is one only, is it adapted and used as and for a private residence only? (3) will a trade or business be carried on upon the premises by the mode in which the defendant proposes to use the same? In my opinion, a block of flats such as is proposed is not one messuage, but several. I cannot see any substantial difference for the purposes of a covenant of this nature between a terrace of adjoining residences, separated from one another vertically, and a pile of residences separated from one another horizontally. If the building of the defendant was carried no higher than the ground floor it would, in my opinion, be impossible to contend that each of the residences opening on to the inner area was not a separate house, and I cannot see that the superposition of seven other rows of residences can make any difference. This is a mere question of construction, on which a rating case such as that cited, *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (*Limited*), can have little bearing; but I would point out that in that case the court held that the whole block was a house, but pointed out that each set of chambers might be a house also. The case of the *domus mansionalis* cited at 24 W. R., p. 998 (*Evans and Finch's case*, Cro. Car. 473) has some bearing on the point. The covenant in the deed of July, 1869, differs from that in the earlier deed in that it contains no express covenant that there shall be one messuage only; but on the true construction of the covenant I have come to the conclusion that the result is the same. In my opinion a large building which is to be used as thirty or forty separate residential flats does not answer the description of a messuage to be used as and for a private residence. But even if the whole structure could be regarded as a private residence only, it is difficult to see how thirty or forty different families and establishments can find place therein, unless the owner of such entire messuage is carrying on the trade of letting apartments.

The third question is that which was most elaborately argued—viz., whether the benefit of the covenants in the two indentures of 1869 passed to Sir John Millais and through him to his trustees so as to enable them to maintain this action. It is not contended that the burden of these covenants has not passed to the defendant; he is obviously bound by reason of notice, whether the covenant as regards him runs with the land or not: *Tulk* v. *Moxhay*, 2 Phillips, 774. It has been argued that this is a covenant the benefit of which runs with the land at law, or if not at law, at any rate in equity, and further that even if this is not so the benefit of the covenants passes by the express general words "rights, easements, or appurtenances belonging or reported to belong thereto." In my opinion the benefit of the covenants runs with the land now vested in the Millais trustees at law. I do not think it necessary to call in aid the analogy of easements, as suggested by Mr. Haldane, on the authority of *London and South-Western Railway* v. *Gomm*. The accurate expression appears to me to be that the covenants are annexed to the land and pass with it in much the same way as title deeds, which have been quaintly called the sinews of land: Co. Litt. 6 *a*. Thus the right to sue on such covenants passes to the heir and not to the executor; the assignee of such covenants could sue under the old law in his own name in the days when the assignee of no other *chose in action* could do so, and before the practice as to venue was abolished, actions on such covenants, when brought by lessees, were local and not transitory: see *Thursby* v. *Plant*, 1 Wms. Saund. 300 *n*. 10. The law, in fact, acted on the sound principle of giving damage to the party aggrieved. Covenants which run with the land must have the following characteristics: (1) They must be made with a covenantee who has an interest in the land to which they refer; (2) they must concern or touch the land. It is not contended that the covenants in question in this case have not the first characteristic, but it is said that they fail in the second. I am of opinion that they possess both. Adopting the definition of Bayley, J., in *Mayor of Congleton* v. *Pattison*, 10 East 130, the covenant must either affect the land as regards mode of occupation, or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land. It is to my mind obvious that the value of Sir J. Millais's land is directly increased by the covenants in question. If authority is needed I would refer to *Mann* v. *Stephens*, 15 Sim. 377, a case very similar to the present; *Vyvyan* v. *Arthur*; *The Priors case*, 1 Sm. L. C. 56; *Fleetwood* v. *Hull*, 37 W. R. 714, 23 Q. B. D. 35; *White* v. *Southend Hotel Co.*, 45 W. R. 434, [1897] 1 Ch. 767. I see no difficulty in holding that the benefit of a covenant runs with the land of the covenantee, while the burden of the same covenant does not run with the land of the covenantor. This must always be the case with regard to grants in fee if it be the better opinion (as Cotton, L.J., in *Austerberry* v. *Corporation of Oldham* and the editors of Smith's Leading Cases think) that the burden of such covenants never runs with the land. At common law the lessee's covenants run with the land, but the lessor's did not run with the reversion; the statute 32 Hen. 8, c. 34, was passed to give the reversioner the same benefit the lessee had; and the definition of a covenant which runs with the land, stated by the learned editors of Smith's Leading Cases (p. 58) is "when either the liability to perform it or with right to take advantage of it passes to the assignee of that land." But a covenant may have the two characteristics above mentioned and yet not run with the land; it is in each case a question of intention to be determined by the court on the construction of the particular document, and with due regard to the nature of the covenant and the surrounding

circumstances. No covenant can run with the land which has not the two characteristics above mentioned, but every covenant which has those two characteristics does not necessarily run with the land. That it is a question of intention in each case to be determined on construction is apparent from the judgment of Vice-Chancellor Hall in *Renals* v. *Cowlishaw*, a judgment of the highest authority, not only from the weight attaching to the opinion of the learned Vice-Chancellor, but also from the approval that it has received in the Court of Appeal and the House of Lords: see *Spicer* v. *Martin* and *Nottingham Brick and Tile Co.* v. *Butler*.

The courts have drawn the inference that the parties intended, or in other words the courts have held on the true construction of the documents that they have contracted, that the covenants shall or shall not run with the land from various circumstances. Thus in *Renals* v. *Cowlishaw* there was nothing to show what assigns where intended by the words of the covenant; there was no necessary implication that each assign of each parcel of the vendor's land, whether acquired before or after the date of the deed, was to have the benefit of the covenant; the impression, indeed, was to the contrary, and the courts accordingly held that the covenant did not run, but must be expressly assigned in order to pass. Contrast this with the case of ordinary covenants for title; these undoubtedly run with the land and each purchaser of each portion of the land gets the benefit of the covenants so far as they relate to the land purchased by him. In both these cases the covenants are entered into with the heirs and assigns, but in the former case the word "assign," on its true construction of the deed, means "assign of the covenant," in the latter "assign of the land, to which is annexed the benefit of the covenant by virtue of the evidence of intention so to contract which is found in the deed and the surrounding circumstances." Again, take the cases of building schemes. There is no express assignment of the benefit of the covenants, but it is held that the true intent of the parties, and consequently the true construction of the covenant, is to be found by applyi ng the words of the deed to the surrounding circumstances. A similar conclusion has been arrived at in cases where there is no general scheme, but various persons enter into similar covenants with reference to lands that lie adjacent to one another. It is sufficient for me to refer to *Nottingham Brick and Tile Co.* v. *Butler*, *Western* v. *MacDermot*, *Whatman* v. *Gibson*, 9 Sim. 196; *Coles* v. *Sims*, 2 W. R. 151, Kay 56. Treating it, then, as a question of construction, I find the express contract to be that these covenants were entered into "with intent that they should bind the premises conveyed by the deeds of 1869, and every part thereof, into whosesoever hands the same might come, and should enure to the benefit of Messrs. Cubitt & Co., their heirs and assigns, and others claiming under them all or any of their lands adjoining or near to the said premises." The draftsman would appear to have had Hall, V.C.'s, words before him when he framed this covenant, and I think it would be difficult to express the intention in clearer words. Inasmuch as the covenantees at the date of the covenant owned the land now belonging to the Millais trustees and such land is in fact "near to" the defendant's land I see no uncertainty as to the land to be benefited. I should add that in my opinion there can be no difference between law and equity in construing such covenants with a view to seeing whether they do or do not run with the land. The same words in the same document must necessarily bear the same meaning in all the courts. It is true that in many of the cases decided by the Court of Chancery expressions are found to the effect that the defendants are bound in equity whether the covenants in strictness run with the land or not. But I think that such expressions are due to the reluctance that the Vice-Chancellors felt to expressing any opinion on points of common law, and for the reason that I have already stated I cannot see how such covenant could run in equity if it does not run at law. One other point was made by Mr. Hughes—viz., that Sir J. Millais knew nothing of the existence of these covenants at the time that he bought, and I assume this to be the fact, as no evidence to the contrary was tendered, but in my opinion it is immaterial; such knowledge has never been held a necessary condition to success in an action on a covenant which runs with the land at law. The plaintiff's right in such an action does not depend upon what he believes himself to have bought but upon what he has in fact bought, and he has bought the land with the covenants annexed. The defendant is not injured, for he bought the land with knowledge of the covenant, and he can claim no more than the land with that burden upon it. If authority is needed for this, *Child* v. *Douglas* is expressly in point and is not affected in this respect by anything said on the appeal or at the trial or by any subsequent authority. It is not necessary for me to determine whether the benefit of the covenants would pass under the general words to which I have referred above, if such covenants did not run with the land. If they are not in fact annexed to the land, it may well be that the right to sue thereon cannot be said to belong or be reputed to belong thereto, but I express no final opinion on this point. In the view that I take of the rights of the Millais trustees I must make a distinction and grant an injunction as asked, but it is at their suit alone that I do so. The plaintiff Rogers joined in a deed of the 30th of October, 1876, whereby Cubitts released the devisee of the late Duke of Bedford from the covenant as to the erection of one dwelling-house only. I have already held that the defendant threatened and intended to erect a number of dwelling-houses, and this, as against Rogers, he is entitled to do. I cannot hold that these facts constitute a business, although if I had thought that they constituted one dwelling-house only, I might have come to a different conclusion. I think that the proper course is to dismiss the action so far as it sets up any claim by Rogers: it would not be right that the judgment should appear to be made at his suit, or that he should be in a position to enforce an injunction which is obtained on the strength of another's title.

*Judgment for the Millais trustees; defendant to pay half the general costs of the action.*

Solicitors, *Stibbard, Gibson, & Co.; Parker & Thomas.*

---

Q. B. Div. (Darling and Channell, JJ.) — Dec. 12, 15.

*In re* JOHN SCOTT, JUN. (DECEASED). (*a*.)

*Inland revenue—Estate duty—Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 33—"*Property passing on death*," *Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1—"*Property of which the deceased was at his death competent to dispose*," *Finance Act*, 1894, *s.* 2 (1)—*Settled property.*

*A. died, in* 1899, *having by his will left property valued at* £16,000 *to trustees for his widow and daughter, and after the death of the widow to the daughter absolutely. Six months after A.'s death his father died, having by*

(*a*.) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

*his will left property to A. valued at £80,000. Estate duty was paid on this amount in respect of A.'s father's death. By section 33 of the Wills Act the devise to A. did not lapse, but took effect as if he had survived his father. On a claim by the Commissioners of Inland Revenue for further estate duty on the £80,000 as property passing on A.'s death, or of which he was competent to dispose at the time of his death under the Finance Act,* 1894 :—

*Held, that this was not property passing on A.'s death within section* 1 *of the Finance Act,* 1894, *but that it was property of which he was at the time of his death competent to dispose under section* 2 (1) *of the Act, and that it was disposed of by his will. By virtue of the Finance Act, ss.* 5 *and* 22 (1) (*i.*), *and of the Settled Land Act,* 1882, *s.* 2, *it was settled property, and only liable to such duty as could be charged having regard to those provisions.*

Per Channell, J.—*The Wills Act, s.* 33, *gives the Crown the same duties as if the son had survived the father, and the devisees of the son take subject to the payment of the same duties as if the son had survived. The rate of duty payable is to be arrived at by taking the rate applicable to the property when aggregated with A.'s other property, but the Crown is not entitled to an increased rate on the* £16,000 *by reason of such aggregation.*

Petition by the executors of the will of John Scott, jun., against a claim made by the Commissioners of Inland Revenue for estate duty.

John Scott, jun., died on the 22nd of January, 1899, having by his will dated the 4th of May, 1896, left his property to the petitioners in trust for his widow and daughter, and after the death of the widow to the daughter absolutely. Probate of the will was granted to his widow on the 10th of March, 1899, and on her application for probate she delivered to the Commissioners of Inland Revenue an affidavit, with schedules, showing that the total net aggregate value of all property passing on the death of John Scott, jun., was £16,004 10s. On the 12th of May, 1899, John Scott, sen., the father of John Scott, jun., died, having by his will dated the 5th of June, 1891, devised freehold property valued at £80,000, to his son John Scott, jun.

On the 12th of May, 1899, the date of the death of John Scott, sen., his grandchild, the only child of John Scott, jun , was still living, and under the provisions of her father's and grandfather's wills, and by virtue of section 33 of the Wills Act, 1837, the devise by John Scott, sen., to his son did not lapse, but took effect as if the death of John Scott, jun., had happened immediately after the death of John Scott, sen., so that the effect of the devise contained in the will of John Scott, sen., was that the property in the freehold premises devised by his will passed to the petitioners to hold upon the trusts of John Scott, jun.'s will. Estate duty was paid upon this property in respect of the death of John Scott, sen.

The Commissioners of Inland Revenue claimed that a further estate duty was payable in respect of the property devised by John Scott, sen., as being property which also passed on the death of John Scott, jun., and that as the property passed under the disposition of John Scott, jun., it was liable to aggregation with his general estate under section 4 of the Finance Act, 1894. The petitioners claimed a declaration that such duty was not payable.

*Joseph Walton, Q.C.*, and *Edwardes Jones*, for the petitioners.—The property devised by the will of John Scott, sen., never became the property of John Scott, jun. The effect of section 33 of the Wills Act, 1837, is not to render the property devised by the will of John Scott, sen., the property of John Scott, jun., or to make it pass on his death, but merely to state the manner in which it is to devolve under the will of John Scott, sen. Assuming that the property did fall into the estate of John Scott, jun., it was not property which passed on his death within the meaning of the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, nor within the meaning of section 22 (*b*) of that Act. If the property passed to John Scott, jun., it was property which passed upon the death of John Scott, sen., in respect of which estate duty was thereupon leviable, and was settled property by the combined effect of the two wills and the statutes 7 Will. 4 and 1 Vict. c. 26, s. 33, 45 & 46 Vict. c. 38, s. 2, and 57 & 58 Vict. c. 30, s. 22 (1), and the interest of John Scott, jun., under the settlement failed by reason of his death before it became an interest in possession, and the subsequent limitations under the settlement continued and subsisted; and therefore by virtue of 57 & 58 Vict. c. 30, s. 5 (3), the property must not be deemed to pass on the death of John Scott, jun. Estate duty has already been paid since the date of the settlement in respect of the property, and neither has John Scott, jun., nor any other person died who was at the time of his death, or at any other time during the continuance of the settlement, competent to dispose of the property; and by virtue of 57 & 58 Vict. c. 30, s. 5 (2), estate duty is not payable. John Scott, jun., never had an interest in the property if it passed to him, and so if it had passed on his death it ought not, pursuant to 57 & 58 Vict. c. 30, s. 4, to be aggregated to any other property of his.

They referred to *Winter* v. *Winter*, 5 Hare 306; *Lord Advocate* v. *Bogie and Others*, [1894] A. C. 83; *Attorney-General* v. *Loyd and Others*, [1895] 1 Q. B. 496, 43 W. R. Dig. 81; *Platt* v. *Routh*, 6 M. & W. 756; *Executors of Perry* v. *The Queen*, 17 W. R. 382, L. R. 4 Ex. 27; *Pearce* v. *Graham*, 11 W. R. 415, 9 Jurist N. S.

*Sir R. E. Webster, A.G.*, and *Sir R. B. Finlay, S.G.* (*Vaughan Hawkins* with them), for the Crown.—This is property "passing on the death" of John Scott, jun., within the meaning of section 1 of the Finance Act, 1894, because the life of the son is projected forward and his death postponed by the Wills Act, s. 33. Under section 2 (1) of the Finance Act, 1894, this property is liable to estate duty as property of which the deceased, John Scott, jun., was at the time of his death competent to dispose. There is no settlement. A settlement must be for lives in succession. The gift by the father's will is an absolute gift to the son. If the father's will is the beginning of the settlement, then there has been since then, a person competent to dispose within the meaning of 57 & 58 Vict. c. 30, s. 5 (2). If it is a settlement by the son's will of property coming to him under his father's will, then there has been no payment of settlement duty. The intention of the Legislature was to substitute estate duty for probate duty.

They referred to *Johnson* v. *Johnson*, 3 Hare 157, and the cases mentioned above.

*Cur. adv. vult.*

Dec. 15.—DARLING, J., gave judgment as follows: The question raised in this case is whether the trustees under the will of John Scott, jun. (deceased), are to pay estate duty under the Finance Act, 1894, in respect of certain real property which had been devised to John Scott, jun., by his father. [After stating the facts of the case, he proceeded:] John Scott, jun., never had an interest in the estate devised to him, for he died before his father, but it is claimed that the estate of John Scott, jun., is liable to estate duty in respect to the property so devised to him, by

reason of the effect of the Finance Act, 1894, and section 33 of the Wills Act, 1837.

It is provided by section 33 of that Act: "That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear in the will." It is plain that the devise of the estate devised to John Scott, jun., by his father did not lapse, but enures to be disposed of according to the trusts of the son's will. Hereupon arises the claim to further estate duty, and it is argued on behalf of the Crown that this estate is covered by the words of the Finance Act, 1894, because it is property which "passed on the death" of John Scott, jun., within the meaning of section 1 of that statute. As a matter of fact this estate never was the property of John Scott, jun., although it would have become so had he in fact died immediately after the death of his father. For the Crown it is, however, contended that the natural death of John Scott, jun., should be disregarded for this purpose, and that "constructive death" at a later date must be imagined; or, in the words of the Solicitor-General, "the life of the son is projected forward, and his death postponed, by the Wills Act." In my opinion the Wills Act has no such operation, and this contention must go the way of that in *Pearce* v. *Graham*, 9 Jurist N. S. 568, where such a reading of the Wills Act was used to support the argument that coverture revived, so that a widow was reconstituted the wife of a man who had been dead some years. That contention, in itself sufficiently extravagant, might easily have led on to a doctrine of constructive bigamy, and the present suggested fiction of "life projected forward" or "death postponed" might, if accepted now, soon be coupled with another doctrine, too readily adopted by some—that of constructive murder—with consequences too absurd to be even alluded to here.

Many cases were cited to us as to the effect of section 33 of the Wills Act. I make no doubt they were rightly decided; but, none the less, I am unable to agree that all the language used in them is appropriate. Take, for example, this expression of Cresswell, J., in *Parker's case* to the effect that section 33 "renders the subject of the gift the absolute property of the predeceased devisee or legatee." That to my mind is impossible, for we do not carry anything out of this world. I think the matter is properly put by Kinderaley, V.C., where in *Pearce* v. *Graham*, he says, "The Wills Act simply prolongs by a fiction the life of a legatee for a particular purpose—viz., to prevent a legacy given to a child dying before, but leaving issue which survived, the testator, from lapsing."

The policy of the Wills Act is, moreover, well explained—as it seems to me—by Wigram, V.C., in *Winter* v. *Winter*.

For my part, I believe that the Act, having regard to parental affection, intended to recognize the truth expressed by Gray in his Elegy:

> "E'en from the tomb the voice of nature cries;
> E'en in our ashes live their wonted fires";

and I think it meant no more. I cannot therefore hold that this was in fact property of the deceased, John Scott, jun., which passed on his death—meaning a fictitious death occurring months after his burial—by virtue of section 1 only, of the Finance Act, 1894.

But I have much greater difficulty in dealing with the contention that within section 2 (1) of that Act it is liable to estate duty as being property of which the deceased was at the time of his death competent to dispose. I do not feel that I derive any assistance in construing these words from the terms of the Finance Act, 1894, s. 22 (2) (*a*); but it is to be observed that the Wills Act does not give the devised property to the issue of the devisee, although failing such issue the devise will lapse; and, further, a devise of the residue of his estate will enable the son who dies in his father's lifetime, leaving issue, to effectually dispose of what never would be his own, even—as *Winter* v. *Winter* shows—of property left to him by a will made after his death. I come, therefore, to the conclusion that this estate was property of which John Scott, jun., was "competent to dispose." It remains still to consider whether "at the time of his death" he was so competent. And here, for the reasons I have given already, I understand by the words "his death" his real, natural death, and not any decease by fiction of law. Now, what disposed of the property? Clearly it was the will of John Scott, jun. When? Well, four months after that will first came into operation—four months after the death of the maker of it. Yet that will had no force of its own. All that it could do was what its testator did, and what he did was to make the will. He made it before his death. It spoke with his last breath, and what he could not then say by means of it, that will cannot say nor ever would. Still it had force to devise this estate. That is to say, he who made it was competent to do what it in law effected. Therefore I think that the case comes within the Finance Act, 1894, s. 2. But I have arrived at this opinion after much doubt, and by a train of reasoning in which I am conscious that there may perhaps be some defect. Still I think this conclusion is right; for my learned brother Channell has arrived at the same end by a different road. Estate duty must therefore be paid. How that duty shall be calculated remains to be determined. I am of opinion that this property is, by virtue of the Finance Act, 1894, ss. 5 and 22 (1) (*l*), and by virtue of section 2 of the Settled Land Act, 1882, to be considered as settled property, and therefore is liable only to such duty as can be charged upon it having regard to those provisions. I understand that additional settlement duty is not in this case claimed.

CHANNELL, J., after briefly referring to the facts The question we have to decide is whether estate duty is payable by the petitioners as upon the passing, or supposed passing, of the property on the death of John Scott, jun. During the argument of this case I certainly was of opinion that the question must be determined by ascertaining what was the true legal construction of the material provisions of the Finance Act. These provisions are extremely intricate, and when we came to apply them to the case before us it was very difficult to arrive at any clear conclusion as to their effect. I was, however, then, and I still am, unable to bring myself to the conclusion that the property really did pass on the death of John Scott, jun., even under the definition of property passing given by section 22 (1) (*l*), and certainly not without it. I think that is so whether "passing on the death" means passing in point of time on the death or "passing by reason of the death," as suggested by the Solicitor-General. It seems to me that after the death of John Scott, jun., as before it, the freehold premises remained absolutely the property of John Scott, sen. Nothing had happened either to pass the property in them or to interfere with Scott, sen.'s, absolute right to dispose of them as he pleased. The property neither passed on the death in point of time, nor did it then or ever pass by reason of the death.

It passed by reason of John Scott, sen.'s, death and of his disposition of the property.

The question whether John Scott, jun., was competent to dispose of the property within the meaning of section 2 (1) (*a*) is somewhat more difficult. It is said on the one hand that any man who dies leaving both a parent and a child living is made competent by the Wills Act to dispose of anything which the parent may happen afterwards, during the life of the grandchild, to leave to him by will. But, at most, the son only directs to whom the property shall go if his father chooses to adopt that mode of disposition, and it is really the father who disposes. Further there is a doubt whether to bring the case within section 2 (1) (*a*) there must be power to dispose of the specific freehold houses in question, which is more difficult still to see. I have, however, come to the conclusion, that this case does not turn so much upon the consideration of these clauses of the Finance Act as upon the question of the true construction of the Wills Act. What is the meaning of the devise "taking effect as if the son had died immediately after the father." Several cases on the construction of this section were quoted to us on the argument, and some difficulty was occasioned by the fact that several of them report language to have been used by counsel and by learned judges which cannot be considered literally accurate. It may be, and I think it is the fact, that in none of the cases was the language used by the judges misleading in the particular cases having regard to the facts of those cases, but when the expressions used by the judges are quoted, and it is sought to apply them to other cases, the language used becomes misleading. It is not the fact that the statute placed the son in the same position as if he had survived the father, nor is it literally true to say that the Wills Act "makes the subject of the gift the absolute property of the predeceased legatee or devisee," though it might be true to say that the Act directs that the subject of the gift should be dealt with as if it had been the absolute property of the deceased. Kindersley, V.C., in *Pearce* v. *Graham* states the effect of the statute correctly when he says that the "Act simply prolongs the life of the legatee for a particular purpose —namely, to prevent a legacy given to a child, dying before but leaving issue which survived the testator, from lapsing, and does not prolong the life for any other purpose." But the Act does say just a little more. What the Act does say is that the devise is not to lapse, but is to take effect "as if the son had died after the father." Now, how is this to be carried out? If the son has died intestate his heir takes as he would if the son had in fact survived his father. If the son has made a will containing appropriate words, by residuary devise or otherwise, to carry the property, the devisees take. If the son has died insolvent, the creditors take. So far the matter is fairly clear. But what do they take in each case? And does the Crown take anything? If the son had in fact survived the father the beneficiaries of the son would have taken the property subject to the payment of duties to the Crown. The duties are a charge on the property. If those duties are not to be paid when the devisees get the property by virtue of the Wills Act the beneficiaries will take more than if the son had survived the father. Is this making the devise take effect as if the son had survived the father? It seems to me that it is giving the devise a different effect, and the only way to give it the same effect is to hold that, as the Wills Act gives the property to the devisees of the son as if he had survived his father, it gives it, subject to the same duties, as if the son had survived the father.

I think this must be considered to have been held by the Court of Exchequer in *Executors of Perry* v. *The Queen*. That is one of the cases which contains some expressions not altogether accurate as to the effect of the Wills Act, and various reasons are given by the judges which are perhaps not quite consistent with each other, but the judgments of Kelly, C.B., and Channell, B., appear based mainly on the ground I have stated. I think also that both the cases of *Lord Advocate* v. *Bogie* and *Attorney-General* v. *Loyd* accord with this view of *Perry's case*. Counsel in his reply on behalf of the petitioners contended that the effect of the Wills Act was to write into the will of John Scott, sen., the words, "And if my son dies in my lifetime the said property shall devolve as if my son had died immediately after me." If that were so the case would be similar to *Bogie's case* and *Loyd's case*, and as Lord Watson points out in one case, and Wright, J., in the other, the question would be one of ascertaining the intention of the testator. Did the testator intend by the words used to give the Crown the same duties as if the son had survived? In neither of the two cases did the judge find any indication of such an intention, nor would it be likely that such an intention would exist in fact. But Wright, J., said, and I think Lord Watson probably meant, that the Wills Act stood on a different footing. Whether they and the other judges taking part in *Bogie's case* and *Loyd's case* approved of *Perry's case*, I do not know, but at any rate they did not say anything to shake its authority. Looking at *Perry's case* as turning merely on the construction of the Probate Duty Acts, though binding on us, it is not in point in this case, because the words of the Probate Duty Acts and of the Finance Acts are very different, but looking at it as putting a construction on the Wills Act it is not only binding upon us but in point. I think that, upon my own view of the true construction of the Wills Act and also upon the authority of *Perry's case*, we are bound to hold that the 33rd section of the Wills Act gives to the Crown the same duties as if the son had survived the father, and gives the property to the devisees of the son subject to the payment of the same duties as if the son had survived. That being so I do not think that there is any difficulty in holding that the machinery of the Finance Act applies to the assessment and recovery of the duty.

Estate duty is, in my opinion, payable, and, of course, upon the view I have taken, the settlement question, which would have been one of some difficulty, does not arise. I think there was in fact a settlement by the combined effect of the two wills and of the Wills Act; but I think that effect must be given to it as if the son had survived—that is to say, that it takes effect as a settlement made by the son. The duty out of this property must be the same as if the son had survived. The rate of duty on the property, therefore, will be arrived at by taking the rate applicable to the property when aggregated with the other property of John Scott, jun. I do not know whether the Crown claims any additional duty—that is to say, at a higher rate than paid on the £16,000, the property of John Scott, jun., by reason of the aggregation with it of this freehold property; but I do not think the Crown entitled to such a higher rate on the £16,000. The Wills Act gives the duty on the property passing by virtue of it; but it is difficult to see how it could give a higher duty on other property. This case should be dealt with as coming under section 7 (6) (*a*) and (*b*), which provision happens to fit this case. There must be judgment for the Crown.

*Judgment for the Crown.*

Solicitors, *Crawley, Arnold, & Co.; The Solicitor for Inland Revenue.*

## House of Lords.

From C. A. (England). Nov. 30.

### HAMPTON URBAN COUNCIL v. SOUTHWARK AND VAUXHALL WATER CO. (a.)

*Local government—Rating—General district rate—Reservoir — "Land covered with water" — Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 211, *sub-section* 1 (b).

*A reservoir of a water company held to be "land covered with water" within the meaning of these words in section* 211, *sub-section* 1 (b), *of the Public Health Act,* 1875, *and therefore assessable to general district rates at one-fourth of its annual value.*

*Decision of the* Court of Appeal, 47 *W. R.* 177, [1899] 1 *Q. B.* 273, *affirmed.*

Appeal by the Hampton Urban Council from an order of the Court of Appeal (A. L. Smith, Rigby, and Collins, L.JJ.), affirming the decision of a Divisional Court (Wright and Darling, JJ.).

The case is set out in the court below, 47 W. R. 177, [1899] 1 Q. B. 273.

By section 211 of the Public Health Act, 1875, it is enacted as follows: "With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect . . . (*b*) The . . . occupier of any land covered with water or used only as a canal or towing path for the same . . . shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

The Court of Appeal held that: "The reservoir was 'land covered with water' within the meaning of section 211, sub-section 1 (*b*), of the Public Health Act, 1875."

*Sir Edward Clarke, Q.C.*, and *H. Courthope-Munroe*, for the appellants.

*Cripps, Q.C.*, and *Walter C. Ryde*, for the respondents, were not heard.

Earl of HALSBURY, L.C.—I think if one applies oneself to the particular matter, and only to the particular matter, which your lordships have to decide in this appeal, the question, whether asked in a court of law or in the most popular assembly in the world, must come to this: "Is a reservoir, land covered with water?" I think it is, and I have heard nothing which induces me to suppose that the Legislature used that phrase in any other or different sense from that in which I should understand it as one of the ordinary subjects of the Queen using his own mother-tongue in the ordinary sense. This is "land covered with water," and it seems to me that it would be a very extraordinary thing indeed if, after the use of this language in this sense, not for thirty-eight years only, but ever since the earlier period from which this phrase was derived, one was to find out some new and extraordinary mode of construing these words, which would prevent its being what it is. It is land covered with water. And it is a remarkable thing that when it was put to the learned counsel more than once, "If a reservoir is not land covered with water, what is it?" I heard no other reply to that question than the statement that it is a reservoir.

It is manifest that what it is attempted to do here is to put into the language of the statute by construction words which are not there. The only other meaning, alternative to that given to it by the Court of Appeal, is that you must put into the statute by construction some such words as "land covered with water," which is not made "land covered with water by an artificial construction," or some words to that purport and effect. What foundation there is for taking that liberty with the language of the Legislature, and putting into the statute words which are not there, I am wholly unable to understand.

I confess the thing that puzzles me most about this case is the doubts which appear to have been entertained by the two learned judges below, Wright and Darling, JJ. I have not the least notion what they mean. To my mind the language of the statute is extremely clear, and is not susceptible of any other meaning than that which has been put upon it by the Court of Appeal. The one point which occurred to me as susceptible of doubt was the words which follow, and which Rigby, L.J., has commented upon: "Or used only as a canal or towing path." At first sight that would seem curious, no doubt. If "land covered with water" was enough, why should they have put in the word "canal" too? And if the words "towing path" had not been added, I should have thought it really was curious; but I think the explanation which has been given is quite satisfactory. The thing which was to be rated was the adventure, the whole construction; and if the Legislature had not put in these words this question upon the rating would have arisen; you have got to rate the canal itself—that is to say, that part of the earth on which the water rests—at one rate, and the towing path, which is only ancillary to it, and is only useful as making part of the artificial construction by which the adventure of the company is carried on, at a different rate. Therefore, for these very obvious reasons, the Legislature have not contented themselves by simply abiding by the phrase "land covered with water," but have added to it "canal or towing path for the same."

I am wholly unable to understand on what ground we are asked to disturb or throw any doubt upon the construction of these words which has prevailed for a very considerable period. Speaking for myself, I must say that I should feel very great hesitation upon such a question in attempting to overrule the judgments of the learned judges in the cases which have been cited to us in the Court of Queen's Bench. That was particularly the court in which rating cases were decided, and very often decided under circumstances in which there was no appeal, so that in many cases the decisions were final. And three of those learned judges were judges of very great eminence, and specially familiar with questions of rating. I think this case is abundantly clear. In my opinion, your lordships ought to dismiss the appeal with costs, and I move accordingly.

Lord MACNAGHTEN.—I entirely concur.

Lord ROBERTSON.—I think this is an extremely clear case, and I also concur in the judgment which has been moved.

*Appeal dismissed.*

Solicitors for the appellants, *Kent & Son.*

Solicitor for the respondents, *Lanfear, Tanner, & Lanfear.*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

From C. A. (England). } Nov. 28.

NATIONAL TELEPHONE CO. v. INLAND REVENUE COMMISSIONERS. (a.)

*Inland revenue—Stamp duty—Agreement in consideration of fixed annual payments—"Bond, covenant, or instrument of any kind whatsoever"—"Only or principal or primary security for any annuity" for indefinite period—Stamp Act,* 1891 (54 & 55 *Vict.* c. 39), *Schedule I.*

*By an agreement in writing not under seal, R. agreed to pay a telephone company the sum of £12 per annum for the use of a telephone wire and apparatus which the company was to affix to his house. The rent was to be payable every year in advance, and either party might put an end to the agreement by giving the other three months' notice.*

*Held, that this instrument was within the words "Bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity" for an "indefinite period" in Schedule I. of the Stamp Act,* 1891, *and chargeable with the* ad valorem *duty therein stated.*

*Decision of the* Court of Appeal, 47 *W. R.* 247, [1899] 1 *Q. B.* 250, *affirmed.*

Appeal from an order of the Court of Appeal (A. L. Smith, Rigby, and Collins, L.JJ.) 47 W. R. 247, [1899] 1 Q. B. 250, affirming the judgment, of the Divisional Court, upon a case stated by the commissioners in pursuance of the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13.

On the 10th of February, 1897, an instrument, of which a copy is hereinafter set out, was presented on behalf of the National Telephone Co. (Limited) (hereinafter called the appellants), by Mr. William E. L. Gaine, the company's solicitor, to the Commissioners of Inland Revenue under the provisions of the 12th section of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable. The following is a copy of the instrument, which is upon paper headed "The South of England Telephone Co. (Limited)—Head Offices, 50, Old Broad-street, E.C. No. 900":

"March 9, 1886.

"The undersigned hereby agree with the South of England Telephone Co. (Limited) (subject to above conditions) to pay them the sum of £12 per annum yearly in advance, the first payment to be made on the first day of the month succeeding that in which the wire and apparatus are fixed on the premises of the undersigned, and each subsequent payment to be made on the corresponding day in each and every following year for the use of a private wire between No. 155, North-street and the South of England Telephone Co.'s local exchange system in Brighton.

"Either the company or the lessee may put an end to this agreement by giving to the other three calendar months' notice in writing expiring on the day previous to the rent being due in any year. No verbal notice can be recognized.

"Signature of renter,

"(Signed) SAMUEL RIDLEY.

"N.B.—All rentals are payable yearly in advance, and the first year's rent becomes due on the first day of the month succeeding that in which the wire and apparatus are fixed on the premises of the renter."

The Court of Appeal held that this instrument was liable to an *ad valorem* duty under the head "Bond, covenant, or instrument of any kind whatsoever" in the first schedule to the Stamp Act, 1891, as "being the only or principal or primary security for any . . . sum or sums of money at stated periods for an indefinite period."

*Asquith, Q.C.*, and *Roskill*, for the appellants.

*Sir R. B. Finlay, S.G.* (*Danckwerts* with him), was stopped.

Earl of HALSBURY, L.C.—My opinion upon this matter may be stated as shortly as the Solicitor-General's argument.

I am wholly unable to draw any distinction between what is included before the words "any instrument whatsoever" and those that are behind them. The real truth is that this taxing Act intended, as it appears to me, to apply taxation to every document of this kind; it mentions, in the first instance, those under seal, and then it occurred to the framers of the Act, "Well, but unless we add some words that will bring within the ambit of taxation documents which do exactly the same thing as the instruments under seal, the result will be that whoever does not particularly care about its being an instrument under seal, but wants to effect the same object, will escape taxation by simply omitting the sealing and delivering, and merely signing the document in question." Therefore they added the word "whatsoever," and I think they intended to include everything of that character. My opinion is that this document is of that nature, and that therefore this judgment ought to be affirmed, and I move your lordships accordingly.

Lords MACNAGHTEN, BRAMPTON, and ROBERTSON concurred.

*Appeal dismissed.*

Solicitor for the appellants, *W. E. L. Gaine.*

Solicitor for the respondents, *Solicitor of Inland Revenue.*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

## Court of Appeal.

From Q. B. Div. (A. L. Smith, Collins, and Vaughan Williams, L.JJ.) } Dec. 1.

BAVINS AND ANOTHER v. LONDON AND SOUTH-WESTERN BANK (LIMITED). (a.)

*Banker—Negligence—Order in writing for payment of money—Trover—Conversion—Measure of damages—Money had and received—Bills of Exchange Act,* 1882 (45 & 46 *Vict.* c. 61), *ss.* 3 (1) (2). 11 (2), 73, 82—*Inland Revenue Act,* 1883 (46 & 47 *Vict.* c. 55), *s.* 17.

*An order in writing, directing a bank to pay to the plaintiffs or their order a sum of money conditionally upon the signature by the plaintiffs of a receipt form at the foot of the document, was stolen from the plaintiffs, and taken to the defendant bank for collection on behalf of a customer of theirs. The signature of the plaintiffs had been forged, both on the indorsement and on the receipt, but both signatures were badly written and the name of one of the plaintiffs was written as "Trench" instead of Junior. The defendant bank, without making any inquiries, received the order, collected the amount from the paying bank, and placed it to the credit of their customer. The plaintiffs subsequently gave notice to the defendant bank that the order had been stolen, and claimed*

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

*the amount received by the defendant bank. The account of the customer of the defendant bank had been drawn upon in the interval, but nothing had occurred to disentitle the defendant bank from cancelling the credit given to their customer.*

*Held, that the defendant bank had been guilty of negligence, and consequently could not avail itself of the benefit of section 82 of the Bills of Exchange Act, 1882, as enlarged by section 17 of the Inland Revenue Act, 1883; and that the plaintiffs could recover the amount from the defendant bank as money had and received to the use of the plaintiffs.*

Semble (per A. L. Smith *and* Vaughan Williams, L.JJ.), *that the plaintiffs could also recover the amount as damages for the conversion of the order.*

Appeal of the defendants from the judgment of Kennedy, J., at the trial of the action without a jury.

The action was brought to recover the sum of £69 7s. as damages for the conversion of a certain order for the payment of money, or, in the alternative, for money had and received to the use of the plaintiffs.

The facts were as follows: On the 7th of July, 1898, the Great Northern Railway Co. were indebted to the plaintiffs in the sum of £69 7s.; and the company gave to the plaintiffs in payment of the debt a document in the following terms: "The Great Northern Railway Co., London, the 7th of July, 1898. The Union Bank of London (Limited), No. 2, Prince's-street, Mansion-house, E.C. Pay to J. Bavins, jun., & Sims, the sum of £69 7s. Provided the receipt form at foot hereof is duly signed, stamped, and dated. £69 7s. (Signature of secretary.) (Signature of assistant-secretary.) Received from the Great Northern Railway Co. the above-named sum as per particulars furnished. This receipt is not to be detached from the cheque. Signature . . . . Dated . . . , 189 ." The order was crossed generally. This document was stolen from the plaintiffs before they had either signed the receipt or indorsed it.

On the 15th of July, 1898, the document was brought to the Shoreditch branch of the defendants' bank by a man whose name was unknown, and who was accompanied by a man named Donsala. The wife of Donsala kept an account at the branch, and her husband was in the habit of paying in cheques to her account. The document had been indorsed. The writing of the indorsement was very bad, and it appeared as if some illiterate person had attempted to copy the names of the payees from the face of the document, but had misread the word "junr." as "Trench." The receipt form at the foot of the document had not been filled in, and the bank clerk drew attention to the omission. Thereupon one of the men filled in the receipt and stamped it. The signature to the receipt was in the same form as that of the indorsement.

The document was then received by the defendants for collection, and they credited Mrs. Donsala with the amount. On the 16th of July the defendants received the amount from the Union Bank of London in exchange for the document. The defendants first knew on the 13th of August that the document had been stolen from the plaintiffs and that the signatures were forgeries. Between the 16th of July and the 13th of August Mrs. Donsala's account with the defendants had been drawn upon to an amount exceeding £69 7s.

The defendants relied upon section 82 of the Bills of Exchange Act, 1882, and also contended that if the document was not a cheque within the meaning of that section, the plaintiffs were only entitled to recover nominal damages. The plaintiffs alleged that the defendants had been guilty of negligence.

The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61): Section 82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

Section 73. A cheque is a bill of exchange drawn on a banker payable on demand.

Section 3. (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed and determinable future time a sum certain in money to or to the order of a specified person, or to bearer. (2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

Section 11. (2) An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

Kennedy, J., held that the defendants had not been guilty of negligence, but that by reason of the proviso that the money was not to be paid until the receipt form had been filled up, the document was not an unconditional order to pay, and therefore not a cheque, and that the defendants were not entitled to claim the protection of section 82 of the Bills of Exchange Act, 1882. The learned judge gave judgment for the plaintiffs.

The defendants appealed and gave the plaintiffs notice that at the hearing of the appeal they would rely on section 17 of the Inland Revenue Act, 1883, which had not been pleaded in the defence or relied on at the trial of the action. The Inland Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17 enacts that "Sections 76 to 2, both inclusive, of the Bills of Exchange Act, 1882 . . . shall extend to any document issued by a customer of any banker and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument."

*Herbert Jacobs*, for the defendants.—Assuming that Kennedy, J., was right in holding that this document is not a cheque, it is, nevertheless, a document issued by the customer of a banker, and intended to enable the plaintiffs to obtain payment from such banker, and, therefore, by the combined effect of section 17 of Inland the Revenue Act, 1883, and section 82 of the Bills of Exchange Act, 1882, the defendants have a good defence to the action, unless they have been guilty of negligence. On the question of negligence, Kennedy, J., found, and rightly found, in the defendants' favour. [A. L. SMITH, L.J.—We are of opinion that the defendants were guilty of negligence in dealing with the document without making inquiries, indorsed as it was with a name different from that of the payees.] In any event the defendants are only liable in nominal damages for the conversion of the document. It is a mere authority to pay, and is, of itself, of no value: *Clegg* v. *Baretta*, 56 L. T. Rep. 775, 35 W. R. Dig. 62. The defendants are not liable for money had and received to the use of the plaintiffs. The money received by the defendants was the money of the Union Bank. That bank cannot debit the railway company with the amount, and the railway company are still liable to the plaintiffs: *Wills* v. *Wells*, 8 Taunt. 264; *Rogers* v. *Kelly*, 2 Camp. 123. Lastly the plaintiffs are too late in bringing this action, for the defendants, before

due in respect of the said premises as if the same had been actually paid to such owner as part of such rent." That was repealed by the Act of 1862, and under the Act of 1862, by section 64, provision is made referring to the provisions of the earlier statute, saying that certain works, matters, and things are required to be constructed, made, or executed on the requisition of vestries and district boards by the owners or occupiers of the premises therein referred to —the 73rd and the following sections being the sections in the earlier Act which are applicable in the case of constructing drains—"and in case any such owner or occupier refuse or neglect to commence, proceed with, or complete the same, as the case may be, the vestry or district board are authorised to perform and execute such works, matters, and things, and recover the costs incurred thereby in manner therein provided." It is enacted that in case of any such neglect or default by any person or persons to comply with the order of any vestry or district board to execute any works, matters, or things under any of the said provisions, the person or persons so offending shall forfeit and pay to the vestry certain penalties therein mentioned, and in their discretion they may either execute or perform any such works, matters, or things, and recover the costs and expenses thereof from the owner of the property, as aforesaid, or proceed for and recover the said penalty or penalties, but nothing herein contained shall render any person or persons liable to be proceeded against for the penalty as well as for the costs and expenses of the work. The argument founded upon that, as I understand it, is this, that up to this point the effect of that section is not to render an occupier liable for anything more than damages.

Then we turn to section 96, and we find that that provides that "the 217th, 218th, and 219th sections of the firstly recited Act are hereby repealed, and in lieu thereof it is enacted: "It shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said recited Act or this Act, either from the owner or from any person who, then, or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorized by the recited Act and this Act; and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises as if the same had been actually paid to such owner as part of the rent: provided always, that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him." Then follow some words which I do not think I need read. Then there is the following proviso: "Provided also that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property, whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant."

Now I think it is quite impossible to read that proviso at the end of that section without seeing that the Legislature contemplated that there might be a contract making the tenant liable for that which the landlord was primarily and ultimately liable under the Act and it uses words—with the exception of the words "dues" appearing there instead of the word "duties"—almost corresponding with the words used in the present case when referring to a contract which presumably it was deemed would affect that primary liability of the landlord. Of course I have to look at the exact bargain that was made between the parties.

Now I am sure Mr. Foa will not consider that it is from any disrespect to his argument, which was extremely thorough, that I do not go through the cases that have been cited before me. In the first place it would take far too long, and in the second place I think if I refer to two or three of them that will be quite sufficient. There were two leading authorities, one of *Thompson* v. *Lapworth*, 16 W. R. 312, L. R. 3 C. P. 149, and the other of *Tidswell* v. *Whitworth*, L. R. 2 C. P. 326. In *Thompson* v. *Lapworth* there was a covenant to pay and discharge all taxes, rates, duties, and assessments whatsoever which during the continuance of that demise should be taxed, assessed, or imposed on the tenant or landlord of the premises thereby demised in respect thereof whether parliamentary, parochial, or otherwise, except property or income-tax, and in that case it was held that the amount payable under the Metropolis Management Acts for paving was a duty or assessment assessed or imposed upon the owner in respect of the premises, within the covenant. In that case *Tidswell* v. *Whitworth* was expressly referred to and distinguished, and the learned judge whose judgment has been chiefly referred to in the matter, Willes, J., expressly refers to it, and distinguishes it from the case that was then before the court.

I have been asked to say that *Tidswell* v. *Whitworth* is applicable to the present case, and that *Thompson* v. *Lapworth* is not, and I have been asked to say that *Sweet* v. *Seager*, 5 W. R. 560, 2 C. B. N. S. 119, is also a case not applicable to the present case. Now it is observable that *Sweet* v. *Seager*, though the words used in the covenant are different so far as the Acts of Parliament are concerned, is substantially the same as the present case, and I find that *Sweet* v. *Seager* is a case which has been constantly recognized in the subsequent cases.

Now I come to a case of a much later date—namely, a case which has recently been before the Divisional Court of *Brett* v. *Rogers*, 45 W. R. 334, [1897] 1 Q. B. 525. That is an authority binding upon me, and it is a case in which the learned judges have gone carefully through the cases of *Thompson* v. *Lapworth*, *Tidswell* v. *Whitworth*, and the other cases. There the covenant was "to pay the land tax, sewers rate, and all other taxes, rates, duties, assessments, and impositions, parliamentary, parochial, or otherwise, which now are or shall at any time during this demise be assessed or imposed on or in respect of the said demised premises." I think I am right in saying Mr. Foa did not suggest that the statutory provisions in that case could be fairly distinguished from the statutory provisions in the present. The learned judges in dealing with this covenant said, "We think that the obligation imposed upon the landlord to take up the defective drain and lay a new one, was a duty imposed on her in respect of the demised premises, and is within the words of the covenant."

I cannot distinguish the covenant in that case from the covenant in the present case, except that the word "payable" is subsequently used. I cannot think there is any real distinction to be drawn between the two cases because the words are "pay and discharge" in the present case, and the word is "payable" subsequently following in the other case. I do not think that is a real distinction. I think that the view taken by the learned judges was that it was a case indistinguishable from *Payne* v. *Burridge*, 12 M. & W. 727, and from *Sweet* v. *Seager*, in principle, and that in fact the tenant had by his covenant covenanted to indemnify the landlord

against payments which the landlord would otherwise have to make in respect of duties—in the sense of performable duties neglected — in the sense of "duties" being payments which he had to make.

That being so, even if I thought this covenant did not apply in the present case, I do not see that I could draw any fair distinction between the present case and the case of *Brett* v. *Rogers*, and that I should be wiredrawing if I were to try and draw a distinction between them which would avail the tenant in the present case.

I have used the word indemnity, and I think it is only right to refer to it as Mr. Foa has laid great stress and spoken about this point. He says that we have in the present case no words of indemnity. It appears to me that being paid clear of all deductions and that being followed by a covenant by the tenant to pay and discharge all taxes, rates, duties, and assessments whatsoever payable for or in respect of the premises, with these very large words it is in fact a covenant amounting to a covenant to indemnify the landlord against such of the payments and duties mentioned as would otherwise have fallen upon the landlord. It is not merely a covenant by the tenant to pay such liabilities as the law casts upon himself. As I have said I have not gone through all the cases, but I have carefully followed Mr. Foa's argument founded upon them, and I think I have sufficiently referred to them to show the grounds upon which I base my decision. The tenant is liable to pay for the works done.

From this decision the defendant appealed.

*Edgar Foa*, for the appellant.—The word "duties" in this covenant, being controlled by the expression "payable in respect of the premises," must mean sums of money due, and cannot mean acts to be performed, and is therefore not a word of indemnity. Cases of this kind all refer to those payments for which there is a direct liability on the tenant (like so-called landlord's taxes), and not to those for which there is direct liability on the landlord alone: *Tidswell* v. *Whitworth*. Here there is no liability on the tenant to make the payment, for section 85 of the Act of 1855 is controlled by section 64 of the Act of 1862; and section 96 of the latter Act does not make the tenant liable, but only provides a remedy against him in the nature of a garnishee order: *Allum* v. *Dickinson*, 30 W. R. 930, 9 Q. B. D. 632. In order to make the covenant extend to those payments for which the landlord alone is liable there must be clear and express words to that effect: *Rawlins* v. *Briggs*, 27 W. R. 138, 3 C. P. D. 368; *Hill* v. *Edwards*, Cab. & Ell. 481. Moreover in this case the statute does not empower the vestry to do the work and exact payment in the first instance, but only entitles them to exact payment on the default of the landlord in complying with the notice. It is therefore not a payment "in respect of the premises," but in the nature of a penalty: *Tidswell* v. *Whitworth*.

*Levett, Q.C.*, and *Gatey* were not called upon.

LINDLEY, M.R., said: If anybody could persuade us that Byrne, J.'s judgment was wrong, Mr. Foa is the man to do it, for he has drawn our attention to the authorities and to the sections of the Acts of Parliament with great minuteness, and has addressed to us an argument which is extremely lucid and extremely clear, but after all said and done we must come back to the doctrine with which we have to deal.

Now here is a lease for seven, fourteen, or twenty-one years at a rent of £125, and the lessee of course agrees to pay that, and then he agrees to this: he covenants that he will pay and discharge all taxes, rates, duties, and assessments whatsoever which now are, or hereafter may become, payable for or in respect of the said premises hereby demised or any part thereof whether parliamentary, parochial, or otherwise, except the landlord's property tax. I cannot imagine wider words than those, and it is not language which we always find in the same form. We have not got the word "impositions," and we have not got one or two others which are found in the old forms, but taking the language which is found there, "all rates, taxes, duties, and assessments whatsoever payable for or in respect of the said premises except the landlord's property tax," I do not see very well how it is possible to use much larger language.

Now the facts are that during the tenancy the drains of the premises continued in bad order owing to structural defects, and not owing to the tenant's negligence in repairing, and then notices were given on the 2nd and 12th of November by the parish, stating that the drains were in bad order, and requiring the drains to be reconstructed according to the regulations of the vestry, and then it was done by arrangement between the landlord and the tenant without any other question except as to the expense, of course, and now comes the question as to who is to bear it.

Now the power of the vestry which requires the drains to be put in order, and if not, to do it themselves and recover the money from the owner or occupier, is conferred by section 85 of the Metropolitan Management Act, as modified by the Act of 1862. We are asked to say that section 85 of the Act of 1855 has been repealed by section 64 of the Act of 1862. It has no doubt been modified, but I cannot say it has been repealed. Section 85 is the one which authorizes the vestry to require the drains which are out of order to be put right by serving notices on the owner and occupier. Other portions of it, no doubt, are modified, but when you look to the sections of the Act of Parliament, which I am not going to read in detail, it is impossible, I think, not to come to the conclusion that there is a duty cast by those Acts of Parliament upon the owner or occupier (I do not care which for the moment) to put the drains in order if they receive a proper notice; and there is also a duty under the said Acts of Parliament to compel or oblige the owner or occupier of them (I do not say which at this moment) to pay the expense. I agree with Mr. Foa in his very able argument that, having regard to the language here, "will pay and discharge all duties payable," "duties" here means sums payable pursuant to some duty imposed by an Act of Parliament. The sum which is here payable appears to me to be a duty payable in the sense of a sum payable in respect of a duty.

But, apart from that altogether he wants us here to put in the words "payable by the owner"; in other words, he wants us to say that the only sums payable by the tenant are sums payable in respect of duties other than those imposed upon him peremptorily. That is his whole point. Now, does the language admit of that? If you look at the language apart from the authorities, I venture to say it does not do anything of the sort. The language is perfectly general; it does not say by him, it does not cut down the word "payable"; it is "become payable for or in respect of the premises." Then there is a very notable exception, "except the landlord's property tax," which does throw light upon the general expression so far as it goes. It excludes, to my mind, the narrow construction which we are asked by Mr. Foa to put.

Now, in his despair he comes to the cases, and he says this case is covered by the decision

due in respect of the said premises as if the same had been actually paid to such owner as part of such rent." That was repealed by the Act of 1862, and under the Act of 1862, by section 64, provision is made referring to the provisions of the earlier statute, saying that certain works, matters, and things are required to be constructed, made, or executed on the requisition of vestries and district boards by the owners or occupiers of the premises therein referred to —the 73rd and the following sections being the sections in the earlier Act which are applicable in the case of constructing drains—"and in case any such owner or occupier refuse or neglect to commence, proceed with, or complete the same, as the case may be, the vestry or district board are authorised to perform and execute such works, matters, and things, and recover the costs incurred thereby in manner therein provided." It is enacted that in case of any such neglect or default by any person or persons to comply with the order of any vestry or district board to execute any works, matters, or things under any of the said provisions, the person or persons so offending shall forfeit and pay to the vestry certain penalties therein mentioned, and in their discretion they may either execute or perform any such works, matters, or things, and recover the costs and expenses thereof from the owner of the property, as aforesaid, or proceed for and recover the said penalty or penalties, but nothing herein contained shall render any person or persons liable to be proceeded against for the penalty as well as for the costs and expenses of the work. The argument founded upon that, as I understand it, is this, that up to this point the effect of that section is not to render an occupier liable for anything more than damages.

Then we turn to section 96, and we find that that provides that "the 217th, 218th, and 219th sections of the firstly recited Act are hereby repealed, and in lieu thereof it is enacted: "It shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said recited Act or this Act, either from the owner or from any person who, then, or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorized by the recited Act and this Act; and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises as if the same had been actually paid to such owner as part of the rent: provided always, that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him." Then follow some words which I do not think I need read. Then there is the following proviso: "Provided also that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property, whereof it is or may be agreed that the occupier shall pay and discharge all rates, dues, and sums of money payable in respect of such house, building, or other property, or to affect any contract whatsoever between landlord and tenant."

Now I think it is quite impossible to read that proviso at the end of that section without seeing that the Legislature contemplated that there might be a contract making the tenant liable for that which the landlord was primarily and ultimately liable under the Act and it uses words—with the exception of the words "dues" appearing there instead of the word "duties"—almost corresponding with the words used in the present case when referring to a contract which presumably it was deemed would affect that primary liability of the landlord. Of course I have to look at the exact bargain that was made between the parties.

Now I am sure Mr. Foa will not consider that it is from any disrespect to his argument, which was extremely thorough, that I do not go through the cases that have been cited before me. In the first place it would take far too long, and in the second place I think if I refer to two or three of them that will be quite sufficient. There were two leading authorities, one of *Thompson* v. *Lapworth*, 16 W. R. 312, L. R. 3 C. P. 149, and the other of *Tidswell* v. *Whitworth*, L. R. 2 C. P. 326. In *Thompson* v. *Lapworth* there was a covenant to pay and discharge all taxes, rates, duties, and assessments whatsoever which during the continuance of that demise should be taxed, assessed, or imposed on the tenant or landlord of the premises thereby demised in respect thereof whether parliamentary, parochial, or otherwise, except property or income-tax, and in that case it was held that the amount payable under the Metropolis Management Acts for paving was a duty or assessment assessed or imposed upon the owner in respect of the premises, within the covenant. In that case *Tidswell* v. *Whitworth* was expressly referred to and distinguished, and the learned judge whose judgment has been chiefly referred to in the matter, Willes, J., expressly refers to it, and distinguishes it from the case that was then before the court.

I have been asked to say that *Tidswell* v. *Whitworth* is applicable to the present case, and that *Thompson* v. *Lapworth* is not, and I have been asked to say that *Sweet* v. *Seager*, 5 W. R. 560, 2 C. B. N. S. 119, is also a case not applicable to the present case. Now it is observable that *Sweet* v. *Seager*, though the words used in the covenant are different so far as the Acts of Parliament are concerned, is substantially the same as the present case, and I find that *Sweet* v. *Seager* is a case which has been constantly recognized in the subsequent cases.

Now I come to a case of a much later date—namely, a case which has recently been before the Divisional Court of *Brett* v. *Rogers*, 45 W. R. 334, [1897] 1 Q. B. 525. That is an authority binding upon me, and it is a case in which the learned judges have gone carefully through the cases of *Thompson* v. *Lapworth*, *Tidswell* v. *Whitworth*, and the other cases. There the covenant was "to pay the land tax, sewers rate, and all other taxes, rates, duties, assessments, and impositions, parliamentary, parochial, or otherwise, which now are or shall at any time during this demise be assessed or imposed on or in respect of the said demised premises." I think I am right in saying Mr. Foa did not suggest that the statutory provisions in that case could be fairly distinguished from the statutory provisions in the present. The learned judges in dealing with this covenant said, "We think that the obligation imposed upon the landlord to take up the defective drain and lay a new one, was a duty imposed on her in respect of the demised premises, and is within the words of the covenant."

I cannot distinguish the covenant in that case from the covenant in the present case, except that the word "payable" is subsequently used. I cannot think there is any real distinction to be drawn between the two cases because the words are "pay and discharge" in the present case, and the word is "payable" subsequently following in the other case. I do not think that is a real distinction. I think that the view taken by the learned judges was that it was a case indistinguishable from *Payne* v. *Burridge*, 12 M. & W. 727, and from *Sweet* v. *Seager*, in principle, and that in fact the tenant had by his covenant covenanted to indemnify the landlord

against payments which the landlord would otherwise have to make in respect of duties—in the sense of performable duties neglected — in the sense of "duties" being payments which he had to make.

That being so, even if I thought this covenant did not apply in the present case, I do not see that I could draw any fair distinction between the present case and the case of *Brett* v. *Rogers*, and that I should be wiredrawing if I were to try and draw a distinction between them which would avail the tenant in the present case.

I have used the word indemnity, and I think it is only right to refer to it as Mr. Foa has laid great stress and spoken about this point. He says that we have in the present case no words of indemnity. It appears to me that being paid clear of all deductions and that being followed by a covenant by the tenant to pay and discharge all taxes, rates, duties, and assessments whatsoever payable for or in respect of the premises, with these very large words it is in fact a covenant amounting to a covenant to indemnify the landlord against such of the payments and duties mentioned as would otherwise have fallen upon the landlord. It is not merely a covenant by the tenant to pay such liabilities as the law casts upon himself. As I have said I have not gone through all the cases, but I have carefully followed Mr. Foa's argument founded upon them, and I think I have sufficiently referred to them to show the grounds upon which I base my decision. The tenant is liable to pay for the works done.

From this decision the defendant appealed.

*Edgar Foa*, for the appellant.—The word "duties" in this covenant, being controlled by the expression "payable in respect of the premises," must mean sums of money due, and cannot mean acts to be performed, and is therefore not a word of indemnity. Cases of this kind all refer to those payments for which there is a direct liability on the tenant (like so-called landlord's taxes), and not to those for which there is direct liability on the landlord alone: *Tidswell* v. *Whitworth*. Here there is no liability on the tenant to make the payment, for section 85 of the Act of 1855 is controlled by section 64 of the Act of 1862; and section 96 of the latter Act does not make the tenant liable, but only provides a remedy against him in the nature of a garnishee order: *Allum* v. *Dickinson*, 30 W. R. 930, 9 Q. B. D. 632. In order to make the covenant extend to those payments for which the landlord alone is liable there must be clear and express words to that effect: *Rawlins* v. *Briggs*, 27 W. R. 138, 3 C. P. D. 368; *Hill* v. *Edwards*, Cab. & Ell. 481. Moreover in this case the statute does not empower the vestry to do the work and exact payment in the first instance, but only entitles them to exact payment on the default of the landlord in complying with the notice. It is therefore not a payment "in respect of the premises," but in the nature of a penalty: *Tidswell* v. *Whitworth*.

*Levett, Q.C.*, and *Gatey* were not called upon.

LINDLEY, M.R., said: If anybody could persuade us that Byrne, J.'s judgment was wrong, Mr. Foa is the man to do it, for he has drawn our attention to the authorities and to the sections of the Acts of Parliament with great minuteness, and has addressed to us an argument which is extremely lucid and extremely clear, but after all said and done we must come back to the doctrine with which we have to deal.

Now here is a lease for seven, fourteen, or twenty-one years at a rent of £125, and the lessee of course agrees to pay that, and then he agrees to this: he covenants that he will pay and discharge all taxes, rates, duties, and assessments whatsoever which now are, or hereafter may become, payable for or in respect of the said premises hereby demised or any part thereof whether parliamentary, parochial, or otherwise, except the landlord's property tax. I cannot imagine wider words than those, and it is not language which we always find in the same form. We have not got the word "impositions," and we have not got one or two others which are found in the old forms, but taking the language which is found there, "all rates, taxes, duties, and assessments whatsoever payable for or in respect of the said premises except the landlord's property tax," I do not see very well how it is possible to use much larger language.

Now the facts are that during the tenancy the drains of the premises continued in bad order owing to structural defects, and not owing to the tenant's negligence in repairing, and then notices were given on the 2nd and 12th of November by the parish, stating that the drains were in bad order, and requiring the drains to be reconstructed according to the regulations of the vestry, and then it was done by arrangement between the landlord and the tenant without any other question except as to the expense, of course, and now comes the question as to who is to bear it.

Now the power of the vestry which requires the drains to be put in order, and if not, to do it themselves and recover the money from the owner or occupier, is conferred by section 85 of the Metropolitan Management Act, as modified by the Act of 1862. We are asked to say that section 85 of the Act of 1855 has been repealed by section 64 of the Act of 1862. It has no doubt been modified, but I cannot say it has been repealed. Section 85 is the one which authorizes the vestry to require the drains which are out of order to be put right by serving notices on the owner and occupier. Other portions of it, no doubt, are modified, but when you look to the sections of the Act of Parliament, which I am not going to read in detail, it is impossible, I think, not to come to the conclusion that there is a duty cast by those Acts of Parliament upon the owner or occupier (I do not care which for the moment) to put the drains in order if they receive a proper notice; and there is also a duty under the said Acts of Parliament to compel or oblige the owner or occupier of them (I do not say which at this moment) to pay the expense. I agree with Mr. Foa in his very able argument that, having regard to the language here, "will pay and discharge all duties payable," "duties" here means sums payable pursuant to some duty imposed by an Act of Parliament. The sum which is here payable appears to me to be a duty payable in the sense of a sum payable in respect of a duty.

But, apart from that altogether he wants us here to put in the words "payable by the owner"; in other words, he wants us to say that the only sums payable by the tenant are sums payable in respect of duties other than those imposed upon him peremptorily. That is his whole point. Now, does the language admit of that? If you look at the language apart from the authorities, I venture to say it does not do anything of the sort. The language is perfectly general; it does not say by him, it does not cut down the word "payable"; it is "become payable for or in respect of the premises." Then there is a very notable exception, "except the landlord's property tax," which does throw light upon the general expression so far as it goes. It excludes, to my mind, the narrow construction which we are asked by Mr. Foa to put.

Now, in his despair he comes to the cases, and he says this case is covered by the decision

in *Tidswell* v. *Whitworth*, to which he has referred at considerable length. I am bound to say that the language here, if not wider than the language in that case, would cause considerable difficulty. The language here is wider, and if we look at the cases decided since *Tidswell* v. *Whitworth* we cannot help seeing that in this case there is language to make it wider and to take it out of *Tidswell* v. *Whitworth*. It seems to me, having regard to this language, we should not only be introducing difficulty in the cases cited by Mr. Foa if we did not take that view, but we should also be introducing confusion if we did not do it. In every case where the word "duties" has been introduced, the construction has been against the tenant and in favour of the landlord. Mr. Foa is justified in saying that in almost all of these cases where the word "duties" is found, there is a money payment imposed upon the landlord or something of that kind. Well, if you look at the decisions—especially *Brett* v. *Rogers*, which he asked us to overrule, but which, I think, is quite right—you will see that in the covenants the word "duty" is inserted. I think Byrne, J., is quite right, and we should be splitting hairs and splitting straws, which we had better not do, if we differed from him; we should do a great deal more mischief than we should do good, and I think, therefore, this appeal should be dismissed.

JEUNE, P.—I am of the same opinion. The learned judge put his main decision on the case of *Brett* v. *Rogers*. Mr. Foa very fairly in his argument challenged that case and said it was wrong, and I do not think he could have taken any other course. It appears to me in the case of *Brett* v. *Rogers* the very ground was traversed which he has sought to traverse in this case. In the case of *Brett* v. *Rogers* the case of *Tidswell* v. *Whitworth* was referred to, and the peculiarity of that case was pointed out and the answer given; and I think the true answer was, that if the covenant in that case contained the word "duties," it is quite inconsistent with the reasoning of the judgment. That appears to me to sum the whole matter up; and in this case it seems to me they have deliberately and of set purpose enlarged the covenant, such as it was, in the case of *Tidswell* v. *Whitworth*, for the express purpose of avoiding the *ratio decidendi* in that case. The moment you come to that point of view, and look at the word "duties" as enlarging that covenant, as the Master of the Rolls has pointed out, and as including sums payable in respect of duty, it appears to me that those who drew the covenant showed that they knew what they were about in avoiding the decision of *Tidswell* v. *Whitworth*, and that the case of *Brett* v. *Rogers* was rightly decided; and I think, in those circumstances, the judgment of the learned judge below was quite right, and should be affirmed, and the appeal dismissed.

ROMER, L.J.—The covenant in this case is peculiarly worded. The numerous cases founded on cases of this class are not easily reconciled, and give rise to fine distinctions. In the state of the facts, I feel myself at liberty to construe this covenant in accordance with what appears to me its true meaning. I think that this covenant is not limited to taxes, rates, duties, and assessments payable by the tenant in respect of the premises, but is general, and means taxes, rates, duties, and assessments payable by either landlord or tenant in respect of the premises; and, further, I think that in this covenant the word "duty" covers the sums that are payable in this case, and for these reasons I agree in thinking that Byrne, J.'s, decision was right, and ought to be affirmed.

*Appeal dismissed.*

Solicitors, *Rundle & Hobrow; Farlow & Fuller.*

From Q. B. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — Nov. 22.

ATTORNEY-GENERAL v. CLARKSON. (*a.*)

*Inland revenue — Settlement estate duty — Contingent settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5 (1) (a)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2 (1)—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 14.

*The construction put on section* 5 (1) *of the Finance Act*, 1894, *in* Attorney-General *v.* Fairley, 45 *W. R.* 589, [1897] 1 *Q. B.* 698—*viz., that a contingent settlement of property is a settlement within the meaning of the section—has been adopted by the Legislature in section* 14 *of the Finance Act*, 1898, *and will not now be questioned by the courts.*

This was an appeal against a decision of Wills and Bruce, JJ., sitting as a Divisional Court.

The question involved was whether property contingently settled is liable to estate duty under section 5 (1) of the Finance Act, 1894.

The facts were as follows: The testator, the late Mr. Peter Robinson, died in 1895. By his will he bequeathed £30,000 to each of three of his sons "to be paid to them respectively if and when they respectively shall attain the age of twenty-five years," with interest in the meantime. In case either of the sons should die under twenty-five leaving issue, his legacy was to be held in trust for his children. But in case either of the sons should die under twenty-five without leaving issue his legacy was to fall into the testator's residuary personal estate. And the testator gave the residue of his estate on trust for such of his seven other children—four of whom were daughters and three sons—"as, being male, attain the age of twenty-five years, or, being female, attain that age or marry, in equal shares as tenants in common." The share of any of the children who was a daughter was not to vest absolutely in her, but was to be retained by his trustees upon the usual trusts of a marriage settlement for the benefit of the daughter, her husband, and children. In case any of the daughters should die in the testator's lifetime leaving issue living at his death, the share thereinbefore directed to be held upon trusts for her and her issue, and the income thereof, was to be held upon the same trusts as if the daughter had died immediately after the testator. If any of the three sons should die in the testator's lifetime leaving a child or children living at the testator's death, the share thereinbefore bequeathed in trust for him, and the income thereof, was to be held in trust for his children or child who, being sons or a son, should attain twenty-one, or, being daughters or a daughter, should attain that age or marry, and if more than one in equal shares, and if there should be no such child to go by way of addition to the share or shares of the others or other of the testator's children. Two of the three first-mentioned sons attained twenty-five before the death of the testator; the third attained twenty-five in August, 1897. One of the seven secondly-mentioned children died before the testator and under twenty-five. The other six were living at the time of the testator's death, and were all unmarried. One of the daughters had since married, but all the six were still under twenty-five.

In these circumstances, the Commissioners of Inland Revenue claimed the payment of settlement estate duty on the whole of the residue of the testator's estate, including the sum of £30,000 contingently bequeathed to the son who attained twenty-five in

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

August, 1897. The appellants, who were trustees and executors of the will, contended that no such duty was payable.

By the Finance Act, 1894, s. 5, sub-section 1, "Where property in respect of which estate duty is leviable is settled by the will of the deceased, or, having been settled by some other disposition, passes under that disposition on the death of the deceased to some person not competent to dispose of the property, (*a*) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased." By section 22, sub-section 1, "(*h*) The expression 'settled property' means property comprised in a settlement. (*i*) The expression 'settlement' means any instrument, whether relating to real property or personal property, which is a settlement within the meaning of section 2 of the Settled Land Act, 1882, or if it related to real property would be a settlement within the meaning of that section." By the Settled Land Act, 1882, s. 2, "Any deed, will, . . . or other instrument . . . under or by virtue of which instrument . . . any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement." (4) "The determination of the question whether land is settled land for purposes of this Act or not is governed by the state of facts and the limitations of the settlement at the time of the settlement taking effect." By the Finance Act, 1898, s. 14, "Where, in the case of a death occurring after the commencement of this Act, settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property shall be repaid."

The Divisional Court, following the decision in *Attorney-General* v. *Fairley*, held that the claim for estate duty was well founded.

The defendants appealed.

*Haldane, Q.C.*, and *Danckwerts*, for the appellants, argued that to constitute a settlement within the meaning of the Act the property must be settled on persons "by way of succession."

They referred to *Attorney-General* v. *Fairley*, 45 W. R. 589, [1897] 1 Q. B. 698; *In re Pocock's Contract*, 44 W. R. 247, [1896] 1 Ch. 302; *In re Morgan*, 31 W. R. 948, 24 Ch. D. 114; *In re Burdin's Will*, 28 L. J. Ch. 840, 8 W. R. Ch. Dig. 35; *In re Goodwin's Settled Estates*, 10 W. R. 612, 3 Giff. 620; *In re Shepheard's Settled Estate*, L. R. 8 Eq. 571, 18 W. R. Ch. Dig 122; *Collett* v. *Collett*, 14 W. R. 446, L. R. 2 Eq. 203; *Attorney-General* v. *Owen*, [1899] 2 Q. B. 253, 47 W. R. Dig. 73; *In re Mundy and Roper's Contract*, 47 W. R. 226, [1899] 1 Ch. 275, *Earl Cowley* v. *Inland Revenue Commissioners*, 47 W. R. 525, [1899] A. C. 198; *Attorney-General* v. *Coulson*, [1899] 2 Q. B. 253, 47 W. R. Dig. 74; *In re Webber*, *Gribble* v. *Webber*, 44 W. R. 489, [1896] 1 Ch. 914.

*Sir R. B. Finlay, S.G.* (*Vaughan Hawkins* with him).—It is impossible to argue that estate duty would not have been payable if this death had taken place since the Finance Act, 1898. The Legislature has in section 14 of that Act adopted the construction put on the Act of 1894 in *Attorney-General* v. *Fairley*. [He was stopped by the court.]

LINDLEY, M.R.—The question we have to decide is one of some difficulty, but I am bound to say that I think the argument for the appellants, ingenious as it is, is not conclusive, and it is not really open to us to accede to it. The real question, and the only question we have to consider (although it involves an investigation into other matters) is this: Whether the property in respect of which estate duty is claimed—that is, the residuary estate of Mr. Peter Robinson, who died in October, 1895—is settled by his will? That is what we have got to consider and to determine. If it is, then by section 1 "a further estate duty" (that is, in addition to the estate duty) "called settlement estate duty on the principal value of the settled property" (that is, the property settled by his will, if any, of course) "shall be levied at the rate hereinafter specified, except where," and so on.

Now if we look at the will I cannot possibly say that in ordinary conveyancer's language this residuary estate is not "settled." The will has been read so often I will not take up time by going through it again, but it strikes me that in ordinary language the residuary estate certainly is settled. But then it is argued very forcibly that we must look and see whether it was settled on any persons in succession when the will came into operation—that is, on the testator's death. That is got at by turning to section 22 of the same Finance Act, and to the Settled Land Act, 1882, which contains the definition of "settlement" and of "settled land."

Well, now, having listened to that argument I will concede that it raises a very nice question, whether this property can be regarded as governed by that 4th clause (which I am not at all convinced about) and whether it can be regarded as settled in succession.

Now it stands in this way. The Divisional Court has decided in *Attorney-General* v. *Fairley*, that upon the true construction of section 5, having regard to section 22 and to section 2 of the Settled Land Act, settlement estate duty is payable on property settled in the same manner as this, and we are asked to overrule that decision. Very well. On looking at it I not convinced that the appellants would have succeeded in inducing us to overrule it, even if we had not that subsequent Act of Parliament which I will refer to presently. I will concede that it is an exceedingly nice point, and by no means free from difficulty, but as we have not heard the other side upon it I will say no more. But admitting this difficulty, it appears to me that section 14 of the Act of Parliament passed in 1898 concludes the question. It is very true that the Act of 1898 does not apply to this particular case, because Mr. Peter Robinson died in 1895 and the Act applies to deaths occurring after the commencement of the Act. But the section, as it seems to me, recognizes the construction which has been put by the courts upon the Finance Act of 1894 and makes the contention of the appellants quite untenable.

Section 14 says: "Where in the case of a death occurring after the commencement of this Act settled estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen and cannot arise, the said duty paid in respect of such property shall be repaid." Now, just consider what that means. In substance it proceeds upon the assumption that the decision in *Attorney-General* v. *Fairley* was right, and affirms it. It adopts the construction put by that decision upon section 5, and the sections of the Act of 1882 which are incorporated in the Act of 1894, and says in unmistakable language: "The duty must be paid before it is known whether the contingency will or will not arise. If you have a property settled on a contingency you must pay the duty, and if you can afterwards satisfy us that the contingency has not arisen

and cannot arise, then we will repay the duty. Well, if that is the construction of section 5 which has been adopted by Parliament, how can we say that it was wrong when the testator died in 1895 and is right after the Act of 1898? We cannot do that. It appears to me that section 14 of the Act of 1898 is a Parliamentary adoption of the construction put by the court on section 5 of the Act of 1894. This construction may work oppressively, because there is no provision for restoring the money which, in the event which has proved to have happened, ought not to have been taken from the taxpayer, and Parliament has said, "We will take it and see what happens, and if it so happens that it ought not to have been paid, we will refund it." It is easy to understand the reason for that, because, if the Inland Revenue did not get the money in that way they could not tell if they would ever know whether the contingency had or had not happened. One sees the reason for that. In the face of section 14 it appears to me that we cannot give effect to the doubt which the appellant's counsel has raised as to meaning of the word "settled." I do not say that we should have arrived at the same conclusion without the Act of 1898, but, with that Act before us, it is not possible to adopt the argument.

Sir F. H. JEUNE, P.—I am of the same opinion. I should have had great doubt whether the decision in *Attorney-General* v. *Fairley*, was right. I was much impressed by the argument of Mr. Haldane, and especially by that of Mr. Danckwerts, upon the use of the words "by way of succession." But, having regard to that Act of 1898, it seems to me that it is impossible for us to take any other view of the construction of section 5 than that which in my opinion the Legislature has imposed upon us. Our duty is to interpret the meaning of the Legislature, and if the Legislature in one Act has used language which is admittedly ambiguous, and in a subsequent Act has used language which proceeds upon the hypothesis that a particular interpretation is to be placed upon the earlier Act, I think the judges have no choice but to read the two Acts together, and to say that the Legislature has acted as its own interpreter of the earlier Act. Taking that view, I have no doubt that our present decision must be in accordance with that of the Divisional Court in *Attorney-General* v. *Fairley*.

ROMER, L.J.—I need only add that I agree with the judgment of the Master of the Rolls.

*Appeal dismissed.*

Solicitors, *Capron, Dalton, Hitchins, & Brabant; Solicitors to Inland Revenue.*

---

From Chan. Div. (Lindley, M.R., Jeune, P., and Romer, L.J.) — Oct. 30, 31; Nov. 9.

WALTER *v.* LANE. (*a.*)

*Copyright — Verbatim report of speech—"Author"— Copyright Act*, 1842 (5 & 6 *Vict. c.* 45).

*A reporter who takes down a speech in shorthand and afterwards corrects it for publication, making the most accurate report he can of the speaker's words, is not an "author" within the meaning of the Copyright Act*, 1842; *though a reporter who recasts a speech, giving the substance of it in his own language, would be.*

*In the former case, therefore, neither the reporter nor his assignee can acquire copyright in the report by first publication.*

Appeal from North, J.

In June, 1899, the defendant published a book which he called "Appreciations and Addresses—Lord Rosebery," and which consisted of reports of speeches delivered in public by the Earl of Rosebery on various occasions. The plaintiffs, who were the proprietors of the *Times* newspaper, then brought this action, seeking to restrain the publication of the book on the ground that five of the "addresses" were practically exact copies of the *Times* reports of Lord Rosebery's speeches, and also claiming a declaration that the plaintiffs were entitled to the copyright in the reports of the five speeches.

It was admitted that whatever copyright had originally vested in the reporter had passed to the *Times*. Lord Rosebery took no part in the controversy.

The reporter, who gave evidence on behalf of the plaintiffs, thus stated the course of procedure which was usually adopted in preparing reports of such speeches for the *Times*, and which had been followed in the present case: "In the course of our duty the reporters of the *Times* have to exercise their judgment and skill so as to represent in a form fit for publication the features of the meetings and the material parts of and the sense of the speeches made at them. This involves considerable skill and labour. Notes of the proceedings and speeches are taken in shorthand, which are afterwards carefully corrected and revised, and written out and punctuated fit for publication."

The plaintiffs moved, before North, J., for an *interim* injunction restraining the publication of copies of their reports.

North, J., holding that the reporter acquired copyright in the report, granted the injunction, and the defendant appealed. It was agreed that the appeal should be treated as an appeal from a judgment at the trial of the action.

*Birrell, Q.C.*, and *T. E. Scrutton*, for the appeal, referred to *Caird* v. *Sime*, 36 W. R. 199, 12 App. Cas. 326; *Kelly* v. *Morris*, 14 W. R. 496, L. R. 1 Eq. 697; sections 2, 3, 18 of the Copyright Act, 1842; *Sweet* v. *Benning*, 3 W. R. 519, 16 C. B. 459; *Leslie* v. *Young*, [1894] A. C. 335; *Exchange Telegraph Co.* v. *Gregory*, [1896] 1 Q. B. 147, 44 W. R. Dig. 44; *Walter* v. *Steinkopff*, 40 W. R. 599, [1892] 3 Ch. 489; *Boucicault* v. *Chatterton*, 25 W. R. 287, 5 Ch. D. 267; *Wilkins* v. *Aikin*, 17 Ves. 422; *Trade Auxiliary Co.* v. *Middlesborough Tradesmen's Protection Association*, 37 W. R. 337, 40 Ch. D. 425; *Maple & Co.* v. *Junior Army and Navy Stores*, 31 W. R. 70, 21 Ch. D. 369; Copinger on Copyright (3rd ed.), p. 66, citing *Mackenzie* v. *Alexander*, 9 Ct. of Sess. Cas. (2nd series), 748.

*Henry Terrell, Q.C.*, and *R. F. MacSwinney*, for the plaintiff, referred to *Lamb* v. *Evans*, 41 W. R. 405, [1892] 3 Ch. 462, [1893] 1 Ch. 218; *Butterworth* v. *Robinson*, 5 Ves. 709; *Sweet* v. *Maugham*, 11 Sim. 51; *Sweet* v. *Benning*, 3 W. R. 519, 16 C. B. 459; *Hodges* v. *Welsh*, 2 Ir. Eq. 266; *Wood* v. *Boosey*, 16 W. R. 485, L. R. 3 Q. B. 223; and *Hinton* v. *Donaldson*, 12 App. Cas. 334*n*.

*Birrell, Q.C.*, replied.

*Cur. adv. vult.*

Nov. 9.—LINDLEY, M.R., read the judgment of the court, after stating the material facts: Now, the case turns on the true construction of the Copyright Act, 1842 (5 & 6 Vict. c. 45). That Act defines "copyright" and "book" (by section 2), and confers copyright on every "author" of a book or his assigns (by

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

section 3). Periodical publications are dealt with in section 18. The Act contains no definition of "author," but it confers copyright on the authors of books first published in this country. There can be no copyright in what is not published in a book; but it does not follow that the first person who publishes a book acquires a copyright in it. The meaning of the word "author" as used in the Act must be gathered from its own language and the decisions upon it. The word occurs constantly throughout the Act, but nowhere is it used in the sense of a mere reporter or publisher of another man's verbal utterances. It is plain that a person who is not the author of a work may nevertheless be the proprietor of the copyright in it; for example, in the ordinary case of an assignment of copyright. The author is one person, the proprietor of the copyright is another. The expression "proprietor of copyright" constantly occurs in the Act. Sometimes the expression clearly includes author; sometimes it as clearly does not, but means his assigns. The latter part of section 3, which relates to the publication of books after the death of their authors, shows that authors and first publishers are by no means synonymous expressions. Again, section 16, which relates to actions for infringement and objections to the title of the plaintiff, shows that authors and first publishers may stand on different footings. The wording of these sections justifies the view that the owner of an unpublished manuscript, although not the author of it, acquires copyright in it by first publishing it. That has been decided in Scotland, and the cases are referred to in Phillips on Copyright, pp. 55, 56. The author of an unpublished manuscript has no copyright in it, but he has a right to acquire copyright in it; and this right he may impliedly transfer to anyone to whom he sells or gives the manuscript. Further, the author who sells or gives away an unpublished manuscript composition of his own may be fairly inferred to transfer his own right to publish it, unless he expressly or impliedly prohibits the publication of the manuscript which he sells or gives. This is intelligible, but it does not carry the plaintiffs far enough. A thief or other unlawful possessor of an unpublished manuscript would not acquire copyright in it by first publishing it. He would not be the author or proprietor of the manuscript.

Again, Lord Rosebery had no copyright in his speech; and, although he could have acquired copyright in it by putting it into writing, or printing and publishing it, he did not do so; and there is no evidence whatever to justify the inference that he transferred to the plaintiffs his right to acquire the copyright in his own compositions, whether written or verbal. The plaintiffs do not derive their title to their publication from Lord Rosebery. Section 18 of the Act refers to copyright in what is printed in newspapers and periodical publications. Unless otherwise agreed, the copyright in such matter belongs to the author. But the publisher or proprietor of the newspaper can himself obtain the copyright in any article published in the newspaper, &c., if he employs someone to "compose" what is published on the terms that the copyright shall belong to the publisher or proprietor. The word "compose" here cannot mean copy or write from dictation; it obviously means compose in the sense of being the author of the matter published. This is made perfectly clear by the language of the proviso, which prevents the publisher or proprietor of the newspaper, &c., from publishing the article in a separate form without the consent of the "author," and which entitles the author to publish it himself in a separate form. The "author" here is the person employed to "compose" the article. The more closely the Act is studied the more clearly it appears that, in order that the first publisher of any composition may acquire the copyright in it, he must be the "author" of what he publishes, or he must derive his right to publish from the author by being the owner of the manuscript or in some other way.

It was contended, and North, J., took the view, that although the reporter had no copyright in the speech, he was entitled to copyright in his report of it. But we cannot follow this. The report and the speech reported are, no doubt, different things, but the printer or publisher of the report is not the "author" of the speech reported, which is the only thing which gives any value or interest to the report. The printer or reporter of a speech is not the "author" of the reported speech in any intelligible sense of the word "author." To hold that every reporter of a speech has a copyright in his own report would be to stretch the Copyright Act to an extent which its language will not bear and which the Legislature obviously never contemplated. The Act was passed to protect authors, not reporters. Moreover, although it may be that reporters and their employers ought to be protected from the unauthorized appropriation of their labours by others, it by no means follows that Parliament would place reporters and their employers on the same footing as authors. It is only by treating reporters as authors of what they report (which they clearly are not) that they can be brought within the existing Copyright Act.

Although we have no sympathy with the defendant we are quite unable to decide in favour of the plaintiffs. Plausible as are the arguments addressed to the court on their behalf, these arguments are all based on the untenable doctrine that, for the purpose of copyright, reporters are authors. The analogy of directories, road-books, maps, &c., is, in our opinion, wholly misleading. There, each man who himself makes a directory, &c., and publishes it, is the author of what he publishes. The reporter of a speech is not. The distinction is all-important, but it is only by wholly ignoring it that the decisions on directories, &c., can be invoked by the plaintiffs.

If the reporter of a speech gives the substance of it in his own languge; if, although the ideas are not his, his expression of them is his own and not the speaker's, with immaterial differences, the reported speech would be an original composition, of which the reporter would be the author, and he would be entitled to copyright in his own production. This is the ground on which copyright in law reports is based. They are by no means mere transcripts of judgments delivered in court. But we have not to deal with speeches re-cast by the reporter. He has reproduced to the best of his ability not only the ideas expressed by the speaker, but the language in which the speaker expressed those ideas. In other words, we are dealing with the most accurate report of the speaker's words which the reporter could make. No doubt it requires considerable education and ability to make a good report of any speech. But an accurate report is not an original composition, nor is the reporter of a speech the author of what he reports.

The appeal must be allowed, and the action dismissed.

*Appeal allowed.*

Solicitors, *Upton, Atkey, & Co.; Soames, Edwards, & Jones.*

## High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } Dec. 14, 15.

BARSHT v. TAGG. (a.)

*Vendor and purchaser—Conditions of sale—Construction—Liability for expenditure on property—Expense of compulsory sanitary work before completion—Public Health (London) Act,* 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 141.

*Conditions of sale provided for completion of the purchase on a certain day, and for the apportionment of rents, rates, taxes, and outgoings up to that day, and also in the event of completion being delayed beyond such day for the purchase-money bearing interest or, at the vendor's option, he to receive the rents up to the day of actual completion of the purchase.*

*Held, that in the event of completion being delayed beyond the appointed day the vendor had the option of either claiming interest and accounting to the purchaser for rents since the appointed day, or of keeping all sums in fact received by the vendor since that day from tenants; but there being no words expressly relieving the purchaser from the obligation to discharge outgoings after the appointed day, and no ground for inserting anything by implication, the expense of complying with a sanitary notice under the Public Health (London) Act,* 1891, *after the appointed day and after the title having been accepted, must be borne by the purchaser.*

Action.

This was an action by a purchaser for specific performance of a contract annexed to the conditions of sale in respect of three leasehold houses, known as 167, 168, and 169, Elwin-street, Hackney-road, Middlesex, sold by auction at the Mart, on the 7th of July, 1898, the three houses comprising Lot 5 in the particulars of sale.

The third condition of sale was as follows: "Each purchaser is, at the close of the sale to him, to pay down a deposit of £10 per cent. on the amount of his purchase-money, and to sign an agreement in the form subjoined to these conditions for the completion of his purchase according to these conditions, and to pay the remainder of his purchase-money on the 11th day of August, 1898, at the office" of the vendor's solicitor, "at which time and place the purchases are to be completed, and a purchaser paying his purchase-money is as from that day to be let into possession or receipt of rents and profits, and up to that date all rents, rates, taxes, and outgoings are (if necessary) to be apportioned, and such apportioned rents shall be paid on completion by such purchaser to the vendor. If, from any cause whatever, other than wilful default on the part of the vendor, the completion of the purchase is delayed beyond the before-mentioned day, the remainder of the purchase-money is to bear interest at the rate of £6 per cent. per annum from that day to the day of the actual payment thereof, or, at the option of the vendor, he may receive the rents and profits up to the day of the actual completion of the purchase. The property shall, as from the day of sale, be at the sole risk of the purchaser, and the vendor shall not incur any liability by reason of its then or subsequently becoming or remaining untenanted, uninsured, or deteriorated."

The plaintiff paid a deposit of 10 per cent. and a title was made out to his satisfaction and was accepted before the 11th of August, but the plaintiff was not then in a position to complete, and did not complete, and the defendant had ever since remained in possession of the property.

On the 9th of November, 1898, notices were served under the Public Health (London) Act, 1891, upon the defendant, as "owner" of the three houses forming Lot 5, that nuisances existed on the houses, the nature of the alleged nuisances being specified in the notices, which required the nuisances to be abated. The defendant, without waiting for any further proceedings to be taken by the public authority, caused the requisite work to be done to the houses and paid the cost of the work, amounting to £24 17s. 3d.

The plaintiff insisted that if the defendant retained the rents and profits since the 11th of August the defendant ought himself to pay this sum, and, as the defendant refused to complete on these terms, brought the above action.

*Buckmaster*, for the plaintiff.—Section 4 of the Public Health (London) Act, 1891, throws the liability on the vendor, as he is in receipt of the rents, and is therefore "owner" within the Act: see section 141. *Tubbs* v. *Wynne*, [1897] 1 Q. B. 74, 45 W. R. Dig. 168, shows that the expense on the work ordered to be done would have been "outgoings" within the third condition of sale. [*Eve, Q.C.*, referred to *Carrodus* v. *Sharp*, 20 Beav. 56.] The meaning of this condition is that the vendor is to be entitled to the benefit of the rents, less outgoings, until the actual day of completion, and the condition ought to be construed as though the actual day of completion was put in place of the day named in the contract.

*Eve, Q.C.*, and *Earle*, for the defendant.—The condition only provides expressly for apportionment of outgoings up to the 11th of August, 1898, and on the true construction there is nothing to relieve the purchaser from subsequent outgoings including these expenses. They are not charged on rents and profits.

They referred to Key and Elphinstone's Conveyancing (6th ed.). vol. 1, p. 240, with regard to the form of the condition.

COZENS-HARDY, J., after stating the facts, continued as follows: I think it is settled law that in the absence of any stipulation on the subject the vendor must bear all expenses and outgoings of property sold down to the time when a good title was first shown, so that the purchaser could prudently take possession, and as from that time all such expenses and outgoings must be borne by the purchaser, and the purchaser must also pay interest on his unpaid purchase-money from that time: see *Carrodus* v. *Sharp*. The sum in question is an "outgoing" to which this principle would be applied: see *Tubbs* v. *Wynne*. As the title was accepted on or before the 11th of August, I think that, in the absence of any stipulation, the plaintiff would have been entitled, on the one hand, to the rents and profits as from that date, and, on the other hand, would have been bound to repay the sum which the defendant has paid in respect of these outgoings. The question which I have to decide is whether to any, and if so what, extent the position of the parties is altered by the express stipulation contained in condition 3. Now that condition distinctly provides that, if completion takes place on the 11th of August, all rates, taxes, and outgoings are to be apportioned, and that the purchaser is to pay to the vendor an apportioned part of the current rents which have not yet been received but which in due course the purchaser will receive from the tenants. If, however, the purchaser is not ready to complete on that day, what is to happen? It is clear that the vendor must remain in possession until completion, and it seems to me that an option is given to the vendor. He may say, "You must pay

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

me 6 per cent. interest, and I will account to you for the rents and profits since the 11th of August"; or he may say, "I have in my pocket a certain sum which I have received from tenants since the 11th of August. I will keep that sum and make no claim against you for interest." I do not think that in that event he can require the purchaser to make any payment in respect of the apportioned part of the current rents. He can only retain so much of the rents and profits as he has in fact received up to the actual completion. Is there anything in this condition to relieve the plaintiff from the obligation to discharge the outgoings? I think not. I cannot regard the second sentence of the condition as simply making the first sentence applicable to the actual date of completion whenever it may be. There are not in it any words about outgoings or apportionment, and I think it would be wrong to insert them by implication. I may observe that in Key and Elphinstone's Precedents the words "less outgoings" are expressly added. The result is that I think the plaintiff is not entitled to specific performance except on the footing of paying to the defendant, in addition to the balance of the purchase-money, the sum of £24 17s. 3d. I presume the plaintiff elects to complete on that footing.

Solicitors, *Harris & Chetham; Edward Betteley.*

---

Chan. Div. } Farwell, J. } Nov. 21, 22, 27.

*In re* STEAD.

WHITHAM *v.* ANDREW. (*a.*)

*Will—Secret trust—Joint tenants—Notice to one only.*

*A secret trust of property bequeathed absolutely to two persons as joint tenants communicated only to one of them is not binding upon the other, unless it is made upon the faith of an antecedent promise by the one to whom the communication is made.*

Action with witnesses for a declaration of the rights of parties interested in the estate.

Maria Stead, by her will dated the 29th of April, 1897, after giving a number of specific and pecuniary legacies, devised and bequeathed her residuary real and personal estate to her executors and trustees, the defendants John Marsh and Mrs. Andrew and the plaintiff, on trust to sell the same, and after payment out of the proceeds, of expenses debts and legacies to hold the remainder in trust for the plaintiff and the defendant Mrs. Andrew absolutely.

The testatrix died on the 1st of May, 1898, leaving no real estate, and the value of her residuary personal estate did not exceed £2,000.

After the death of the testatrix the plaintiff stated that the testatrix had expressed a desire that £2,000 out of the residue of her estate should be given to her nephew, the defendant J. W. Collett, and the remainder to certain charities.

The defendant Mrs. Andrew denied that she had any knowledge of the existence of the trust until she was informed of it by the plaintiff, and refused to admit that she was bound by it.

At the trial the plaintiff stated that the testatrix had communicated her intention to create the secret trust to the plaintiff before the execution of her will; but the solicitor who prepared the will gave evidence which tended to show that the testatrix had no intention to benefit the defendant Collett in the manner alleged. The defendant Mrs. Andrew, in her evidence, denied all knowledge either of the residuary bequest or of the alleged secret trust until after the testatrix's death.

*Dibdin*, for the plaintiff.

*Bramwell Davis, Q.C.*, and *F. H. L. Errington*, for the defendant J. W. Collett.—There is here a gift of residue to the plaintiff and the defendant Mrs. Andrew, who take as joint tenants; and the trust was communicated to one of them, and therefore affects the other: *Russell* v. *Jackson*, 10 Hare, 204; *Moss* v. *Cooper*, 1 Joh. & Hem. 352, 9 W. R. Ch. Dig. 114; *Tee* v. *Ferris*, 4 W. R. 352, 2 K. & J. 357; *Robotham* v. *Dunnett*, 26 W. R. 529, 8 Ch. D. 430. In this respect the case differs from that of tenants in common: see the last two cases cited, and the recent case before Byrne, J., of *Freeman* v. *Laing*, *ante* p. 9, [1899] 2 Ch. 355.

They also referred to *Lester* v. *Foxcroft*, 2 W. & T. L. C. 10th ed., p. 460, and the notes, and to Theobald on Wills (4th ed.), p. 65.

*E. P. Hewitt*, for the defendant Mrs. Andrew.—The cases where the communication to one trustee has been held to bind the other are cases of actual fraud. They are rested upon the principle of *Huguenin* v. *Baseley*, 1 W. & T. L. C. 10th ed., p. 247, and do not depend upon the presence or absence of a joint tenancy. The evidence shows that the trust was not communicated to the plaintiff until after the signature of the will.

*P. B. Abraham*, for the defendant John Marsh, took no part in the argument.

*Dibdin*, in reply.—I submit that in this case the trust was communicated to the plaintiff before the execution of the will. The principle which governs these cases is that laid down by Lord Cairns in *Jones* v. *Badley*, 16 W. R. 713, L. R. 3 Ch. App. 362.

*Cur. adv. vult.*

Nov. 27.—FARWELL, J., after stating the facts and pointing out that the plaintiff had not discharged the burden of proving to his satisfaction that the defendant Mrs. Andrew was affected with a trust, continued as follows: The facts, therefore, stand thus: A gift by will to Mrs. Whitham and Mrs. Andrew in joint tenancy; a trust affecting that gift communicated by the testatrix to and accepted by Mrs. Whitham alone after making her will; entire ignorance of such trust by Mrs. Andrew until after the testatrix's death. The authorities establish the following propositions: If A. induces B. either to make or to abstain from revoking a will leaving him property by expressly promising or tacitly consenting to carry out B.'s wishes concerning it, the court will hold this to be a trust, and will compel A. to execute it: see *McCormick* v. *Grogan*, 17 W. R. 961, L. R. 4, H. L. 82 at p. 89. If A. induces B. either to make or to leave unrevoked a will leaving property to A. and C. as tenants in common by expressly promising or tacitly consenting that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after A.'s death, A. is bound, but C. is not: see *Tee* v. *Ferris*, the reason stated (p. 368) being that to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust. If, however, the gift were to A. and C. as joint tenants, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A., and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case the trust binds both A. and C. (*Russell* v. *Jackson* and *Jones* v.

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

*Badley*), the reason stated being that no person can claim an interest under a fraud committed by another (*Burney* v. *Macdonald*, 15 Sim. 6); in the latter case A. and not C. is bound (*Moss* v. *Cooper*); the reason stated (p. 367) being that the gift is not tainted with any fraud in procuring the execution of the will. I am bound to decide in accordance with these authorities, and I accordingly hold that Mrs. Andrew is not bound by any trust.

The action must be dismissed, but the plaintiff must have her costs out of the fund which she admits that she holds in trust for the defendant Collett.

Solicitors, *Vincent & Vincent* for *North & Sons*, Leeds; *Iliffe, Henley & Sweet* for *Russell & Mackay*, York; *Torr, Gribble & Co.* for *Nelson, Ball & Nelson*, Leeds.

---

Q. B. Div.
(Bigham and Phillimore, JJ.) Jan. 15.

NEWTON-IN-MAKERFIELD URBAN DISTRICT COUNCIL v. LYNN.
THE SAME v. BROWN. (a.)

*Market — Toll — Exposure for sale — Newton District Improvement Act*, 1855 (18 & 19 *Vict. c. c.*), *s.* 59, *Schedule B.*

*The plaintiffs were authorized by section 59 and Schedule B. of the Newton District Improvement Act, 1855, to collect a toll "for every cart used by any person for exposing or in which shall be exposed for sale any article," &c.*

*An ærated water dealer was in the habit of sending round a cart loaded with ærated waters to the houses of his customers. The man in charge of the cart entered the house of the customer, took his order, and there and then delivered from the cart the goods ordered.*

*Held, that the goods were not exposed for sale within the meaning of the schedule, and that no toll was therefore chargeable in respect of the cart.*

Appeals from a county court.

The two appeals were heard together, the facts being precisely similar.

The actions in each case were brought to recover 9d., the amount of the toll.

The facts in Lynn's case were as follows: The respondent, who dealt in ærated waters, was in the habit of sending round a cart loaded with boxes of ærated waters to his customers. On the 10th of March, 1899, the cart, in charge of the respondent's son, stopped in front of a shop kept by Mrs. Kirkman. The defendant's son went inside the shop and asked Mrs. Kirkman if she wanted any ærated waters, and, if so, how much. She replied, "One and a-half boxes." The defendant's son then took the amount named from the cart and brought it into the shop. Mrs. Kirkman dealt with the respondent regularly. At first she used to give an order, and the respondent would bring what she ordered the next time he came round.

The county court judge gave judgment for the defendants in each case.

*Horridge*, for the appellants.—The goods in the respondents' carts were articles exposed for sale within the meaning of the Act, and the respondent in each case was therefore liable to pay the toll claimed in respect of the cart: see *Pletts* v. *Campbell*, 43 W. R. 634, [1895] 2 Q. B. 229, and *White* v. *The Mayor, &c., of Yeovil*, 61 L. J. M. C. 213, 41 W. R. Dig. 132.

*S. H. Day*, for the respondents.—The goods were not exposed for sale in the cart, but were merely in the cart ready to be delivered when sold.

BIGHAM, J.—In my opinion the learned county court judge was right. It is said that the respondents in these two cases sent round these boxes of ærated waters in order to expose them for sale. In my opinion they did not do anything of the kind. The goods were sent round to the customer's house not to be exposed for sale, but in order that they might be there if the customer bought any. That is not an exposure for sale in any sense. I will not attempt to define what is an exposure for sale. It is sufficient to say that the facts of these cases do not bring them within the definition, whatever it may be.

PHILLIMORE, J.—I am of the same opinion. The object primarily aimed at by the statute is to tax carts hung round with articles for sale so as to tempt people to buy. It is not necessary to say how far the facts are short of an exposure for sale. It is sufficient to say that the carts here were used not to expose the goods in them for sale, but to facilitate the delivery of the goods when sold.

*Appeal dismissed.*

Solicitors for the appellants, *Rawle, Rowcliffe, & Co.*, for *Peace & Ellis*, Wigan.

Solicitor for the respondents, *C. F. Day.*

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

---

Q. B. Div.
(Grantham and Channell, JJ.) Jan. 11.

BURTON v. THE ASSESSMENT COMMITTEE OF THE PARISHES OF ST. GILES-IN-THE-FIELDS AND ST. GEORGE, BLOOMSBURY, AND THE SURVEYOR OF TAXES FOR THE DISTRICT COMPRISING THE SAID PARISHES. (a.)

*Poor Law—Rating—Land used for exhibition of advertisements — Advertisement hoardings — Advertisement contractor—Advertising Stations (Rating) Act*, 1889 (52 & 53 *Vict. c.* 27), *s.* 3.

*An advertisement contractor hired from builders and owners of land the right to affix advertisements upon the hoardings erected by the builders during building operations, and affixed thereto the advertisements of the persons whose advertisements he had agreed to exhibit.*

*Held, that the advertisement contractor was not a person who permitted the land on which the hoardings stood to be used for the exhibition of advertisements within the meaning of section 3 of the Advertising Stations (Rating) Act*, 1889, *and that he was not rateable, as beneficial occupier, in respect of such land.*

Case stated by justices of London.

The appellant objected before the assessment committee to the insertion of his name in the supplemental valuation list of the parish of Bloomsbury as being the rateable occupier of an "advertising station" situate at 72 and 86, Southampton-row, and of "hoardings" situate at 100 and 112, Southampton-row, and at other places. The objection was disallowed and the assessment confirmed. The appel-

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

lant appealed to the quarter sessions, who dismissed the appeal subject to this case.

The appellant was an advertisement contractor carrying on business under the name of the Partington Advertising Co. He obtained licences from builders, owners, or lessees of land to affix during building operations advertisements on the exterior of hoardings necessarily erected during the continuance of building operations, and he affixed on such hoardings the advertisements of those whose advertisements he had agreed to exhibit. The advertising station and hoardings in respect of which his name was inserted in the valuation list were hoardings used by him in the above manner.

Licences had been obtained in respect of each of the hoardings from the board of works, pursuant to section 5 of the Advertising Stations (Rating) Act, 1889, subject to the monthly payments imposed by the board in such cases.

Section 3 of the same Act provides as follows: "Where any land is used temporarily or permanently for the exhibition of advertisements, or for the erection of any hoarding, frame, post, wall, or structure used for the exhibition of advertisements, but not otherwise occupied, the person who shall permit the same to be so used, or (if he cannot be ascertained) the owner thereof, shall be deemed to be in beneficial occupation of such land or part thereof, and shall be rateable in respect thereof to the relief of the poor, and to all local rates, according to the value of such use as aforesaid."

*R. C. Glen*, for the appellant.—The appellant's name was wrongly inserted in the valuation list. So far from being the person who permitted the land on which the hoardings were erected to be used for the exhibition of advertisements he was the person who actually used them. The builder was the right person to be rated: see *Chappell* v. *Overseers of St. Botolph*, 40 W. R 192, [1892] 1 Q. B. 561, and *Shelley* v. *Dillon*, 30 L. R. Ir. 304, 30 W. R. Dig. 172.

*Macmorran, Q.C.*, and *Ryde*, for the respondent.—In *Chappell* v. *Overseers of St. Botolph* the question raised was, as between the owner and the builder, which of these was the right person to be rated. No question was then raised as to the liability of the advertisement contractor. The decision is therefore not an authority on this point. The appellant is clearly a person who permits the land to be used for the exhibition of advertisements.

GRANTHAM, J.—We think that the justices were wrong. We have no doubt on the facts of this case that the appellant was not the person who ought to have been rated. It would be highly inconvenient if the advertisement contractor were the person to be rated. It would be inconvenient both for the agent and for the overseers. Take, for instance, the case of boards erected in fields close to a railway. It would be very inconvenient for the overseers to collect the rates from an advertisement contractor, whose business may very likely be carried on, not in the parish, but in some town far away.

CHANNELL, J.—I am of the same opinion. As I understand the facts of this case, the appellant would not have been rateable before the Advertising Stations (Rating) Act was passed. I am clearly of opinion that he is not a person rateable within the meaning of that Act.

*Appeal allowed.*

Solicitors for the appellant, *R. Mote & Son.*

Solicitor for the respondent, *H. C. Jones.*

Prob. Div. & Adm. Div. Admiralty. } Aug. 12, 1899.

"THE HAABET." (*a.*)

*Ship—Bottomry—Absence of maritime interest—Bond payable on vessel putting into port short of port of destination—Payment of bottomry loan by cheque or approved draft—Insurance of bond.*

*A bottomry instrument may be valid though it does not stipulate for maritime interest, and notwithstanding that it be made payable if the vessel on which the money is lent on bottomry "shall, in the course of the voyage on which she is now being despatched, go into any port of refuge to repair there."*

The Cecilie, 4 *P. D.* 210, 27 *W. R.* 198, *followed.*

This was an action of bottomry instituted on behalf of Messrs. Hanschell & Co. against the Norwegian barque *Haabet* and her freight.

The writ of summons in the action was indorsed as follows: "The plaintiffs' claim is for the sum of £144 17s. 7d. in respect of necessaries supplied to the Norwegian barque *Haabet*. Alternatively the plaintiffs claim the said sum upon an engagement entered into by the master of the said vessel for the requirements of the ship in the capacity of master. In the further alternative the plaintiffs claim the said sum as the holders of a bottomry bond or instrument of hypothecation dated the 7th of April, 1898, and signed by the master of the said vessel."

So far as material the instrument so referred to in the above indorsement was in the following terms: "Within ten days after arrival at port of discharge in Europe or at any other place at which the voyage may terminate of the Norwegian barque *Haabet* under my command now being despatched for a voyage from Apalachicola, I promise to pay in an approved bankers' freight-draft or cheque on London in sterling to the order of Messrs. Brodr Trier, Copenhagen, or if on arrival so instructed by them, to them direct, or at their option my consignees are hereby directed to deduct from the freight due to the vessel and to hold at the disposal of Messrs. Brodr Trier for credit of Messrs. Hanschell & Co., Barbadoes, the sum of £144 17s. 7d. being amount of cash advances made to me here by the said Hanschell & Co. to defray vessel's necessary expenses and disbursement at this port, and for which I hereby pledge the said vessel, her freight and her owners; all cost of remittance to be for vessel's account. This claim to have priority over all others that may be presented against the said freight and vessel, with the express agreement, however, that it shall not invalidate nor affect the lien upon or right of process against the said vessel and freight and owners for the amount of this bill with costs and expenses of recovering and interest in case of its not being duly accepted and paid. Provided always, and it is hereby expressly agreed and declared that if the said vessel shall in the course of the voyage on which she is now being despatched go into any port of refuge to repair there, all the moneys for the payment of which the said vessel, her freight and owners, are hereby pledged shall forthwith become due and payable, and it shall be lawful for the said Messrs. Brodr Trier or their agents or representatives to proceed at once against the vessel, freight, and owners, or any or either of the same separately, to recover the amount of this bill and costs and expenses incurred in recovering the same.

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

"Signed in duplicate, one being accomplished, the other to stand void.

"Barbadoes, the 7th April, 1898.

"J. E. KJORSWIG,

"Master Norwegian barque *Haabet*."

Two actions of necessaries were also instituted against *The Haabet* and her freight, the plaintiffs in one of such actions claiming the sum of £171 4s. 5d., and as it was apprehended that on *The Haabet* being sold by the court she would not realize the amount of all the claims against her, the plaintiffs in the action of necessaries in which £171 4s. 5d. was claimed took out a summons in chambers in the action instituted by them for an order directing the payment to them out of the fund in court representing the proceeds of *The Haabet* of the sum of £171 4s. 5d., together with the taxed costs of the action of necessaries in which the summons was taken out, or that in the alternative such order may be made as to the judge may seem fit for dealing with the claims against *The Haabet* in respect of which action may brought.

This summons was adjourned into court and came on for hearing before the judge in court (Bucknill, J.) on the 27th of June last, before any pleadings had been delivered in the bottomry action or judgment obtained either in that action or in any of the actions of necessaries instituted against *The Haabet*. The hearing was continued on the 3rd of July last.

*Roche*, for plaintiffs in the action of necessaries in which £171 4s. 5d. was claimed.—The form of the instrument which the plaintiffs in the bottomry action ask the court to pronounce to be a bottomry bill shows that the transaction was not one of bottomry. No stipulation is to be found in the document for maritime interest. Payment is to be made on the vessel putting into a port to repair, and a cheque or draft on which the master, who is also the owner of the vessel, would be personally liable is to be given as part of the arrangement entered into. The following cases support this view: *The Emancipation*, 1 Wm. Rob. 124; *The Royal Arch*, 6 W. R. 191, Swa. 269; *The Indomitable*, Swa. 446, 7 W. R. Adm. Dig. 18.

He also referred to *Stambank* v. *Sheppard*, 1 W. R. 505, 13 C. B. 418.

*Noad*, for plaintiffs in the action of bottomry.—The cases of *The Laurel*, 13 W. R. 352, Br. & Lush. 317, *The Cecilie*, 4 P. D. 210, 27 W. R. Dig. 198, and *The Elpis*, L. R. 4, A. & E. 1, show that the instrument signed by the master of *The Haabet* at Barbadoes was a valid bottomry bill. The bill has become due as the ship arrived safely at Dover, and the court for the saving of expense is asked to express its opinion at the present stage of the actions whether the instrument referred to in the indorsement on the writ of summons in the bottomry action is a valid bottomry bill, and, therefore, giving the bottomry bill holder priority over the claimants for necessaries.

It appeared by an affidavit filed in the action of necessaries in which the summons had been taken out, that John Edward Kjorswig, the master of *The Haabet*, was the sole registered owner of that vessel, and that his name appeared as such in the Norwegian register of shipping issued at Christiana. It was admitted at the bar that the plaintiffs in the necessaries action in which the summons had been taken out were entitled to judgment for the amount of their claim, and that if the court should be of opinion that the plaintiffs in the action of bottomry were right in construing the instrument of the 7th of April, 1898, as a bottomry bill, the amount claimed by them was due to them on bottomry, and they were entitled to a decree pronouncing for the validity of the bottomry bill proceeded on. *Cur. adv. vult.*

Aug. 12.—BUCKNILL, J.—The question I have to decide is whether the document is a bottomry bond. It is in the following terms: [The learned judge read the document of the 7th of April, 1890, above set out, and continued:] From the document itself it is clear that it purports to be in the nature of a bill transaction as well as a pledge of the ship and freight. It is also clear that the lender did not stipulate for what is commonly called maritime interest, but it is also clear that he was running the risk of the vessel not reaching the port of discharge in Europe, unless whilst on her voyage she should put into a port of refuge to repair, in which case the loan was to become at once due and payable, and for the recovery of which the lender was to have power at once to proceed against the ship. It is said, on the one hand, that this is not a bottomry transaction, but a bill transaction or a mortgage, as distinguished from a bottomry bond. I have no doubt that those who prepared the document intended that it should be both a bill transaction — as it is in fact described — and a bottomry bond as well — that is, that if on the arrival of the ship at her port of discharge a bill at sight or cheque was given, or freight to the amount of the loan was remitted to or held at the disposal of the agents of the lender, then that the ship should be free, but if not then that the ship should be held liable.

It appears, however, from the case of *The Elpis*, 21 W. R. 576, L. R. 4 A. & E. 1, that a document if in substance and effect a bottomry bond is not invalid because it is called something else. There the document was called "this first of exchange" but Sir Robert Phillimore said: "Now it is clear to me that this is in substance and effect a bottomry bond, and looking to the precedents in this court it must be so considered." It that case it must be observed that there was no maritime interest paid or agreed to be paid by the borrower, but there was a maritime risk, because unless the ship arrived at her port of discharge the loan was lost. That case was followed by *The Cecilie*, which was decided by the same learned judge seven years later, and is important on the question of maritime risk, and, there there had been no stipulation made for interest. Sir Robert Phillimore said: "I am satisfied that on the authority of precedents and decided cases I must hold that the instruments in respect of which this action is brought are valid bottomry bonds." There, as here, the money was to be paid not only in the event of the ship's arrival at her port of discharge, but in the event of her putting in at some place between the port of sailing and the port of discharge which involved a maritime risk, because if she was lost at sea after setting sail and was never heard of again the lenders would lose their loan. On the other hand "the total absence of any mention of a maritime risk, either express or implied," would invalidate the document as a bottomry bond: see *The Emancipation*, and see also *The Indomitable*, where it was attempted to make the document a bottomry bond; but the court held, as it was impossible to find any intention on the part of the lenders to include a maritime risk, it was not a bottomry security. That case may also be referred to on another point. In the margin of the document which I have to construe appears this memorandum: "Insured under open policy with . . . through Brodr Trier, Copenhagen," who were the agents of the persons who made the advances to the master of *The Haabet*. Now, in *The Indomitable*, Dr. Lushington said: "I agree that if there was a maritime risk directly stated, the mere fact that the insurance was to be made by the lenders and paid for by the borrowers might not invalidate the bond." I follow that *dictum* and find that as

there was a maritime risk in the case so the fact of insurance by the lender—as I suppose it was—does not invalidate the bond.

Remembering that it is the practice of this court to construe liberally such a document as this, where the parties intended to treat the loan as one of bottomry, and finding, as I do, that by the language of the instrument the lenders incurred a maritime risk, and that neither the bill transaction nor the insurance memorandum invalidate it, I pronounce for the validity of the bond.

Solicitors for plaintiffs in bottomry action, *Crump & Son.*

Solicitors for plaintiffs in action of necessaries, *Botterell & Roche.*

## House of Lords.

From C. A. (England). Dec. 14.

RUABON STEAMSHIP CO. *v.* LONDON ASSURANCE. (*a.*)

*Insurance, marine—Underwriters' liability—Repair to ship—Owners taking advantage of ship being dry-docked—Apportionment of expenses.*

*A ship was dry-docked solely to enable the underwriters to effect the repairs for which they were liable. The owners took advantage of the ship being in dry dock to have her surveyed for the purpose of reclassification at Lloyds, but no extra expense was occasioned to the underwriters thereby.*

*Held, that the underwriters were alone liable for the whole dock dues and the cost of getting in and out of dock, the owners being under no liability for them whatsoever.*

Marine Insurance Co. *v.* China Transpacific Co. (Limited) (Vancouver case), 35 *W. R.* 169, 11 *App. Cas.* 573, *commented on and explained.*

*Decision of the* Court of Appeal, 46 *W. R.* 417, [1898] 1 *Q. B.* 722, *reversed.*

This was an appeal by the plaintiffs from an order of the Court of Appeal (Chitty and Collins, L.JJ., A. L. Smith, L.J., dissenting), 46 W. R. 417, [1898] 1 Q. B. 722, affirming judgment of Mathew, J. The facts are given at length in the report in the court below, and shortly in the Lord Chancellor's judgment.

*Cohen, Q.C.*, and *Montague Lush*, for appellants.—It is not enough that an incidental advantage should be taken to fix us with any liability. The steamer was put into the dock for the underwriters' purpose alone, and there was no increase of expense owing to our action. The *Vancouver case*, 35 W. R. 169, 11 App. Cas. 573, is really in our favour.

*J. Walton, Q.C.*, and *Hamilton*, for respondents.—This case is covered by the *Vancouver case.*

*Cohen, Q.C.*, replied.

The House took time for consideration.

Earl of HALSBURY, L.C.—The sum sought to be recovered in this case is a very small one, but the principle discussed and decided is one of very far-reaching importance, and I am unable to concur in the judgment of the majority of the Court of Appeal. The agreed facts may be very shortly stated. The steamship *Ruabon* having been placed in dock for the purpose of repairs, for which the underwriters were liable, while she was in dock the owner took advantage of the opportunity to have the vessel surveyed. It is part of the agreed facts that the holding of the survey added not a farthing to the cost, or a moment to the period of time during which the execution of the repairs proceeded, and the question raised is whether the owner of the vessel is liable on any reason known to the law to bear part of the expense involved in the docking of the vessel and keeping her there while the repairs were being executed. I notice that in more than one of the judgments it is said that the owner of the vessel used the dock for his own purposes. I think that there is a fallacy in the employment of that word "used." He went on to his own vessel and held a survey, and I think that it is not true to say that the dock was used for his purposes at all. He took advantage of the opportunity which was afforded to him by another person (the insuring company) being under contract to do themselves that which gave him an opportunity of seeing the vessel, and for which, if he had been minded to make a survey, he would have had to pay himself. But unless the phrase "using of the dock" is explained, it seems to me to be fallacious first to say that he used the dock and then to infer that as he used the dock he is called upon to pay for it. I propose to examine in detail the various cases, or rather the various classes of cases, where the right to contribution has been held to be part of our law. But it seems to me a very formidable proposition indeed to say that any court has a right to enforce what may seem to them to be just, apart from common law or statute. The courts, no doubt, will enforce the common law, and will apply it to new questions of fact which arise; but I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it. Many cases might be put where the generality of such a proposition would be plainly contrary to any received principle, and to my mind the question now in debate—admitted to be absolutely novel — would not be covered by any principle known to the law, except such a general proposition as I have indicated above. Now, I am unable to affirm that that is the condition of the common law. The doctrine of "average" has been repeatedly held to be a rule derived from the maritime law of Rhodes. In his judgment in *Strang, Steel, & Co.* v. *Scott*, 38 W. R. 452, 14 App. Cas. 601, Lord Watson said: "The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text as presented by Paulus, Dig. L. 14, tit. 2, is, *Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*" Bramwell, L.J., it is true, in *Wright* v. *Marwood*, 29 W. R. 673, 7 Q. B. D. 62, rested it upon an implied contract *inter se* to contribute by those interested. Brett, M.R., on the other hand, in *Burton* v. *English*, 32 W. R. 655, 12 Q. B. D. 218, spoke of it as a right arising not from any contract at all, but from the old Rhodian laws, which had been incorporated into the law of England as the law of the ocean. It is not necessary to go minutely into the arguments arising from the difference of opinion as to the origin of the law. It is, at all events, a known principle enforceable by the courts, resting either upon positive enactment adopted into our law or from an implied contract between the parties. So Lord Coke in *Sir William Harbert's case*, 3 Rep. 11*b*, at 14*b*, explains very clearly when dealing with "contribution." He says: "Note, reader, when it is said before and often in our books that if one purchaser be only extended for the whole

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him anything by way of contribution, but it ought to be intended that the party, who is only extended for the whole, may by *audita querela* or *scire facias*, as the case requires, defeat the execution, and thereby he shall be restored to all the mean profits, and compel the conusee to sue execution of the whole land; so in this manner everyone shall be contributory, *hoc est*, the land of every ter-tenant shall be equally extended." Lord Redesdale in the case of *Stirling* v. *Forrester*, 3 Bligh, 575. at p. 596, said that "the decision in *Dering* v. *Lord Winchilsea*, 1 Cox Ch. 318, 2 Bos. & Pull. 270, proceeded on a principle of law which must exist in all countries, that where several persons are debtors all shall be equal. The doctrine is illustrated in that case by the practice in questions of 'average,' &c., where there is no express contract, but equity distributes the loss equally. On the prisage of wines, it is immaterial whose wines are taken; all must contribute equally, so it is where goods are thrown overboard for the safety of the ship, the owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation." I know of no case in which anything like the present claim has been advanced. There is no debt here for which both the parties in question are bound to some third person. It cannot be denied that the underwriters here were themselves bound to incur all the liability they did incur, and that the shipowner was under no such liability. There is here no joint ownership which makes a liability upon all partaking of that ownership, and which liability each is under an obligation to some third person to fulfil. In another part of Lord Redesdale's observations in the case of *Stirling* v. *Forrester*, his lordship makes clear what he means by his commentary on the case of *Dering* v. *Lord Winchilsea*. He says: "The principle established in the case of *Dering* v. *Lord Winchilsea* is universal, that the right and duty of contribution is founded in doctrines of equity, it does not depend upon contract. If several persons are indebted and one makes the payment the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditors to exact or receive payment from one and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract but always in conscience as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of the decision in *Dering* v. *Lord Winchilsea*, and in that case there was no evidence of contract as in this. So in the case of land descending to coparceners, subject to a debt, if the creditor proceeds against one of the coparceners the others must contribute. If the creditor discharges one of the coparceners he cannot proceed for the whole debt against the others; at the most they are only bound to pay their proportions." In all the cases to which I have referred, and in all the observations made by the learned judges, the liability of each of the persons held to be bound to contribute is assumed to exist either by contract or by some obligation binding them all to equality of payment or sacrifice in respect of that common obligation. But this is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons, except that one person has taken advantage of something that another person has done, there being no contract between them—there being no obligation by which each of them is bound; and the duty to contribute is alleged to arise only on some general principle of justice, that a man ought not to get an advantage unless he pays for it. So that if a man were to cut down a wood which obscured his neighbour's prospect and gave him a better view, the neighbour ought upon this principle to be compelled to contribute to cutting down the wood. Or if a man built a wall so as to shield his neighbour's house from undue wet or danger from violent tempests, he ought to be entitled to contribution because the latter has got an advantage from what his neighbour did. I can find no authority for any principle which includes this case. The heads of "Average," "Principal and Surety," "Joint Debtor," or "Ownership of Lands," all of which are liable in execution and only one of which has been made the subject of execution, are intelligible heads of the law, and are included within well-known and ascertained principles. This case seems to me to go entirely beyond those ascertained principles, and for it there would appear to be no authority. No statute has authorized it; no principle of the common law comprehends it; and I am therefore unable to concur with the judgment of the majority of the Court of Appeal.

But it remains to consider whether the case is not covered by authority. That supposed authority is to be found in what has been called the *Vancouver case*—*Marine Insurance Co.* (*Limited*) v. *China Transpacific Co.* (*Limited*). I cannot think that that case establishes any such proposition as is insisted on here. In that case the sole question was whether a particular average loss sustained by the respondent exceeded 3 per cent. within the meaning of the warranty. It is necessary to observe somewhat minutely the facts of that case in order to see whether there is anything in it which affects the question now in debate. *The Vancouver*, the vessel in question, was insured in a time policy which contained the warranty "free from average under 3 per cent." During a voyage covered by the policy she sustained certain damage not known at the time, but when some time after the owners for their own purposes of cleaning and scraping her, put her into dock, the damage was observed then and there, and the underwriters were, of course, liable to make good the particular average loss for which under the policy they were liable. The question having arisen in this form, and the owners having paid the whole of the dock dues while the vessel was being scraped and cleaned, and while simultaneously the obligation of the underwriters was being fulfilled by the repair of the damage, it was argued that by the accidental circumstance of the owner having put his vessel into dock, and the underwriter having thereby escaped any liability to the dock-owner for dock dues, the cost of repairs to him was brought under the agreed amount of 3 per cent. What the court had to determine was the liability under the policy in question, and with reference to that question, which, be it observed, is to be measured by what the damage would cost to repair, the court held that the dock dues were part of the cost, and that, under the circumstances, as the operations were simultaneously performed, the cost should be attributed (let the phrases be noted) in moieties to the operations of those two persons interested. Now the owner paid the dock dues, and if he had not done so the underwriter would undoubtedly have had to pay for dock dues, and if he had, the amount paid would have been over 3 per cent. It came, in fact, to a calculation of the extent of the damage done, and that being measured by its cost of repair, it was held that the 3 per cent. was reached. What Lord Herschell meant is, I think, sufficiently explained by what he says in commenting on the case

of *Pitman* v. *Universal Marine Insurance Co.*, 30 W. R. 906, 9 Q. B. Div. 192, as to the mode in which the particular average loss was to be arrived at in that case. He says: "All the judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled as a general rule to recover the sum properly expended in executing the necessary repairs, less the usual allowances." Now the facts found in that case (*Vancouver case*) which is relied on were that the vessel was put into dry dock on the 4th of January, 1876. It was discovered on the afternoon of the same day that her stern-post was broken. It was found by the special case that if the vessel had required nothing but scraping and cleaning, the purpose for which alone she was put there by her owners, she might have been finished and discharged by the evening of the 6th, whereas for the purposes of her repair, for which the underwriters were responsible, she required the whole time from the 4th to 11th of January, when in fact she was discharged. How a mode of thus calculating the particular average loss so as to satisfy the contract between the two parties to it can justify such a proposition as is here insisted on, I am unable either to understand or to agree to, and I think this judgment should be reversed.

Lord MACNAGHTEN.—I concur. I agree with my noble and learned friend on the woolsack that there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it, nor is there, I think, any authority to be found for the application of such a proposition, unless it is to be found in the *Vancouver case*. The *Vancouver case* has been supposed to go some way in that direction in a question between shipowner and underwriter, where ship's repairs and underwriter's repairs are carried out simultaneously. But it must be borne in mind that the question for decision in that case was "whether a particular average loss sustained by the respondents exceeded 3 per cent. within the meaning of the warranty contained in a policy of assurance underwritten by the appellants," and that (as Lord Herschell was careful to point out) was the sole question for decision. It was not decided that the shipowner was liable for one-half the cost of the use of the dock, including dock charges, but that the underwriter in respect of his obligation was liable at least for one-half of the cost. That was enough in the particular case to give the victory to the shipowner, and in this House he could not have asked for more.

Lord MORRIS concurred.

Lord DAVEY.—I have had the opportunity of reading the judgment of my noble and learned friend Lord Brampton. It expresses my opinion so much better than I could express it myself that I will not trouble your lordships with any observations of my own.

Lord BRAMPTON.—I entirely concur in the judgment which has been delivered by the Lord Chancellor. I take the general rule to be correctly stated by Lord Herschell in the *Vancouver case*, "that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled to recover the sum properly expended in executing the necessary repairs, less the usual allowances, as the measure of his loss." I take it also as admitted that, but for the matter which I am about to mention, it would not be disputed that the respondents were liable under their policy to pay as an indemnity against the loss by perils of the sea which occurred, the full sum of £82 5s. claimed. This represents *primâ facie* their responsibility. The respondents seek to reduce this amount by the sum of £2 5s. by reason of a survey of the ship which the plaintiffs, the owners, caused to be made by Lloyd's surveyor, during the period in which the vessel was under repair on the pontoon, which, for this purpose, I may call a dry dock. If they are right in making a reduction on this account, no question being raised as to the amount, the respondents are entitled to retain the judgment pronounced in their favour by the majority of the Court of Appeal. Since the decision of the *Vancouver case*, by which, of course, we are bound, and which to me seems to be founded on good sense, it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea—one of such operations being to effect repairs for the cost of which underwriters are responsible; the other to clean and scrape the ship necessitated by wear and tear, the cost of which must be borne by the owners themselves, neither of which operations could be performed unless the ship were dry-docked, and both of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters, deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous dry-docking, in such cases the cost of docking and all dock dues during the period in which the vessel is in dock must be shared in proportion, having regard to the period of joint or separate actual use of it. I do not, however, find anything in the *Vancouver case* which would justify such division of dock dues, unless in such cases as I have mentioned. The present is a very different case. *The Ruabon* was dry-docked solely to enable the underwriters to effect the repairs for which they were liable and with no other object, and no other repair was, in fact, done or required to be done on the ship; the survey of Lloyd's surveyor was in no way necessary for any purpose connected with the work performed on the vessel, but was only made to entitle the owners to reclassification at Lloyd's, and need not have been made at that moment, nor at any particular time, so long as it was made within the time limited by Lloyd's rules, which had then nine months to run. It is quite true that if it had not then been made it would have been necessary if she were afterwards surveyed to have incurred the expense of again dry-docking her at the owners' expense, and to that extent the owners might have been benefited. I say might, because the owners might have sold the vessel in the meantime, or some other thing might have occurred to render such survey unnecessary. Assuming, however, that the expense of another dry-docking was in this way saved, and that to that extent the owners were benefited, I think that circumstance immaterial, and it does not warrant a claim for contribution towards the dock dues imperatively incurred on the underwriters' account in the discharge of their obligations. I think that such contribution can only be insisted upon in those cases where work is done to the vessel itself by two or more persons, each separately and simultaneously engaged under different obligations in doing portions of it, dry-docking being necessary for each. If the respondents' claim for contribution were allowed, I see no reason why such a claim might not be made against an owner who, while his ship was in dry dock, sold her, subject to immediate inspection and survey by his purchaser. A variety of other cases similar in character might be suggested. I think that the

owners, in causing the survey to be made in this case, were taking what Lord Herschell termed "an incidental advantage," from the fact that a damage arising from a risk within the policy had necessitated repairs at the expense of the underwriter; and he puts by way of illustration the case of a vessel in ordinary course requiring scraping and painting at intervals of five years, and before the time for such operation has arrived meeting with a disaster by perils of the sea and docked for repairs for which underwriters were responsible; and the shipowner taking the opportunity of scraping and painting his ship. In repudiating the notion that the entire time occupied in that operation should be borne by the shipowner, he adds, "if they were to be borne by him at all." This observation of that noble and learned Lord makes it clear to me that he did not contemplate his judgment covering such a case as this, where nothing was in fact done on the ship, and the survey did not in the smallest degree delay the completion or add one farthing to the expense of the repairs done for the underwriter. I think, therefore, that this appeal should be allowed.

Lord ROBERTSON concurred.

*Judgment of the Court of Appeal reversed, with costs, here and below.*

Solicitors for the appellants, *Botterell & Roche*, for *Vaughan & Roche*, Cardiff.

Solicitors for the respondents, *Waltons, Johnson, Bubb, & Whatton.*

---

## Court of Appeal.

Appeal.
(A. L. Smith, Collins, and Vaughan Williams, L.JJ.) — Dec. 16.

FRANCIS v. TURNER BROTHERS. (a.)

*Master and servant—Accident—Compensation—"On or in or about a factory"—Factory of third person—Workmen's Compensation Act,* 1897 (60 & 61 *Vict.* c. 37), *s.* 7.

*Section* 7, *sub-section* 1, *of the Workmen's Compensation Act,* 1897, *which provides that the Act shall apply only to employment by the undertakers "on or in or about a . . . factory," applies only to a factory occupied by the employer where he carries on his business, and does not include a factory belonging to a third person to which the workman is sent on his employer's business.*

Appeal from the decision of the Newtown County Court judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897.

The appellant, Francis, was a labourer in the employment of the respondents, Messrs. Turner Brothers, who were the owners and occupiers of a factory. On the 14th of November, 1897, the appellant was sent by the respondents with some other workmen to the cloth factory of the Severn Tweed Co. to remove an old disused steam engine which the respondents had purchased. While engaged in removing the engine from the place where it was fixed, a tank which was above the engine fell down and injured the appellant. It was admitted that the accident arose out of and in the course of the appellant's employment. The Severn Tweed Co.'s factory was about 850 yards from the respondents' factory by the footpath, and about one mile by the cart-road.

The county court judge held that section 7, sub-section 1, of the Workmen's Compensation Act, 1897, did not apply to employment on or in or about a factory not occupied by the respondents, and he accordingly made an award in their favour.

*Ellis J. Griffith* and *H. C. Davenport*, for the appellant.—By section 7, sub-section 1, of the Workmen's Compensation Act, 1897, the Act only applies to employment by the undertakers—that is, by sub-section 2, in the case of a factory the occupiers thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895—"on or in or about a factory." The section does not say "the" factory. The Act applies to employment by the occupier of a factory at another factory. The accident having arisen out of and in the course of the appellant's employment, the respondents were liable though the accident happened at a factory not belonging to them to which they had sent the appellant on their work.

*Ruegg, Q.C.*, and *A. Powell*, for the respondents, were not called upon.

A. L. SMITH, L.J.—This seems to me a clear case. The respondents were the occupiers of a factory, and they had in their employment a workman who, if this accident had happened in that factory, would have been entitled to compensation under the Act. The respondents having bought an old engine which was in a factory about half a mile away from their own factory by the footpath, and about double that distance by the cart-road, sent some of their workmen, among them the appellant, to that factory for the purpose of removing the engine and taking it to their own factory. While the men were removing the engine at the other factory a tank fell upon the appellant and injured him. The question is whether the appellant is entitled to compensation under the Act of 1897. By section 7, sub-section 1, the Act only applies to employment by the undertakers, *inter alia*, "on, in, or about a factory." It is said that those words include employment at a factory other than that occupied by the employer. In my opinion that is not the meaning of the section. The section means employment at the factory occupied by the employers, where the employers carry on their business. For these reasons I am of opinion that this appeal must be dismissed.

COLLINS and VAUGHAN WILLIAMS, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the appellant, *Woosnam & Smith*, for *Martin Woosnam*, Newtown.

Solicitors for the respondents, *Hurd & Son*, for *Williams, Gittins, & Taylor*, Newtown.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

---

From Chan. Div.
(Lindley, M.R., Jeune, P., and Romer, L.J.) — Dec. 4, 5, 12.

BOOSEY v. WHIGHT & CO. (a.)

*Copyright — Infringement — Book — Sheet of music—Perforated sheets for use in a mechanical instrument —Copyright Act,* 1842 (5 & 6 *Vict.* c. 45), *ss.* 2, 15.

*A copy is that which comes so near the original as to give every person seeing it the idea of the original. Things, therefore, which are used for purposes wholly*

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*and fundamentally distinct from those of their originals are not copies of such originals within the meaning of the Copyright Act,* 1842. *Nor do they become copies within the Act because they might possibly be used for the purposes of their originals, so long as no such use is either intended or made.*

*The plaintiffs were proprietors of the copyright of certain sheets of music. The defendants sold certain perforated sheets to be used as part of a mechanical instrument for the production of musical sounds. It was possible to read the notes of the perforated sheets. Certain words indicating time and expression, which were taken from the plaintiffs' sheets of music, were printed on the perforated sheets.*

*Held,* (1) *that the perforated sheets, being part of a mechanical instrument, were not copies of the plaintiffs' sheets of music within the meaning of the Copyright Act,* 1842; *and* (2) *that the plaintiffs' copyright was not infringed by the printed words on the perforated sheets, as these were only of use as directions for working the mechanical instrument.*

*Judgment of* Stirling, J. (47 *W. R.* 554, [1899] 1 *Ch.* 836), *affirmed on the first point, and reversed on the second point.*

This was an appeal from a decision of Stirling, J. (reported 47 W. R. 554, [1899] 1 Ch. 836).

The plaintiffs were proprietors of the copyright in the music of three songs, and they brought the action to restrain an alleged infringement of their copyright.

The acts complained of consisted in the sale by the defendants of perforated sheets of paper for use in an instrument called the Æolian.

The Æolian was a wind instrument worked mechanically, but furnished with stops, swells, and pedals, by means of which changes in time and expression were effected. It contained forty-six pipes or reeds, each of which sounded a particular note.

The sheets in question were made in the form of rolls, which were placed in the instrument and unrolled by its action. They were so prepared that whenever a perforation passed under a particular pipe the appropriate note was sounded. The perforations were made in straight lines parallel to the edges of the notes, so that all perforations in the same line gave the same note. The perforations were of different lengths so that if the same time were kept, as would be the case if the machine were left to itself, the length of the perforation would indicate the duration of the note.

At the beginning of each roll was printed a statement as to the key in which the particular piece of music was written. The rolls contained no indications of any change of key. There were, however, printed on some of them certain words which were found on the sheets of music published by the plaintiffs, such as piano, crescendo, &c.

The stops were used to alter the pace and expression at and with which the music was played, and the skill of the player mainly consisted in availing himself of these stops so as to produce the best effect.

The plaintiffs contended that these perforated rolls were copies of sheets of music within section 2 of the Copyright Act, 1842.

It was proved at the trial that it was possible to construct a key so as to enable anyone to copy down the ordinary notes from the perforation. But there was no evidence that anyone had ever acquired the art of reading these rolls, and in the opinion of the judge it was improbable that anyone would ever do so.

Stirling, J., held that the rolls, so far as they contained perforations, were part of the instrument and were not copies of sheets of music within the Copyright Act, 1842; but that the addition of the directions as to time and expression constituted an infringement of the plaintiffs' copyright: see 47 W. R. 554, [1899] 1 Ch. 836.

The plaintiffs appealed from the first part of the judgment, and the defendants from the second.

*Butcher, Q.C.*, and *Scrutton*, for the appellants.

*Moulton, Q.C., T. Terrell, Q.C.*, and *Eustace Smith*, for the respondents.

*Butcher, Q.C.*, replied.

The arguments were similar to those in the court below.

The following cases were cited: *D'Almaine* v. *Boosey*, 1 Y. & C. Ex. 288; *Hanfstaengl* v. *Empire Palace*, 42 W. R. 681, [1894] 3 Ch. 109; *Wood* v. *Boosey*, 16 W. R. 485, L. R. 3 Q. B. 223; *Davis* v. *Comitti*, 54 L. J. Ch. 419, 33 W. R. Dig. 54; *Hollinrake* v. *Truswell*, [1894] 3 Ch. 420, 43 W. R. Dig. 350; *Warne* v. *Seebohm*, 36 W. R. 686, 39 Ch. D. 73; *Maple* v. *Junior Army and Navy Stores*, 31 W. R. 70, 21 Ch. D. 369; *Novello* v. *Sudlow*, 12 C. B. 177; *Nicols* v. *Pitman*, 32 W. R. 631, 26 Ch. D. 374.

*Cur. adv. vult.*

Dec. 12.—LINDLEY, M.R., read the following judgment, in which JEUNE, P., concurred: The plaintiffs are entitled to copyright in three sheets of music. What does this mean. It means that they have the exclusive right of printing or otherwise multiplying copies of those sheets of music—*i.e.*, of the bars, notes, and other printed words and signs on those sheets. But the plaintiffs have no exclusive right to the production of the sounds indicated by or on those sheets of music; nor to the performance in private of the music indicated by such sheets; nor to any mechanism for the production of such sounds or music.

The plaintiffs' rights are not infringed, except by an unauthorized copy of their sheets of music. We need not trouble ourselves about authority; no question turning on the meaning of that expression has to be considered in this case. The only question we have to consider is whether the defendants have copied the plaintiffs' sheets of music.

The defendants have taken those sheets of music and have prepared from them sheets of paper with perforations in them; and these perforated sheets, when put into and used with properly-constructed machines or instruments, will produce, or enable the machines or instruments to produce, the music indicated on the plaintiffs' sheets. In this sense the defendants' perforated rolls have been copied from the plaintiffs' sheets. But is this the kind of copying which is prohibited by the Copyright Act? or, rather, is the perforated sheet made as above mentioned a copy of the sheet of music from which it is made? Is it a copy at all? Is it a copy within the meaning of the Copyright Act?

A sheet of music is treated in the Copyright Act as if it were a book or sheet of letterpress. Any mode of copying such a thing, whether by printing, writing, photography, or by some other method not yet invented, would, no doubt, be copying. So, perhaps, might a perforated sheet of paper to be sung or played from in the same way as sheets of music are sung or played from. But to play an instrument from a sheet of music which appeals to the eye is one thing; to play an instrument with a perforated sheet which itself forms part of the mechanism which produces the music is quite another thing. I have consulted Johnson's, Richardson's, and Murray's Dictionaries to ascertain the meanings attributed to the word copy, and I do not myself think that the perforated sheet can be said to be a copy of the sheet of

music unless the word copy is used in a very loose and inaccurate sense. Be this as it may, I cannot think, or bring myself to decide, that the perforated sheet is a copy of a sheet of music within the meaning of the Copyright Act. The fundamental ideas underlying them are different, and the uses to be made of them are fundamentally different. Music appeals to the ear, but a sheet of music appeals to the eye, and the observation of Bayley, J., in *West* v. *Francis*, 5 B. & Ald. 737, is applicable not only to engravings but to all kinds of books, and the Copyright Act treats a sheet of music as it treats a book. He said: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." I do not say that the defendants' perforated rolls cannot possibly be regarded as sheets of music. They may possibly be so regarded by specially skilled persons who have learned to read the perforations. Conceding, for the sake of argument, that a person might be trained to play or even to sing from the perforated sheets, it is clear that they are not made to be so used, nor are they ever so used in fact; and we ought, in my opinion, to deal with the case on broad business lines, and not on unpractical, although theoretically possible, assumptions.

If these perforated rolls were new it appears to me that their invention might be patented; and this could not, in my opinion, be said of any copy of any book.

It may be true that the manufacture and sale of the perforated sheets diminish the sale of the plaintiffs' sheets of music. But it does not follow that the plaintiffs' copyright has been infringed; and I am of opinion that it has not.

I regard the defendants' perforated sheets as part of a mechanical contrivance for producing musical notes, and I cannot think that manufacturers of musical instruments infringe any person's copyright by so constructing their instruments and appliances to be used with them as to produce musical notes indicated on a sheet of music.

On this broad and very important question, which, so far as I know, has never been raised before in this country, I am of opinion that the decision of Stirling, J., is correct.

There is, however, another, but comparatively subordinate, question on which I am unable to agree with him. He has restrained the defendants from copying the directions on the plaintiffs' sheets of music to the person using them.

The defendants' appeal from this part of the judgment ought, in my opinion, to succeed. The directions on the plaintiffs' sheets of music are no doubt protected by their copyright so long as they are used in connection with the plaintiffs' musical score. But apart from those scores the plaintiffs have no copyright in such directions. The directions are not themselves a sheet of music, nor are they a sheet of letterpress separately published. Even if they were they would be mere words, not sentences forming a literary composition in which copyright could be acquired. Upon this point the case is governed by *Hollinrake* v. *Truswell*, and the injunction granted by Stirling, J., to restrain the use of these directions must be discharged.

The net result is that the plaintiffs' action wholly fails. Their appeal must be dismissed and the defendants' appeal be allowed.

ROMER, L.J.—I agree in thinking that the appeal of the plaintiffs should be dismissed. As the question involved is one of some importance I desire to add a few remarks. The rights under the Copyright Act of an author of a piece of music are: (1) To prevent others from copying the published music regarded as a book; (2) to prevent the music itself being performed in public without the author's permission. But anyone may perform the music in private by voice, musical instrument in the ordinary sense, such as violins, piano, and so forth, or by any mechanical instrument. Seeing that mechanical instruments for producing musical sounds were well known at the date of the Act, I think that the Legislature never contemplated that the author's right to multiply copies of published music would entitle him to stop the use in private of such an instrument because it performed the published music. Of course I am now speaking of mechanical musical instruments known at the date of the Act. But those instruments were numerous and included, for instance, musical boxes. The Act, to my mind, never contemplated that the cylinder of a musical box, taking that as one of the best known mechanical instruments, could be regarded as a copy of the printed music, even though an accomplished musician might be able by inspection of the cylinder to gather from it the notes of the music. Now in the case before us, the sheets which are said to be copies of the plaintiffs' published sheets of music were issued only for the purpose of being used as parts of a mechanical musical instrument to produce musical sounds. And as a matter of substance the defendants' sheets have in fact only been used by those to whom they were issued for the sole purpose for which they were in fact issued. But it is said they could be used so as to answer the same purpose as copies of the plaintiffs' printed music, and that therefore they ought to be regarded as copies within the Act. To my mind it does not of necessity follow that because a thing might be so used as to answer the same purpose as the copy of a book, it must be regarded as a copy within the Act. But, passing that by, I deal with the question before us as one of substance, and I ask myself whether in substance and in any practical view the defendants' sheets could be used so as to answer the purpose of copies of the plaintiffs' musical sheets. On the evidence in the case I agree with Stirling, J., that this question must be answered in the negative. I think that that really disposes of the appeal. In no practical or substantial view, in my opinion, can the defendants' sheets be regarded as copies within the meaning of the Act of the plaintiffs' sheets of music regarded as books. And I may add, at the risk of repeating what I have already said, that the plaintiffs' sheets and the defendants' sheets are issued and used for substantially different objects. The plaintiffs' sheets are issued and used as books to be read. The defendants' sheets are issued and used, not as books to be read, but as parts of a mechanical musical instrument to produce the sounds of music.

On the defendants' appeal, which raises a question of comparatively little importance, although I have felt some doubt about it, especially having regard to the views of Stirling, J., I come, on the whole, to the same conclusion as the Master of the Rolls. I think that no substantial part of the plaintiffs' book—that is, of their printed musical sheets has been copied by the defendants'. So far as words have been taken from the plaintiffs' book and put in the defendants' sheets, they have no use or connected meaning by themselves, and are only of use as regards the defendants' sheets, in any practical point of view, as directions for working the defendants' mechanical instrument to produce musical sound. I therefore agree in thinking that the plaintiffs' action ought to stand dismissed with costs here and below.

*Appeal dismissed; cross-appeal allowed.*

Solicitors, *Wilkinson, Howlett, & Co.; Maples, Teesdale, & Co.*

Appeal.
(A. L. Smith, Collins, and Vaughan Williams, L.JJ.) Dec. 9.

HENNESSEY v. MCCABE. (a.)

*Master and servant—Employment—Accident—Factory—Machinery—Loading from a dock—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-section* 1.

*A stevedore's labourer was injured by an accident in the course of his employment. At the time of the accident he was on board a ship lying in a dock, and was engaged in loading the ship from a lighter by means of a steam winch which was attached to the ship. No shore machinery was being used.*

*Held, that the steam winch was not constituted a factory within the meaning of the Workmen's Compensation Act*, 1897, *by virtue of section* 23 *of the Factory and Workshop Act*, 1895; *for it was not being used in the process of loading from a dock.*

Appeal from an award of the judge of the Bow County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was a stevedore's labourer, and the employer was a master stevedore. The applicant sustained accidental injuries while he was in the course of his employment on board a vessel which was lying in Victoria Docks. At the time of the accident the applicant was engaged in loading the vessel with cargo from a lighter, which was lying alongside, by means of a steam winch, which was attached to the vessel. No shore machinery was being used.

The question was whether the employment in which the applicant was engaged was employment to which the Workmen's Compensation Act applied.

The county court judge made an award in favour of the applicant.

The employer appealed.

*Ruegg, Q.C.*, and *Roskill*, for the employer.—This was not an employment to which the Workmen's Compensation Act applies. By section 7, sub-section 1, the Act applies to employment in a factory; and by sub-section 2, "factory" includes any dock, wharf, quay, warehouse, machinery or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. By section 23 of the Factory and Workshop Act, 1895, certain specified provisions of the Factory Acts "shall have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process, and (*b*) any premises on which machinery worked by steam, water, or other mechanical power, is temporarily used for the purpose of the construction of a building or any structural work in connection with a building, were included in the word factory, and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents or workmen, temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery shall be deemed to be the occupier of a factory." The word "factory" therefore includes two classes of machinery — viz., machinery used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse, and machinery worked by steam for the purpose of building. And the person using machinery of either of these two classes is to be deemed to be the occupier of a factory. *McNicholas* v. *Dawson & Sons*, 47 W. R. 500, [1899] 1 Q. B. 773, is an instance of the second class of machinery, but that case does not touch the present, for this is not a case of machinery used for building. The applicant, in order to make out his claim, must show that this steam winch was machinery used in the process of loading from a dock or unloading to a dock. The facts, however, show that the machinery was being used for loading from a lighter. The county court judge thought that *Woodham* v. *Atlantic Transport Co.*, 47 W. R. 105, [1899] 1 Q. B. 15, governed this case. But in that case cargo was being unloaded by means of a crane on a quay, and the decision of the court was that the Act applied because the employment was on or about machinery used in the process of unloading to a quay.

They also referred to *Flowers* v. *Chambers*, 47 W. R. 513, [1899] 2 Q. B. 142; *Hall* v. *Snowdon, Hubbard, & Co.*, 47 W. R. 486, [1899] 2 Q. B. 136; and *Durrie* v. *Warren & Co.*, 15 Times L. R. 365.

*Montague Lush*, for the applicant.—This case comes within section 23 of the Factory and Workshop Act, 1895. The steam winch was used in the process of loading from the dock. The section contemplates loading to or unloading from a dock, wharf, quay, or warehouse. Some meaning must be given to the word "dock"; and the only way in which cargo can be loaded from a dock, in contradistinction to a wharf or quay, is by means of a lighter. The word "dock" in this section clearly means the water. The decision in *Flowers* v. *Chambers*, that a ship lying in a dock is not a dock, must be accepted. But loading from a lighter lying in a dock is loading from the dock. The lighter, though not part of the dock, is part of the plant used for the operation of loading from the dock. If cargo were taken on board a ship from a cart standing on a quay, although the cart would not be the quay, the cargo would be none the less loaded from the quay.

A. L. SMITH, L.J.—The point raised in this case is whether a steam winch on board a ship lying in a dock, which steam winch is used for taking in cargo from a lighter lying alongside, is a factory within the meaning of the Workmen's Compensation Act. To determine this we have to consider the incorporation into the Workmen's Compensation Act of provisions in the Factory Acts defining what constitutes a factory. No case that we have yet decided covers this point. In *Flowers* v. *Chambers* we held that employment on a ship lying in a dock is not employment in a dock. In *Durrie* v. *Warren & Co.* we went a long way in the direction in which we are going to-day.

Section 7, sub-section 1, of the Workmen's Compensation Act says that the Act shall apply to employment in, on, or about a factory. Then sub-section 2 says that "factory" shall include any dock, wharf, quay, warehouse, machinery or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. That brings us to section 23 of the Factory and Workshop Act, 1895. This section deals with certain provisions of the Factory Acts, which it arranges in five groups, and numbers (i.), (ii.), (iii.), (iv.), and (v.). These provisions applied to factories, and to factories only. Section 23 extends their application and says that they are to have effect as if every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading and unloading therefrom or thereto, all

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

machinery and plant used in that process were included in the word "factory." The point is whether the steam winch used in this case was machinery used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse, within the meaning of that section. The cargo in this case was being loaded into a ship from a lighter. The winch was not used in the process of loading cargo from a wharf, quay, or warehouse, but in the process of loading cargo from one ship into another ship. It is said it was used in the process of loading from a dock. But I think it would be straining the section beyond reasonable bounds to hold that a steam winch on board a ship used for loading cargo from a lighter was machinery used in the process of loading from a dock, wharf, quay, or warehouse. In my opinion the case does not come within the Act.

COLLINS, L.J.—In this case I have felt some doubt as to whether we ought not to give weight to the argument of the learned counsel for the applicant, which appears to me to be logical. But I think we shall probably be right in interpreting "dock" in section 23 of the Factory and Workshop Act, 1895, in its ordinary sense—that is, as the place which embraces the land bounding the water as well as the water itself. When the Legislature speaks of loading to or from a dock, I think that it does not contemplate a loading from one ship lying in a dock to another, but that it contemplates a process which involves some use of a wharf or quay or other constituents of the dock. I agree that this construction renders certain words in the section nugatory; for the section speaks of loading or unloading therefrom or thereto—that is, from or to a dock, wharf, quay, or warehouse, so that it seems to put wharf and quay in contradistinction to dock. But I think that the words "loading from a dock" mean what nine out of ten ordinary persons would say they mean—viz., a loading which involves some use of the boundaries or edges of the dock. The point is whether the machinery used in this case can be brought within the word "factory." The applicant has to find some section in the Factory and Workshop Act, 1895, which makes it a factory by applying to it any of the provisions of the Factory Acts. He relies on section 23. But that section only applies to machinery in certain circumstances, which do not include the circumstances of this case, unless it can be shown that this machinery was used in the process of loading or unloading from or to a dock, wharf, quay, or warehouse; and it seems to me that that cannot be shown.

VAUGHAN WILLIAMS, L.J., delivered judgment to the same effect.

*Appeal allowed.*

Solicitor for the applicant, *Richard White.*

Solicitors for the employer, *W. Hurd & Son.*

---

From Q. B. Div. (A. L. Smith, Collins, and Vaughan Williams, L.JJ.) — Nov. 10.

JONES *v.* BIERNSTEIN. (*a.*)

*Landlord and tenant—Distress—Goods impounded on premises—Possession—Pound breach—Abandonment—Distress for Rent Act,* 1737 (11 *Geo.* 2, *c.* 19), *s.* 10 *—Practice—Leave to appeal to Court of Appeal on one point—Argument limited.*

*Where a landlord, in distraining for rent, has, under section* 10 *of the Distress for Rent Act,* 1737, *impounded goods on the premises, it is not necessary that anyone on his behalf should remain in possession of the goods.*

*Where leave to appeal on one point has been given by the Divisional Court, the Court of Appeal will not allow appellant to argue other points which had been raised in the county court and in the Divisional Court.*

*Decision of the* Divisional Court (Lawrence *and* Channel, JJ.) 47 *W. R.* 239, *affirmed.*

This was an appeal from the decision of the Divisional Court (Lawrance and Channell, JJ.), 47 W. R. 239, on an appeal from the Southwark County Court. The action was for pound breach. The plaintiff levied a distress for arrears of rent upon certain premises which he owned and which he had let at a yearly rent to one Morrisey.

A man, Kay, was put into possession of the goods upon the premises. A large quantity of the goods belonged to the defendant Biernstein, a furniture dealer on the hire system, who had let them to Morrisey. Kay went home every night, returning the following morning. On Saturday, the 16th of July, he left the premises at 8.30 p.m. and returned at 8 a.m. on the following Monday. Shortly after his departure the defendant removed the goods from the premises. The plaintiff thereupon brought an action in the county court for pound breach, claiming treble damages under 2 Will. & M. c. 5.

The county court judge found that Kay abandoned possession of the goods, there being no reasonable necessity for his absence, but that he did not abandon the distress, and upon these findings he gave judgment for the defendant on the ground that real possession was required, allowing for absences reasonable.

Upon appeal to the Divisional Court (Lawrance and Channell, JJ.) it was held that where goods have been impounded under section 10 of the Distress for Rent Act, 1737, it is not necessary that anyone on behalf of the landlord should be left in actual possession of them, and judgment was given for the plaintiff.

Leave to appeal was given on the point of pound breach, the court stating that their judgment proceeded on the facts as found by the county court judge, and that it must not be assumed that the case raised any question of general importance.

Defendant now appealed.

*Schwabe,* for the appellant.—Two points were raised in the county court—firstly, that there had been no pound breach; and, secondly, that there had been an abandonment of possession. There had been no actual impounding here. Nothing had been done to show that the goods were impounded. They had not been collected and locked up. All that was done was to make an inventory and put a man in possession. This man left the premises every evening, returning in the morning. When he left the premises the goods were then neither "impounded" nor "otherwise secured by the Act" (Distress for Rent Act, 1737, s. 10). The county court judge was wrong in holding that there was an impounding. The point was taken in the court below, and the learned judges there were wrong in not entertaining it, and the point was admissible in argument in this court. [A. L. SMITH, L.J.—Leave to appeal was given on one point only—namely, as to whether there had been a pound breach, and counsel can be heard on that point only.] When the impounding is done on the premises it is necessary that the man in possession remain on the premises. If he leaves he must show some real necessity to do so, otherwise there is an abandonment of possession: *Bagshawes* (*Limited*) v. *Deacon,* 46 W. R. 618, [1898] 2 Q. B. 173; *Bannister* v. *Hyde,* 2 E. & E. 627, 8 W. R.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

C. L. Dig. 26; *Swann* v. *Falmouth* (*Earl*), 8 B. & C. 456.

*J. D. Crawford*, for the respondent, was not called on.

A. L. SMITH, L.J.—The only point we have to determine is that which was determined by the judgment of the Divisional Court, and as to which leave to appeal was alone given. The county court judge found as a fact that an actual impounding of the goods had been made, and the judgment now appealed from proceeded on that basis. The only question before us, therefore, is whether in a case when the landlord has impounded goods on the premises it is necessary that a man should remain in possession of the goods. Where goods are in an actual pound it is admitted that it is not necessary that anyone should remain in possession. It seems perfectly clear to me that where, as in this case, the goods have been impounded, they are in *custodia legis*, and there is no necessity for anyone to remain in possession of them. The appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. The only question before us is whether, the goods having been impounded—for both the learned judges in the court below gave their judgment on the basis that the county court judge had found as a fact that there had been an impounding—it is necessary that someone should always remain in possession. I clearly think that it is not necessary, and that the learned judges in the Divisional Court were quite right in so holding.

VAUGHAN WILLIAMS, L.J.—I agree that, if we are limited in this case to the point upon which the judges in the Divisional Court gave leave to appeal, there is really nothing to be argued. The very statement of the point excludes all argument upon it. Speaking for myself I cannot say that the consequent result is entirely satisfactory. If one looks at the notes of the county court judge in this case, it is quite clear that the point as to which leave to appeal to this court was given by the Divisional Court was not the real point raised. Force of circumstances prevent us from considering that point, and all I can say is that I am sorry that that is so.

*Appeal dismissed.*

Solicitor for the appellant, *H. E. Tudor.*

Solicitor for the respondent, *C. J. Parker.*

---

## High Court of Justice.

Chan. Div. } Stirling, J. } Jan. 11, 17.

STEWART v. RHODES. (*a.*)

*Practice—Charging order* nisi *under R. S. C., ord.* 42, *r.* 23—*Death of judgment debtor—Liability of estate.*

*A charging order* nisi *made under R. S. C., ord.* 42, *r.* 23, *against the interest of a deceased judgment debtor, is not valid as against his executor, and cannot be made absolute.*

Adjourned summons.

This was an application arising upon a summons to cross-examine in an action transferred from the Queen's Bench Division, the summons having been adjourned by Stirling, J., into court on the preliminary point raised by the defendant that a charging order *nisi* could not be made absolute in the following circumstances.

The action was commenced in the Queen's Bench Division, and by the writ the plaintiffs, who were the assignees of the uncalled capital of and trustees for the debenture-holders of the Lands Trust Co. (Limited) claimed a sum of £959 11s. 9d. due in respect of 500 shares standing in the name of the defendant Rhodes.

On the 30th of January, 1899, the defendant having appeared, an order was obtained giving leave to sign judgment in accordance with order 14, and costs were taxed and allowed.

On the 27th of March the defendant died.

On the 9th of June his will was proved by his executor, one Wilford, who thus became his legal personal representative.

On the 16th of June an action in Chancery was begun by a secured creditor of Rhodes seeking to enforce his security, and to get general administration; on the same day an order was made in lunacy (the defendant Rhodes having been a person of unsound mind not so found by inquisition) to the effect that enough of a fund in court of £743 8s. 7d. New Consols standing to the credit of the defendant in connection with certain lunacy proceedings against him in his lifetime should be realized to pay the costs when taxed, the residue to be transferred to Wilford.

On the 17th of June the charging order *nisi* was made in chambers, the validity of which was the subject of the present application; thereby it was ordered that the plaintiffs be at liberty to issue execution against Wilford, the executor of the defendant judgment debtor, under ord. 42, r. 23, and that unless sufficient cause were shown to the contrary on the 28th of June the defendant's interest in the said sum of New Consols should, and that it in the meantime did, stand charged with the payment of the sum due on the judgment.

On the 22nd of June judgment for the administration of Rhodes' estate was pronounced in the Chancery action.

On the 26th of June the present action was transferred from the Queen's Bench Division to Stirling, J. The preliminary objection was then taken that there was no power under the statutes to make an order after the death of the judgment debtor charging the interest of the debtor in property, with the debt.

*Jenkins, Q.C.* (*Whinney* with him), for the applicants, the plaintiffs in the action.—The executor ought to be treated as the judgment debtor as he takes all the rights and liabilities of the deceased, against whose estate the plaintiffs have leave to levy execution. The order here made is the same in substance as that in *Haly* v. *Barry*, 16 W. R. 654, L. R. 3 Ch. App. 452. *Brereton* v. *Edwards*, 37 W. R. 47, 21 Q. B. D. 226, 488, is also relied on. *Finney* v. *Hinde*, 27 W. R. 413, 4 Q. B. D. 102, is distinguishable and is not to be pushed to cover facts which do not exactly coincide.

*Harman*, for the executor.—The rule is that a charging order only operates as a charge by the debtor; here he was dead, and an order in lunacy had dealt the day before with the very fund: *Dixon* v. *Wrench*, 17 W. R. 591, L. R. 4 Ex. 154; *Gill* v. *Continental Union Gas Co.*, 21 W. R. 111, L. R. 7 Ex. 332; *Finney* v. *Hinde; In re Leavesley*, 39 W. R. 276, [1891] 2 Ch. 1. *Haly* v. *Barry* is distinguishable. [STIRLING, J.—Cannot I amend the order?] No; for an administration has been decreed meanwhile. [STIRLING, J.—The question is whether ord. 42, r. 23, is equivalent to making the legal personal representative a defendant. *Jenkins, Q.C.*, referred to form No. 20 in the Annual Practice,

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

vol. 2, p. 1027 in the Appendix Tables.] That does not apply to a charging order: *Brereton* v. *Edwards*, *per* Lindley, L.J., at p. 497 of 21 Q. B. D.

*E. S. Ford* (*Upjohn, Q.C.*, with him), for another respondent, the liquidator of the company above referred to.—This order has been wrongly made; as this court has not the jurisdiction to do what would be equitable here—viz., to amend the order, then the proceedings should be commenced *de novo*. This court will not assist one creditor over another: *In re Cave*, W. N. (1892), p. 142; *Wallace* v. *McCann*, [1842] 4 Ir. Eq. 522; *Finney* v. *Hinde*.

*Jenkins, Q.C.*, in reply.—In *Haly* v. *Barry* the interest of the dead man was put in as description; *Finney* v. *Hinde*, when read with that case, has no application to the present case.

*Cur. adv. vult.*

STIRLING, J., after stating the facts, continued: The objection which is taken to the order is that there is no power under the statutes to make an order after the death of the defendant charging his interest with this debt. On this point I have to pay regard to previous decisions, and particularly to two cases, both of which are binding on me—viz., *Haly* v. *Barry*, a decision of the Court of Appeal, and *Finney* v. *Hinde*, a decision of the Divisional Court. I shall best deal with them in order of date. [His lordship having read the facts in *Haly* v. *Barry* and the material parts of the order made in that case, continued:] In order to appreciate the effect of that we must look at the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). [His lordship referred to sections 129 and 130 and to Form 8 in Schedule A.] The result is that the plaintiff is to have execution against the defendant's legal personal representative as such. The question of the validity of the order *nisi* does not appear to have been much argued in *Haly* v. *Barry*, but certainly there are expressions of opinion in the judgments of the Lords Justices which seem to show that they regarded the order as valid. The other case to which I was referred is that of *Finney* v. *Hinde*. There at the date when the order *nisi* was obtained the judgment debtor was dead and cause was shown on behalf of his widow, the executrix of his will, but a caveat was entered against the proof of the will. It was objected that as in the case of an ordinary execution by *fieri facias* it would be necessary upon the death of the judgment debtor in order to obtain execution, to apply for leave to enter a suggestion on the roll according to the Common Law Procedure Act, 1852, s. 129, and that a charging order could not be made absolute until such a suggestion had been entered in the action or until the plaintiff had applied under ord. 42, r. 19, for leave to issue execution against the defendant's representative; but Field, J., thought that as the defendant's representative had appeared to show cause, it was unnecessary to apply for leave to proceed against her, and he made the order absolute. On the appeal, it was argued for the executrix that the Act 1 & 2 Vict. c. 110, ss. 14, 15, gave no power to make the order. The charging order was to be made absolute unless the judgment debtor showed cause to the contrary and after proof of notice of the order *nisi* to the judgment debtor. There was, it was said, no mention of executors or representatives of the judgment debtor, and the debtor being dead it was impossible that the requisite conditions should be fulfilled. In opposition to that various arguments were adduced, and the case of *Haly* v. *Barry* was cited. [His lordship read from the judgments delivered by Cockburn, C.J., and Pollock, B.] So that where a proceeding has not been taken equivalent to the application to enter a suggestion on the record as provided by the Common Law Procedure Act, 1852, the charging order cannot be made. I am bound by both these cases, and I must reconcile them if I can. The only view, as it seems to me, in which they can be reconciled is this: The effect of them is that there is no power after the death of the original judgment debtor to make a charging order on his interest, but that there is power to make a charging order on the interest of the executor after an order giving liberty to issue execution against the executor has been made. I take it that in the latter case the executor becomes the judgment debtor within the meaning of 1 & 2 Vict. c. 110, s. 14. In the present case what has been done? It is ordered that the plaintiffs be at liberty to issue execution against the executor of the defendant, but the order continues that the defendant's interest in the said sum of New Consols shall stand charged with the payment of the amount due under the judgment. The charge is created, not on the interest of the executor, as was the form in *Haly* v. *Barry*, but on the interest of the defendant. It seems to me plain upon the construction of the order that by the defendant is meant John Rhodes, and, indeed, he is treated in the order not only as defendant but as judgment debtor, because the recital is that there is standing to the credit of the said John Rhodes, the judgment debtor, a person of unsound mind, the sum, &c. Is that a valid order? It seems to me, upon the authority of *Finney* v. *Hinde*, that it is not. There is no authority to charge the interest of a defendant after his death, and in point of fact what was his interest at the time of his death had ceased to be such by the order of the preceding day. It is said that this charging order ought to be construed liberally, and that I ought to say that the interest of the defendant means such interest as is now vested in his legal personal representative. But the rules applicable to the construction of wills are not applicable to the construction of orders of the court, which are formal documents, and must be taken to have the legal meaning attributable to them, according to a well-known principle acted on in many cases. In particular I remember a case of *Freke* v. *Carbery*, which is not reported upon the point for which I am citing it. In that case the right of a tenant for life to cut timber was considered, and the matter came before Lord Selborne, who was sitting for the Master of the Rolls (Lord Romilly). He made a declaration that the tenant for life was not entitled to cut timber. Afterwards the question arose whether the tenant for life was entitled to cut timber for the purpose of repairs, which is the ordinary right of a tenant for life. The question came before Jessel, M.R., who held that he was bound by the form of the previous order, though there was plainly a slip, and that the tenant for life had no right to cut timber for any purpose. The matter was then taken to the Court of Appeal, and the decision of Jessel, M.R., was affirmed. Therefore I cannot hold on this order that by the interest of the defendant is meant the interest which has become vested in the executor. Then it is said that this is a slip which ought to be put right. It is very probable, or at least it is possible, that if the attention of the master who made this order had been drawn to the point, the order would have been made in the same form as the order in *Haly* v. *Barry*. But it was not. Now, the provision which is applicable is rule 11 of order 28, which empowers the court to correct "clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission" on motion of summons. The effect of that rule has been considered by the House of Lords in *Hatton* v. *Harris*, [1892] A. C. 547, 41 W. R. Dig. 162, where the power was exercised. Lord Watson states in a sentence the

effect of it. He says, at p. 560: "Where an error has been committed it is always within the competency of the court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce. The correction ought to be made upon motion to that effect and is not matter either for appeal or rehearing." No motion has been made to that effect here, but I think that I should express my opinion so far as I can upon the materials before me as to what would be the result of such an application. It seems to me that this case falls within the exception mentioned by Lord Watson and that something has happened which would render it inequitable to correct this order, because on the 22nd of June judgment for the administration of the debtor's estate was pronounced and the effect of that is to give the general creditors the right to have the property of the deceased applied in payment of their debts *pari passu*. I think, therefore, that this order is bad.

Solicitors, *Markby, Stewart, & Co.; Johnson, Weatherall, & Sturt*, for *Wade, Bilbrough, Booth, & Co.*, Bradford; *May, Sykes, & Co.*

---

Chan. Div. } Stirling, J. } Nov. 7, 8; Dec. 20.

BARBER v. MEXICAN LAND AND COLONIZATION CO. (LIMITED). (a.)

*Practice — Jurisdiction — Private international law — Authority of American judgment creditor to sue in English court—Californian Code.*

*Where an American court had made an order authorizing a person who had recovered judgment in that court against an American company to bring actions against an English company "in any and all proper courts, in his own name, or in the name of the said American company,"*

*Held, that the jurisdiction of the American court was limited to the exact scope of the Californian Code conferring it, and that, in an action brought by the said person in an English court, he was not properly authorized to sue, and could not sue, in the name of the said American company.*

This was a summons on behalf of the International Co. of Mexico, one of the plaintiffs, that the writ and subsequent proceedings in the action might be amended by striking out the name of that company as plaintiffs, on the ground that such name had been used without due authority. It raised a question as to the jurisdiction of an American court to make an order authorizing a person who had recovered judgment in that court against an American company to bring an action in the name of that company in this country against an English company.

The plaintiff company was incorporated under and in accordance with the laws of the State of Connecticut, U.S.A.

The defendant company was an English company registered under the Companies Act 1862.

By an agreement in writing dated the 4th of May, 1889, made between the plaintiff company of the one part and the defendant company of the other part, the plaintiff company agreed to sell and transfer all the property and undertaking of the plaintiff company to the defendant company; and the defendant company thereby undertook to pay and satisfy all the obligations, debts, engagements, and liabilities of the plaintiff company, and to indemnify the plaintiff company in respect thereof.

On the 10th of June, 1889, one F. E. Bates commenced an action in California against the plaintiff company, to which the plaintiff company duly appeared; and on the 29th of November, 1892, Bates recovered judgment in that action for a sum equivalent in English money to £24,751, which still remained unsatisfied.

On the 12th of December, 1892, Bates assigned to the plaintiff Barber his judgment and all sums to be recovered in respect thereof.

On the 16th of March, 1896, in certain proceedings in the Californian court, an order was made whereby Barber was "authorized and empowered to institute any and all necessary and proper action or actions against the said Mexican Land and Colonization Co. (Limited), in any and all proper courts, in his own name, or in the name of the said American company to his use, for enforcement of the said agreement of the 4th of May, 1889, and the recovery of the said judgment and the moneys due, and to become due on the said judgment and claim"; and the order further appointed Barber receiver of the International Company of Mexico, with full power to bring all actions and take all proceedings necessary and proper for the collection of the said judgment.

The writ in the present action was issued on the 15th of June, 1896, Barber and the International Company of Mexico being the plaintiffs, and the Mexican Land and Colonization Co. being the sole defendant.

The statement of claim was delivered on the 23rd of June, 1896, and thereby the plaintiffs claimed specific performance by the defendant company of the agreement of the 4th of May, 1889, so far as might be necessary to enforce payment by the defendant company to the plaintiff Barber of his judgment debt; payment of the debt with interest, and damages for breach of the agreement.

On the 12th of March, 1897, the plaintiff company gave notice of motion in the American action for an order vacating and setting aside the order of the 16th of March, 1896, on certain grounds, *inter alia*, that the court had no jurisdiction to make it.

On the 12th of January, 1898, the motion was refused and no further proceedings had been taken in the American action.

*Jenkins, Q.C.*, and *Danckwerts*, for the plaintiff company.—The American court had no power under American law to allow an execution creditor to do acts to levy execution here; the order is no better than if a sheriff had come over here to enforce execution. We rely on the provisions of the Californian Code, ss. 564, 714, 717, 720, to which we say a strict construction should be given; an order of this kind, being ancillary to execution, can only be good in the jurisdiction in which it was granted. Also, it is an interlocutory order and is modifiable, whereas this court will only deal with foreign judgments when they are final: *Nouvion* v. *Freeman*, 38 W. R. 581, 15 App. Cas. 1. The conduct of Bates amounts to maintenance: *Bradlaugh* v. *Newdegate*, 31 W. R. 792, 11 Q. B. D. 1; *Guy* v. *Churchill*, 37 W. R. 504, 40 Ch. D. 481.

*Upjohn, Q.C.*, and *Eustace Smith*, for Barber.—We rely on the words used in the order, which is quite general; the whole matter was before the American judge who had jurisdiction to make the unlimited order which he did. The case is not really one of execution here, but one in which the court here is asked to appoint a receiver for abroad: see Seton, vol. 1, p. 381.

Foote on Private International Jurisprudence (2nd

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

ed.) p. 516; Dicey on Conflict of Laws, p. 711; Westlake on Private International Law (3rd ed.), p. 362, s. 345, also referred to.

*Cur. adv. vult.*

STIRLING, J., in giving judgment, said that on the facts it must be taken that the order of the 16th of March, 1896, was properly made, and it was on that that the plaintiff Barber relied in opposition to the summons. The order, however, did not in terms empower the plaintiff Barber to bring an action in the name of the plaintiff company in an English court; and the contention of the plaintiff company was that if a construction were placed on the order which would so authorize the plaintiff Barber, then it was not within the powers of the court in California, and that a more limited meaning ought to be given to it. In support of that contention reliance was mainly placed on the reasons given by the learned judge who made the order in the judgment delivered by him on the application of the plaintiff company to set it aside. The learned judge then relied upon sections 714 and 720 of the Code of Civil Procedure of California as conferring on him authority to make the order of the 16th of March, 1896. Those sections fell under the Title IX. of the code, "On the Execution of the Judgment in Civil Actions." That title was divided into two chapters —(1) "The Execution," (2) "Proceedings Supplemental to Exection." Sections 714 and 720 were found in the second chapter. An examination of those two chapters showed that (as might be expected) they contained provisions as to the mode of obtaining execution of a civil judgment through courts and officers of courts whose proceedings were regulated by the code—that was to say, the courts of the State of California, the district courts of the United States of America having jurisdiction within the State of California, and possibly other courts of the United States or of the individual States. It seems to me that section 720, when carefully considered, applied only to such courts. The concuding sentence: "Such order may be modified or vacated by the judge granting the same or the court in which the action is brought, at any time, upon such terms as may be just," appeared to show that the section was to be read with such a limitation as I have indicated. If that were so, then the order of the 16th of March, 1896, would be perfectly valid and operative in all American courts whose proceedings were regulated by the Code of Civil Procedure of California; and it ought not to receive such a construction as would give it an effect beyond that authorized by the very enactment in pursuance of which it was made. I think, therefore, that the "proper courts" mentioned in the order ought to be read as meaning courts in respect of which the courts of California could properly make the order, and not as including the English courts. It was to be observed that the learned judge nowhere stated that he had power to authorize the plaintiff Barber to sue in the name of the plaintiff company in an English court; indeed, his language appeared to indicate that he at least entertained doubts on the subject. [His lordship then referred to the opinions of several American lawyers, and, continued.] It was not contended that the plaintiff Barber could, according to the practice of the English courts, maintain this action in his capacity as receiver. If effect were given to the contention on behalf of Barber remarkable results might follow. In my opinion an order ought to be made in accordance with the summons.

Solicitors, *John Broad; H. S. Holt.*

Chan. Div. } Dec. 12, 13.
Kekewich, J. }

JOHN BROTHERS (ABERGARW, BREWERY) v. HOLMES. (a.)

*Mortgage—Covenant—"Tied" public-house—Collateral security for mortgage—Omission of "successors"—Assign and sub-lessee—Superior title.*

*J. J., the owner of a public-house, mortgaged it, subject to a prior mortgage to J. T., to M. J. and W. J., trading together as "J. Brothers" as brewers and wine merchants. By an indenture of even date with this second mortgage, J. J. covenanted with the said M. J. and W. J., "trading in co-partnership as 'J. Brothers,'" and thereinafter "styled as 'J. Brothers,'" that he, the said J. J., his executors, administrators, and assigns, for so long as he or they should continue in possession of the said public-house, would purchase their beer and spirits from the said "J. Brothers." Subsequently J. J. and J. T. united in granting a sub-lease to H., who had at the time notice of the said covenant; and the business of "J. Brothers," together with the mortgage to them already mentioned, was transferred to the A. Brewery Co.*

*Held, that the covenant and the mortgage to "J. Brothers" must be read together, and that H. was bound to purchase his beer from the A. Brewery Co., notwithstanding the fact that "J. Brothers" had technically ceased to exist and that H. was not bound by the actual words of the covenant to purchase his beer from their "successors."*

Clegg *v.* Hands, 38 *W. R.* 433, 44 *Ch. D.* 503, *and similar cases, distinguished.*

*Held, that "assign" does not necessarily exclude "sub-lessee," and that the fact that H. was not the "assign," but the "sub-lessee," of J. J. did not relieve him from liability on the covenant, with notice of which he was affected.*

Bryant *v.* Hancock, 46 *W. R.* 386, [1898] 1 *Q. B.* 716, [1899] *A. C.* 442, *distinguished.*

*Held, that H. was bound to claim under his superior title; and that he must accordingly be considered, in the eye of the law, to derive his title, not from J. T., but from J. J.*

Trial of action.

By an indenture of mortgage dated the 24th of September, 1891, John Jenkins assigned to certain mortgagees therein mentioned certain leasehold premises called the Tondu Arms Hotel, at Tondu, in the county of Glamorgan, for the residue of a term of eighty years from the 30th of June, 1865 (less the last ten days thereof), in order to secure the repayment of the sum of £1,000 with interest thereon. By a second indenture of mortgage also dated the 24th of September, 1891 (but expressed to be made subject to the first indenture of mortgage abovementioned), the said John Jenkins assigned the Tondu Arms Hotel for the residue of the said term of eighty years (less the last ten days thereof) to Morgan John and William John (trading in co-partnership as John Brothers as brewers and wine merchants) in order to secure the repayment of the sum of £550 with interest thereon. The said sum of £550 was expressed in the said indenture to be advanced by the said John Brothers out of the partnership account. By a deed of covenant, also dated the 24th of September, 1891, the said John Jenkins in consideration of the advance to him of the said sum of £550 covenanted with the said Morgan John and William John, "trading in co-partnership as John Brothers," and thereinafter "styled as John Brothers," their

(a.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

executors, administrators, and assigns, that he, the said John Jenkins, his executors, administrators, and assigns, for so long as he or they should continue in possession of the Tondu Arms Hotel, did thereby bind the said hotel to the said John Brothers for an entire supply for consumption of certain beers at certain prices therein particularly mentioned.

Prior to the 22nd of September, 1896, the mortgage security for £1,000, above mentioned, became vested in a manner which did not appear at the hearing of the action in a certain John Thomas; and the leasehold interest in the Tondu Arms Hotel also became vested (subject to the two above-mentioned indentures of mortgage) in a certain Evan Thomas. By an indenture of underlease, dated the 22nd of September, 1896, the said John Thomas "demised," and the said Evan Thomas (therein described as the "lessor") "demised and confirmed" the Tondu Arms Hotel to the defendant for the term of nine years from the 22nd of September, 1896. It was not denied that the defendant had notice at the time of his taking his underlease of the deed of covenant of the 24th of September, 1891. The plaintiff company was incorporated on the 20th of June, 1895, and by an indenture of the same date the mortgage security for £550, already mentioned, was transferred to the plaintiff company. The defendant continued to purchase his beer from the plaintiff company till November, 1898, but subsequently ceased to do so. On the 22nd of March, 1899, due notice was given to the plaintiff company, on behalf of the defendant, of an intention to pay off the said mortgage debt of £550. On the 27th of April, 1899, the plaintiff company commenced the present action to restrain the defendant from selling beer at the Tondu Arms Hotel other than that supplied to him by the plaintiff company. By his defence, delivered on the 14th of July, 1899, the defendant pleaded (*inter alia*) that he was ready and willing to pay off the said mortgage debt of £550. On the 22nd of September, 1899, the sum of £550 was duly tendered by Evan Thomas to the plaintiff company on behalf of the defendant, and refused by them. No action for redemption had been commenced on behalf of the defendant.

*Warrington, Q.C.*, and *Edward Ford*, for the plaintiff company.—The benefit of the covenant of the 24th of September, 1891, passed to the plaintiff company on the transference to them of the mortgage for £550 on the 20th of June, 1895. The covenant is to subsist so long as Jenkins or his assigns shall continue in possession of the premises, and the defendant is an assign of Jenkins. The defendant had notice of the covenant, and is bound by the doctrine of *Tulk* v. *Moxhay*, 2 Phillips 774.

*P. O. Lawrence, Q.C.*, and *S. T. Evans*, for the defendant.—(1) The defendant is bound (if at all) to buy his beer from "John Brothers," not from their "successors"; and "John Brothers" have ceased to exist: *Clegg* v. *Hands*, 38 W. R. 433, 44 Ch. D. 503; *White* v. *Southend Hotel Co.*, 45 W. R. 434, [1897] 1 Ch. 767; *Doe d. Calvert* v. *Reid*, 10 B. & C. 849. (2) The defendant is not an "assign" within the meaning of the covenant, because (*a*) he is a "sub-lessee," and "sub-lessee" is not included in "assign." He is not therefore bound, even though he take with notice: *Bryant* v. *Hancock*, 46 W. R. 386, [1898] 1 Q. B. 716, [1899] A. C. 442. (*b*) John Thomas is the prior mortgagee, and the mortgage to John Brothers is expressly subject to the mortgage to him. In the sub-lease of the 22nd of September, 1896, John Thomas is expressed to demise to the defendant; the defendant is therefore "in" by the prior estate, and his tenancy is not subject in any point to the mortgage for £550 or to the covenant of the 24th of September, 1891. The question is one of intention; and the intention that the defendant should be "in" by the prior estate is evidenced by the fact that John Thomas, the mortgagee, has been expressly made a party: *Roache* v. *Wadham*, 6 East 289. (3) The £550 was tendered to the plaintiff company on the 22nd of September, 1899. After their refusal to accept it they cannot now ask for an injunction.

*Warrington, Q.C.*, in reply.—(1) As to the question of the omission of "successors," none of the cases cited are in point. In all those cases the question was one between lessor and lessee. Here the covenant must be read as part of the mortgage itself, and its benefit must be taken to pass to the persons who from time to time are entitled to the benefit of the mortgage. (2) (*a*) *Hall* v. *Ewin*, 36 W. R. 84, 37 Ch. D. 74, shows that a sub-lessee in possession with notice is bound, not less than an assign, by the doctrine of *Tulk* v. *Moxhay*; (*b*) Evan Thomas is called the lessor, and a mortgagee not in possession is incapable under the Conveyancing Act, 1881, of granting a valid lease. The defendant's title is derived accordingly, both nominally and really, through Evan Thomas.

KEKEWICH, J.—In this case I am asked to give relief by way of injunction, but it is impossible for me to do so, and it is impossible for this reason. The covenant here appears to me to be a good one as being attached to the mortgage for £550. The defendant, however, has offered in his defence to redeem that mortgage; and his sub-lessor has actually tendered the amount. The result is this: that although, as a matter of fact, owing to the plaintiff company's refusal of this tender, the mortgage has not yet been redeemed, and although the defendant has not yet taken any legal steps to enforce its redemption, yet the defendant could now be held to his offer, and it would be wrong for me simply to grant an injunction without further qualification. Possibly I might make a complicated order to the effect that, if the mortgage should not be redeemed within a fixed time, the injunction should then be granted. Why then, it may be asked, do I not at once dispose of the case on this ground alone? I do not so dispose of it because of the question of costs. As a matter of fact the mortgage has not been redeemed, and it is impossible for me to say that either the plaintiff or the defendant has been wrong all through the action. If, accordingly, I were to decide the action solely on the point above indicated, I should be obliged to make a sort of division of spoils, in the matter of costs, between the plaintiff and the defendant. It will be better, therefore, to decide the case on its other merits, and not on this one point alone.

Two real questions arise in the present action. Firstly, is the plaintiff company entitled to sue for breach of this covenant? Secondly, is the defendant liable to be sued on it? (1) The defendant says that the covenant is that he should buy his beer from "John Brothers," but that he is now being asked to buy his beer from the Abergarw Brewery and not from "John Brothers" at all. Now the covenant is contained in a separate deed; but it is contemporaneous, and must be read, with the mortgage. I altogether leave out of question the fact that the words "successors and assigns" are omitted. Cases, it is true, have been cited by the defendant to show that those words may be of importance. Standing by themselves, no doubt, they may point to a certain conclusion, but that is no reason why we should not, in their absence, come to precisely the same conclusion on quite different grounds. To my mind their absence is of no importance here. The covenant speaks of Morgan and

William John "trading in co-partnership as John Brothers . . . hereinafter styled as John Brothers." Now, had conveyancing forms permitted it, the draftsman, I suppose, would have said something like this: "The firm of John Brothers, which firm now consists of," &c., &c. The draftsman, however, could not do that—it would have been an anachronism. What he does is to take the actual number of existing partners at the time of the covenant, and define them as "John Brothers." I find that characteristic running through both deeds—through the mortgage and the covenant alike. The reference in every case is invariably to "John Brothers." More than that, I find that the mortgage money is advanced out of the partnership account; that the property in question is "tied" to a firm of brewers; and that the covenant is intended to be for the benefit of that business. The benefit, therefore, must be taken to belong to whoever, from time to time, possesses the business in question. I lay no stress on the fact that in this case a private firm has been converted into a joint-stock company. There is just as much an assignment to them as there would have been to strangers. I hold, therefore, that the plaintiff company, since they are entitled to the business of "John Brothers," is entitled also to the benefit of the covenant made with them.

(2) Now as to the second point. It is contended—and it is contended from two different points of view—that the defendant is not an assign of John Jenkins. That is a more difficult point, especially in its second branch. (a) Why is not the defendant to be bound by an application of the ordinary doctrine, that anyone claiming through John Jenkins and having notice of John Jenkins' covenant is bound to perform that covenant? It is asserted, indeed, on the authority of *Bryant* v. *Hancock*, that "assign" does not include a sub-lessee. It is argued, accordingly, that a sub-lessee was never under any circumstances meant to be bound, and cannot, therefore, in this case be bound, under any doctrine of notice. But *Bryant* v. *Hancock* does not show that "assign" necessarily excludes "sub-lessee." It is a question of construction in each individual case. In this case, I think, on the true construction, there is a clear intention to bind the premises as far as possible in the hands of anyone claiming under a title derived from John Jenkins subsequently to the date of the second mortgage. But does the defendant claim under a title thus derived from John Jenkins? That is the most difficult question of all. The defendant says that he is the sub-lessee, not of Evan, but of John Thomas, because John Thomas, who has the legal estate, "demises," whereas Evan Thomas merely "demises and confirms." I have the sub-lease before me; and, under section 18, sub-section 1, of the Conveyancing Act, 1881, it would have been a perfectly good lease had it been made by Evan Thomas alone. By sub-section 2 of the same section it would have been a good lease, if made by John Thomas alone, only if he had been in possession, not otherwise. Since, however, the two have joined together, whose lease does it actually purport to be? John Thomas is described as being the owner of the legal estate; Evan Thomas is described as the lessor. I do not think that those descriptions are of very great importance. In the witnessing part we find that John Thomas "demises," and that Evan Thomas "demises and confirms." It is very strange that John Thomas, the mortgagee, should be put first, and that the so-called "lessor" should be put second. That is certainly strange conveyancing. We learn, however, from *Roach* v. *Wadham*, that it is quite immaterial who is called the "lessor," though it is very material, on the other hand, to discover under what title the best is really made as a matter of law. The defendant, in short, is bound to claim under his superior title—the title which is best in point of law. As to that there can be no doubt. The better title is conferred by Evan Thomas, and it is therefore under that title that the defendant holds. As a result I am against the defendant on every point except the one I first mentioned. I cannot therefore give the defendant the costs of the action. In very strict justice I ought, perhaps, to give the plaintiff company the costs up to the tender of the redemption money in the statement of defence. I shall, however, make no order as to costs.

*Judgment for the defendant.*

Solicitors, *Wrentmore & Son*, for *S. H. Stockwood*, Bridgend; *Smiles & Co.*, for *T. H. Belcher*, Cardiff.

---

Chan. Div. } Jan. 26.
Buckley, J. }

IND, COOPE, & CO. (LIMITED) v. HAMBLIN. (a.)

*Vendor and purchaser—Covenant—Restrictive covenant — Vendor and purchaser — Construction — Windows —"Buildings adjoining."*

*Vendors sold and conveyed land, retaining adjacent land. The purchaser covenanted, "in the erection of buildings adjoining the hereditaments of the vendors," not to insert windows overlooking their land. He nevertheless built houses with windows which did so overlook. Between the houses and the land of the vendors were gardens belonging to the purchaser, several yards long, and a fence.*

*Held, that the houses "adjoined" the land of the vendors within the meaning of the covenant.*

Action.

This was an action by vendors to enforce a covenant by the purchasers not to insert windows in houses overlooking land retained by the vendors.

The plaintiff company were the owners, subject to a lease, of the Bournbrook Hotel, in Bournbrook, near Birmingham, and of land around the hotel, principally at the rear, part of which had been laid out as a bowling green. The hotel fronted, on the south, upon the Bristol road, and the land connected with it was bounded upon the east by the Grange-road, and on the west or south-west and north or north-west by other land which, at the date of the conveyance next mentioned, also belonged to the plaintiff company, and which contained about 22,000 square yards. The plaintiff company also owned at the date of the conveyance, land on the opposite side of the Grange-road of about 3,000 square yards.

In June, 1897, the company conveyed these two pieces of land, containing respectively 22,000 square yards and 3,000 square yards, which in the plan in the conveyance were edged round with pink, to the defendant in fee simple. The hotel and land connected with it retained by the vendors were in the plan edged round with blue. The conveyance contained covenants on the part of the purchaser that he would not permit the land sold to be used for a public-house, &c., that he would pay for certain repairs to the roads, "and also from time to time, and at all times hereafter, in the erection of any buildings adjoining the hereditaments of the vendors edged blue on the said plan shall not nor will insert or permit to be inserted any lights overlooking such other hereditaments as afore-

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

said." The defendant, having entered into possession of the land sold, erected a row of small dwelling-houses on it in a line more or less parallel to the west (or north-west) boundary of the land at the rear of the hotel retained by the vendors. The rear of these houses was towards the land of the company, and the windows at the back of several of these houses overlooked the bowling-green. The houses were not built so that the backs touched the boundary of the company's land, but between the backs of the houses and the land of the company there were gardens belonging to the houses of a length of from twenty-five to thirty feet. These gardens were separated from the company's land in the case of the first one by a wall, in the case of the others by a wooden fence or barrier. The plaintiffs alleged that the existence of these windows lessened the value of the hotel and bowling-green, and gave evidence to that effect. In these circumstances they asked that the defendant might be ordered to build up the windows overlooking their property, and pay damages.

*Astbury, Q.C.*, and *Stewart Smith*, for the plaintiffs.

*H. Terrell, Q.C.*, and *Edward Clayton*, for the defendant.—The houses of the defendant may be adjacent to the land of the plaintiffs, they are not adjoining to it, as the gardens of the houses lie between. The case of *Rex* v. *Hodges*, 1 Moo. & M. 341, decides this.

They also cited *Vale & Sons* v. *Moorgate-street, &c., Buildings (Limited)*, 80 L. T. Rep. 487, 47 W. R. Dig. 96; they also relied on standing by, waiver, and acquiescence.

BUCKLEY, J.—The case of *Rex* v. *Hodges* turned on the construction of a statute of criminal law, which is construed more strictly than other instruments. I am of opinion that what the defendant has done here is a breach of the covenant in his conveyance. I shall grant an inquiry as to damages, but not a mandatory injunction in the circumstances of the case.

Solicitors for the plaintiffs, *H. Tyrrell & Sons*, for *Blewitt, Reynolds, & Co.*, Birmingham.

Solicitors for the defendant, *F. A. K. Doyle*, for *J. Cartwright Frith*, Birmingham.

---

Q. B. Div.
(Darling and Channell, JJ.) } Dec. 7.

DUCKHAM (*Appellant*) *v.* GIBBS (*Respondent*). (*a.*)

*Ship—Docks — Dock-master, duty of — Requisition to remove vessel—Obstruction—West India Dock Act* (1 *& 2 Will.* 4, *c. lii.*), *s.* 101.

*Section* 101 *of the West India Dock Act provides that every master or other person in charge or command of a vessel, having placed such vessel within* 200 *yards of the entrance to any of the docks to which the Act applies, "who shall not immediately remove such vessel from within such distance on being therewith required by the dock-master," shall incur a penalty "for every hour that such obstruction shall remain after such requisition."*

*Held, that a notice or requisition, signed by a dock-master, with the name of the vessel left blank, and handed by him to his deputy, with instructions to serve it upon any master who should place his vessel within the prescribed limit, and which was afterwards served by such deputy upon the respondent, was a sufficient requisition within the Act.*

*Held, also, that it is not necessary that the vessel should be proved to have actually obstructed navigation to constitute the offence.*

Case stated by a metropolitan police magistrate.

An information was laid by the appellant, on behalf of the London and India Docks Joint Committee, against the respondent for that, being a person having the charge or command of a certain lighter or barge known as *The Sapphire*, he did unlawfully on the 8th of May, 1899, place or permit or suffer it to remain in the River Thames within 200 yards of the old entrance of the East India Docks, and refused and did not immediately remove, such lighter or barge from within such distance on being thereunto required by the dock-master, and did remain, after such requisition was made, a long and unreasonable time—to wit, one hour and upwards, contrary to the West India Dock Act, s. 101.

The section enacts as follows: "And for the better making and preserving of a free and clear entrance, navigation, and passage into and out of the said docks, basins, locks, and cuts, be it further enacted that every master or other person having charge or command of any ship, lighter, barge, or boat, or other vessel of any description whatsoever who shall place or permit or suffer the same to remain in the River Thames within 200 yards of any of the entrances to the said docks, basins, locks, or cuts, except at the said Limehouse entrance into the said south docks as aforesaid, unless for the purpose of coming into or going out of the same, shall forfeit and pay for every such offence any sum not exceeding £10, and every master or other person having the charge or command of any ship, lighter, barge, boat, or other vessel of any description whatsoever so placed within such distance as aforesaid (whether for the purpose aforesaid or not) who shall not immediately remove such ship, lighter, barge, boat, or other vessel from within such distance on being thereunto required by the dock-master or dock-masters shall, for every such offence, forfeit or pay any sum not exceeding £5 for every hour that such obstruction shall remain after such requisition . . ."

On the upper pier-head of the entrance to the East India Docks, which is one of the docks to which the Act applies, there is a notice painted up in the following terms: "No ship, lighter, barge, tug, or craft shall be made fast to or shall lie alongside of any part of this pier-head unless so ordered by the dock-master, and any person or vessel thus offending will be proceeded against as the Act of Parliament provides.—J. H. DUCKHAM, Dock-master."

On the 8th of May, 1899, at 4.30 p.m., at which time the tide was ebbing and would so continue for about two hours, the barge *Sapphire* in the charge of the respondent arrived at the pier-head. She came there for the purpose of going into the dock, but according to the ordinary practice would not be able to enter the dock, nor would the dock-gates be opened to permit the exit or entrance of any traffic until the tide had turned and had been running up for between two and three hours.

The respondent on his arrival at the pier-head was told by the appellant's lockman on duty that the barge could not remain there and must be removed. He, however, made the barge fast to the upper pier-head, within 60 feet of the dock entrance, but so that when the tide turned she would swing round away from the entrance. The respondent then came ashore. On landing he was served by the lockman with a notice, which was as follows: "You are required to unmoor and remove your vessel from the pier-head and from within the distance of 200 yards from the entrance.—J. H. DUCKHAM,

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Dock-master." The respondent did not comply with the notice or remove the barge, and it was still there at 6.30 p.m.

It appeared from the evidence of the lockman that until the 1st of May, 1899, it had for years been the practice of barges to make fast to the pier-heads in a similar position to that occupied by *The Sapphire*. On that day the dock-master gave general instructions to the lockman to prevent barges from making fast to the pierheads. No specific orders were given to the lockman with regard to the respondent's barge, but he acted under his general instructions. The notice handed by the lockman to the respondent was one of several blank notices signed by the dock-master which had been supplied to him. The lockman filled up the date and name of the barge, and if the person in charge refused to move, he served him with the notice without consulting the dock-master.

The magistrate dismissed the information, holding that before an offence under the section could be held to have been committed, special instructions applicable to each particular vessel must be given by the appellant. He also found that there was no evidence that any particular vessel entering or leaving the dock had in fact been obstructed by *The Sapphire*, but held that such obstruction was not necessary to the proof of an offence under the section.

*George Wallace*, for the appellant.—There is nothing in the section to show that it was necessary for the dock-master to give special instructions. The notice served by the lockman is therefore in accordance with the Act and the offence is complete.

*J. A. Hamilton*, for the respondent.—The notice was not a sufficient notice within the section for the reason stated by the magistrate. The section does not apply unless the barge in question constitutes an actual obstruction. There was no navigation or passage of vessels at the time, so that the barge could not have been an obstruction.

DARLING, J.—In this case the magistrate has decided one of the points raised in favour of the respondent, and the other in favour of the appellant. The first question, which he decided in favour of the respondent, arose upon section 101 of the West India Dock Act.

Now, it is first of all said that this offence was not committed, and the fine did not become due because the dock-master, after the barge had been moored within 200 yards of the dock gate, did not himself come and—with regard to that particular barge—give to the master of it a direction to take it away. What he did was this: He filled up and signed a lot of "requisitions" directed to masters of barges which might commit this offence, and he gave those documents so signed and filled up to a deputy of some kind. When the barge came within the proscribed distance and attempted to remain there the dock-master's deputy simply took one of these documents, filled in the name of the barge and of the master of it, and served him with it. It was said by the appellant that that was a requisition to remove the obstruction. On behalf of the respondent it was contended that it was not a requisition at all, that it was made before the barge became an obstruction, if it ever became one, and that it was therefore not within what the Act allowed the dock-master to do. The magistrate found that the requisition was not a good one, and in that I think he was wrong. I think that what was done did amount to a requisition by the dock-master. I do not see anything in this section or in any other part of the Act which satisfies me that the requirement must be made by the dock-master personally to the master of the barge. The barge, having brought itself within the proscribed limit—200 yards—became, I think, a thing which the dock-master had a right to order away, and I cannot see that he had not a right to order it away because the document by means of which he ordered it away had been filled up by him before it came there, except that he had not put in its name.

With regard to the other point, Mr. Hamilton contended that if no particular vessel had in fact been obstructed by the lighter, then there was no obstruction within the meaning of section 101, and no offence was or could be committed. I do not agree with that. I think that section 101 means this: It first of all says that you shall not moor a lighter within 200 yards of a certain place. It then goes on to say if you moor it within such a distance you may be required by the dock-master to remove it, and, if you do not then remove it, for every such offence you shall have to pay a sum for every hour that such obstruction shall remain after the requisition is made.

I do not think that the words "such obstruction" there require that it should be proved that any particular vessel was obstructed, nor that the traffic was obstructed or might have been obstructed. I think that the meaning of the words "such obstruction" is this, that directly you have a lighter moored within 200 yards of the forbidden spot it becomes an obstruction. True, it is still a lighter, but I think it is something else, it is a lighter in a forbidden place. It is a lighter remaining in the forbidden place after its master has been required to remove it, and I think that then such a lighter, in such a place, after such a requisition directed to its master, becomes an obstruction within the meaning of the statute, and that it is so because of the place where it is and because of its being there in defiance of notice given to it to leave, and that independently of the question whether it actually does obstruct or is in imminent danger of obstructing any particular ship or traffic at large. I think, therefore, that the appeal must be allowed.

CHANNELL, J.—I am of the same opinion upon both points. As regards the second point I think the construction of the statute is made quite clear by the words "such obstruction." It first of all declares that no person shall moor a barge within a certain distance of the dock gates, and then talks, not having used the word "obstruction" before, about the period when such obstruction continues. That amounts to saying that mooring a barge within 200 yards from the dock gates is an obstruction. Assuming that to be an obstruction, the section says that no vessel that is going into the docks shall moor within this 200 yards. The mere mooring of a vessel within that distance, if it is going into the docks, gives rise to one penalty. Then the next part of the section provides a continuing penalty, and it provides such a continuing penalty both for vessels going into the dock and for those that are not going in, and says that after a certain requisition has been made, if the vessel remains there, there shall be a continuing penalty for every hour.

That being so, what is the requisition to be made? The words are "on being required by the dock-master or dock-masters to move." It is suggested that the dock-master must come and see whether or not it is necessary for the vessel to move. You cannot possibly put that interpretation upon the section with respect to the vessels which are not going in and which are already subject to one penalty for being moored there at all. Yet the requirement must mean just the same in one case as in the other. I think it is quite clear that if the dock-master person-

ally authorizes his assistants to say, "This vessel shall move," that is quite enough. Whether the assistant can do it himself is a totally different question which we have not got before us; but in cases in which, as in the present case, the dock-master authorized the assistant to serve the notice, it is quite clear that there is a requirement by the dock-master within the mean- of the section.

*Appeal allowed.*

Solicitor for the appellants, *Hillearys.*

Solicitors for the respondent, *Keene, Marsland, & Co.*

## Court of Appeal.

From Chan. Div. (Lindley, M.R., Vaughan Williams and Romer, L.JJ.) — Jan 24.

*In re* JOSEPH HARGREAVES (LIMITED). (*a.*)

*Company—Winding up—Discovery of documents—Income tax returns—Misfeasance summons—Public department—Discretion of judge—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 115.

*Section* 115 *of the Companies Act,* 1862, *gives a discretion to the judge which will not be interfered with* primâ facie *by the Court of Appeal.*

*Accordingly the judge of first instance having in his discretion refused an application by the liquidator of a company for production of certain balance-sheets of the company, which had been deposited with the district surveyor of taxes for the purpose of income tax returns, on an affidavit by the secretary of the Board of Inland Revenue that in the opinion of the board such production was injurious to the public interest:*

*Held, that this decision would not be reviewed by the Court of Appeal.*

This was an appeal from a decision of Wright, J.

The liquidator of the above-named company, which was in liquidation, issued a misfeasance summons against the directors and the auditor on the ground that dividends had been paid out of capital. While the company was a going concern the auditor had signed three balance-sheets, which had been delivered to and left with the district surveyor of taxes for income tax assessment purposes. There were no other balance-sheets of the company in existence. To prove the complicity of the auditor the liquidator took out a summons under section 115 of the Companies Act, 1862, to compel the district surveyor to produce these balance-sheets. The surveyor declined to do so, and was supported in his refusal by the Board of Inland Revenue, who passed the following resolution: "In the opinion of the Board of Inland Revenue, who have duly considered the question, the production of the documents referred to in the summons . . . would be prejudicial and injurious to the public interest and service." A minute of this resolution was proved by the secretary to the board.

Wright, J., held that though there might be cases in which the court would require the principal officers of a public department to come into court and prove that the production of documents would be injurious to public policy, yet in the present case the objection had been sufficiently taken in point of form, and no ground had been shown for overruling it. Accordingly, in the exercise of his discretion, he dismissed the application.

The liquidator appealed.

*P. F. Wheeler,* for the appellant.—There is nothing in the affidavit which the board have had filed to enable the court to see whether it is right or not to order the production of these documents. The reasons given by Wright, J., for refusing production are inapplicable. The liquidator is not a stranger trying to inspect some other person's returns, but the company wishes to see documents which it has itself furnished. This application might be made by the directors, and it therefore can be made by the liquidator in whom all the powers of the directors are vested. It is no disclosure to tell a man what he already knows. The objection should be overruled—first, because the affidavit states no grounds which would enable the court to see how the board arrived at their conclusions; secondly, because the proper course is for the head of the department to appear and explain why the production of the documents required is injurious to the public interest. There is no section of the Income Tax Act which prevents the surveyor producing the documents, but only his oath.

He referred to *Lee* v. *Birrell,* 3 Camp. 337; *Mitchell* v. *Koecker,* 11 Beav. 380, 12 Beav. 44; *Rex* v. *Clarke,* 8 T. R. 220; *Kain* v. *Farrer,* 37 L. T. Rep. 469, 26 W. R. Dig. 79.

*Danckwerts, Q.C.,* and *Rowlatt,* for the respondent, were not called upon.

LINDLEY, M.R.—It appears to me it is quite unnecessary for us, and it would not be in accordance with the usual practice of the court to decide a speculative case which is not before us. What we have to consider is whether Wright, J., ought to be overruled as wrong in coming to the conclusion that it was not necessary, or proper, or expedient (whichever word you choose to use) to order the production of these documents upon an application made to him under section 115 of the Companies Act, 1862. That section says: "The court may, after it has made an order for winding up the company"—I understand there has been a winding-up order here—"summon before it" among other persons "any person whom the court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company," and the court may require any such person "to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company."

The language in which that section is expressed shows that the person who applies under it has no abstract right to an order; and it has been decided over and over again, in accordance with the language, that the judge has a discretion in the matter, and that, if he exercises his discretion, the Court of Appeal will not interfere with it. I do not say it has not jurisdiction; that is going perhaps too far, because there might be cases in which there has been such an obvious miscarriage of justice and wrongful exercise of discretion that the Court of Appeal can interfere; but *primâ facie* this court does not interfere in these cases.

Now let us see what the facts are. Here there is a misfeasance summons, which has been taken out by the liquidator against the auditor of the company, amongst others, and the liquidator, very naturally, wants to get information in support of that proceeding. Therefore he is applying to the court to make an order upon the surveyor of taxes, who has in his possession or physical custody some returns made by the company for income tax purposes, for production of those documents. The surveyor, I suppose, acting

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

under general instructions, objects, and the matter is considered by the Board of Inland Revenue, and we have a certificate that in the opinion of the Board of Inland Revenue, who have duly considered the question, the production of the documents referred to in the summons would be prejudicial and injurious to the public interests and service. Therefore, Wright, J., says: No; in the face of that, as far as I have a discretion in the matter, I shall not make any order. Now we are asked to reverse that. I decline to do anything of the sort. I do not say, and I do not intend to say, what is the limit of the power of the court (if there is a limit) to order the production of such documents as these; but I do say that if the learned judge below has come to the conclusion that under section 115 they should not be produced—that it is not expedient to do so—this court ought not to interfere. In my opinion this appeal ought to be dismissed, and dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I entirely agree. I do not understand it to be denied that communications made to the Inland Revenue are communications which are documents coming within the rule that enables the heads of departments to object on their own responsibility to their production, but, at all events, if it were disputed, it seems to me that there is ample authority to show that such a contention would be ill-founded. Under these circumstances it is said here that the discretion was wrongly exercised, because Wright, J., had not got before him the head of the department. It seems to me that we ought not to review the discretion exercised by Wright, J., upon any such ground, especially in a case where the production is asked upon the examination of a witness under this section 115 of the Companies Act, which expressly puts the matter in the discretion of the judge.

I only wish to make one observation with regard to the case of *Kain* v. *Farrer*, which was cited. There the Board of Trade had put forward the defendant, the secretary of the Board of Trade, as the person to represent the Board of Trade, and service had been accepted of the writ by the secretary as representing the Board of Trade; and in the course of that litigation the production of documents in the ordinary form of discovery was asked for. It is quite plain that the rules which would guide the court as to what affidavit was necessary from a party to the action representing a department of the State are entirely different from the rules which would be applied in a case where the officer of a department was merely subpœnaed as a witness. The officer of the department is merely the custodian of the documents as the servant of the department, and the department here have not put forward their servant in the sense of representing the department.

ROMER, L.J.—I agree. I will only add that in my opinion the question before us is not necessarily the same as that which may possibly come before the judge upon the hearing of this summons when he has to consider any application for a subpœna that may be made for the production of these documents.

*Appeal dismissed.*

Solicitors, *Jacques & Co.*, for *Neill & Holland*, Bradford; *Solicitor to Inland Revenue.*

---

From Q. B. Div. (A. L. Smith and Vaughan Williams, L.JJ.) — Dec. 15.

LORD STANLEY OF ALDERLEY v. WILD & SON. (a.)

*Crown — Prerogative — Right to remove proceedings to the Revenue side—Right to apply to stay proceedings.*

*It is part of the prerogative of the Crown to have an action between its subjects in which the title or interests of the Crown is concerned, in whatever stage such action may be, removed from the county court into the Revenue side of the Queen's Bench Division; and, where an information is filed by the Attorney-General raising the same question as that to be decided in such an action, the Crown has the right to apply to have the action stayed until the information is determined, and such application may be made after judgment has been delivered in the action.*

Appeal from an order of a Divisional Court (Darling and Channell, JJ.).

Lord Stanley of Alderley was the owner of the surface of land on a mountain called Holyhead Mountain, in Anglesey, under a grant in fee in 1840 from the Crown, by which the mines, minerals, and quarries within, upon, or under the land were reserved to the Crown, with full power to the Crown and its assigns to enter upon, work, use, and enjoy the same as fully and effectually to all intents and purposes as if the grant had not been made.

The Crown granted a lease of the minerals to Messrs. Wild, who erected on the surface of the land a building for storing dynamite for the purpose of working the quarries of china stone.

Lord Stanley of Alderley brought an action in the county court against Messrs. Wild claiming £1 damages for trespass and also an injunction.

On the 11th of July, 1899, the county court judge gave judgment in favour Lord Stanley for £1 damages for trespass and granted an injunction restraining Messrs. Wild from using the land as they had previously done.

Notice of appeal was given by Messrs. Wild to the Queen's Bench Division.

On the 12th of August, 1899, the Attorney-General filed an information against Lord Stanley asking for a declaration that the Crown, its lessees, agents, and servants, were entitled to work the minerals under the land, and for that purpose to do and exercise all such acts, powers, and privileges upon or affecting the surface of the land as might have been done or exercised by the Crown's authority if the surface had not been granted by the deed, and for an injunction to restrain Lord Stanley from interfering, by legal proceedings or otherwise, with the exercise by the lessee or licensee of the Crown of the surface powers or privileges reserved by the deed, and that all proceedings for enforcing the order of the county court should be stayed. Upon application by the Crown, the Divisional Court made an order directing the appeal in the county court action to be transferred to the Revenue side of the Queen's Bench Division of the High Court, and that all further proceedings in the appeal should be stayed until after the hearing of the information.

This was the order appealed from.

*Haldane, Q.C.*, and *Bryn Roberts*, for the appellants.—The Crown is not entitled by virtue of its prerogative right to have proceedings in which it is interested stayed after final judgment. Such right only applies to proceedings in which final judgment

(a.) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

has not yet been given, and does not apply to an appeal.

*Sir R. B. Finlay, S.G.*, and *Vaughan Hawkins*, for the Crown.

The following cases were referred to in the course of the arguments: *Cawthorne* v. *Campbell*, 1 Anstr. 205; *Attorney-General* v. *Barker*, 20 W. R. 509, L. R. 7 Ex. 177; *Attorney-General* v. *Constable*, 27 W. R. 661, 4 Ex. D. 172; *Attorney-General* v. *St. Aubyn*, Wightw. 167; *Leonard* v. *Rogers*, cited in Wightw. at p. 204; *Yates* v. *Dryden*, Cro. Car. 589; *Attorney-General* v. *Hallett*, 15 M. & W. 97.

A. L. SMITH, L.J., after stating the facts: The first question is whether it is within the prerogative of the Crown to have a cause in the county court, whatever its position in that court may be, removed to the Revenue side of the Queen's Bench Division, formerly the Revenue side of the Court of Exchequer. That question was not seriously contested. The first part of the order of the Divisional Court is therefore right. The order goes on to direct that all further proceedings on the appeal from the county court shall be stayed until after the hearing of the information. It is said that it is too late for the Crown to make such an application now, and that it should have been made before the county court judge delivered judgment. I can find no authority for that contention. The case of *Yates* v. *Dryden* seems to me to be directly adverse to such a view, for in that case, after a writ of error was brought—that is, after judgment had been delivered, the Attorney-General intervened and the court stayed the proceedings on the writ of error. That is a direct authority upon the second part of the order of the Divisional Court staying the appeal in the county court action pending the hearing of the information. In *Attorney-General* v. *Barker*, Kelly, L.C.B., says: "I feel bound to hold that the Crown has at any time a right to insist upon its claim to land, or upon its right to the establishing of any customs belonging to a manor, by means of a suit instituted by the Crown itself, and is not bound to abide the event of any action or suit in which the Crown, through a subject, is made the real defendant and can only appear as defendant."

That is direct authority that it is part of the prerogative of the Crown not only to have the action removed and stayed, but also to become the actor in the litigation involving its rights, and that this can be done after judgment. It seems to me, therefore, that the Divisional Court had jurisdiction to order a stay in this county court action until after the hearing of the information.

VAUGHAN WILLIAMS, L.J.—I agree. It seems to me that when there is an action between subjects which raises a question of title, or any other question in which the Crown is interested, the Crown has two rights. The two rights are not necessarily connected. The one right is the right to have the cause, in whatever court it is, removed into the Revenue side of the Exchequer. That removal does not by itself put an end to the action, but the parties to the action are brought into the Exchequer, and such modifications of the action are then made as may be necessary to the conduct of the trial of the action there. It appears from the case of the *Attorney-General* v. *Hallett* that if the action was in such a form that the Crown could not take part in it, or intervene in it, without doing something or permitting something to be done which was impossible for the Crown, then in the Exchequer they moulded the action, they changed the action of trespass into a petition of right. Then the action went on to be tried, and I take it that here in the present case if the Crown had chosen immediately to get an order for its removal, the Crown might have done so, and if the proceedings had then been moulded by changing the action of trespass into a petition of right, there is no reason, so far as I can make out, why the rights of the Crown against Lord Stanley should not have been disposed of. The Crown preferred to exercise the right of having the proceedings, whether removed or not, stayed until the information was tried in which the same question of the Crown's rights was intended to be tried. It appears from the case of *Yates* v. *Dryden* that a stay might have been obtained without any removal at all. The removal was not essential to the stay. The case of *Leonard* v. *Rogers* shows that there is no objection to the Crown adopting both proceedings at the same time if it chooses. There is ample authority for making the order. I do not wish to say whether the Crown is entitled as of right to an order to stay the action. So far as the removal order is concerned, I think it is plain that the Crown is entitled to that as of right.

*Appeal dismissed.*

Solicitors, *T. D. Jones*, for *T. R. Evans*, Holyhead; *The Solicitor to the Office of Works.*

---

From Prob. Div. & Adm. Div. (A. L. Smith, Collins, and Vaughan Williams, L.JJ.) — Nov. 15.

"THE BRUNEL." (*a*.)

*Admiralty—Limitation of liability—Ship not exceeding fifteen tons burden—Exemption from registry—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 3, *sub-section* 1.

*The meaning of the words "not exceeding fifteen tons burden" in section* 3, *sub-section* 1, *of the Merchant Shipping Act*, 1894, *is not exceeding a net register tonnage of fifteen tons.*

*Judgment of* Barnes, J. (47 *W. R.* 288), *affirmed.*

Appeal from a judgment of Barnes, J. (47 W. R. 288).

The owners of *The Glanmire* having commenced an action against the owners of *The Brunel* for damage by collision, the owners of *The Brunel* commenced an action against the owners of *The Glanmire* for limitation of liability under section 503 of the Merchant Shipping Act, 1894.

The question was whether *The Brunel* was exempted from registry under the Merchant Shipping Act, 1894, by virtue of section 3, sub-section 1, of that Act, which exempts "ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom."

*The Brunel* was an unregistered steam-tug solely employed in navigation on the River Avon and such part of the Bristol Channel as is situate within the port of Bristol. Her gross tonnage, ascertained by measurement in accordance with the provisions of the Merchant Shipping Act, was 35·99 tons. Her propelling-power space amounted to 31·15 tons, and her crew space to 6·73 tons.

The plaintiffs, the owners of *The Brunel*, contended that *The Brunel* was a ship not exceeding fifteen tons burden within the meaning of section 3, sub-section 1; for a ship's tonnage within the meaning of that sub-section was the net register tonnage, for the purpose of calculating which the tonnage of the propelling-power space and the crew space ought to be deducted from the gross tonnage.

---

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The defendants, the owners of *The Glanmire*, contended that *The Brunel* was a ship exceeding fifteen tons burden within the meaning of the sub-section; for the words "tons burden" meant the tonnage capacity of the vessel under the tonnage deck without deductions.

Barnes, J., held that *The Brunel* was a ship not exceeding fifteen tons burden, and was, therefore, exempted from registry, and that the plaintiffs were entitled to limit their liability under section 503 to £8 per ton of her gross tonnage.

The defendants appealed.

*Joseph Walton, Q.C.*, and *Aspinall, Q.C.*, for the defendants.

*Robson, Q.C.*, and *Lauriston Batton*, for the plaintiffs.

A. L. SMITH, L.J.—The question is whether the words "not exceeding fifteen tons burden" in section 3, sub-section 1, of the Merchant Shipping Act, 1894, mean not exceeding a gross tonnage of fifteen tons burden, or not exceeding a registered tonnage of fifteen tons burden. In the court below counsel for the defendants argued that "tons burden" meant the carrying capacity of the ship. Here they have abandoned that argument, and their contention is, in effect, that it means gross tonnage. They do not admit that that is the proper way of putting their argument, but that is what it comes to, for they say that "tons burden" is the tonnage capacity of the vessel without deductions for engine-room space, &c. In support of their contention they rely on the rules for measurement of tonnage in the second schedule to the Act. But the words "tons burden" which we have to construe are in a group of sections which relate to the registration of ships, and it may well be that the same words "tons burden" and "tonnage" are to be found in other parts of the Act which deal with other matters, bearing a different meaning from that which they bear in this group of sections. In my opinion the meaning of "tons burden" in this section which deals with the registration of ships is not gross tonnage but net register tonnage—that is, the gross tonnage after allowing for the authorized deductions. There was therefore no necessity for registry, and the appeal must be dismissed.

COLLINS and VAUGHAN WILLIAMS, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Robins, Hay, Waters, & Hay*, for *D. Travers Burges*, Bristol.

Solicitors for the defendants, *Thomas Cooper & Co.*

---

## High Court of Justice.

Chan. Div. North, J. — Dec. 8.

STAMFORD, SPALDING, AND BOSTON BANKING CO. v. KNIGHT. (a.)

*Vendor and purchaser—Contract for sale of leaseholds—Title—Assignment of lease recited, but not abstracted in chief—Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-section* 6—*Expense of verification of abstract.*

*A vendor contracted to sell two leasehold houses held under separate leases. An assignment of one of the leases to an intermediate assignee was not abstracted in chief in the abstract of title, though it was recited in the abstract of a subsequent assignment in the same abstract of title.*

*Held, that the assignment must be abstracted in chief and verified at the vendor's expense.*

Summons under Vendor and Purchaser Act, 1874.

Thomas Knight entered into a contract on the 16th of May, 1899, for the purchase of two leasehold villas, known as "Burgoyne" and "East Dean," held for a term of ninety-nine years from the 24th of June, 1890, under two distinct indentures of lease, each dated the 8th of May, 1890. The contract provided that "the vendors will deliver to each purchaser or his solicitor an abstract of their title to the property purchased by him, such title to commence with the leases, whether original or derivative, mentioned in the particulars under which the premises are respectively and immediately held."

The solicitors for the vendors, the Stamford, Spalding, and Boston Banking Co., delivered an abstract of title from which it appeared that by two indentures of assignment, each made on the 26th of November, 1890, the leasehold premises were respectively assigned to G. J. Phillips and J. Pugh for all the unexpired terms of years granted by the leases of the 8th of May, 1890.

The abstract of title comprised an indenture dated the 17th of November, 1891, made between A. C. Palmer, the trustee in bankruptcy of the said John Pugh, of the one part and the present vendors of the other part, whereby A. C. Palmer as trustee assigned to the vendors the said leasehold villas for the residue of the term.

The abstract of this indenture of the 17th of November, 1891, contained a recital in the words following, "and reciting that by an indenture bearing date the 2nd of December, 1890, and made between G. J. Phillips of the one part and J. Pugh of the other part, the said G. J. Phillips did convey all the estate and interest of the said G. J. Phillips in all property pertaining to the partnership lately subsisting between him and the said J. Pugh, of which the said leasehold hereditaments formed part, whether freehold, copyhold, or leasehold, to hold the same unto and to the use of the said J. Pugh in fee simple or otherwise according to the respective estates or tenure applicable to the said properties thereby assured."

No abstract in chief of the indenture of the 2nd of December, 1890, was contained in the abstract of title or was ever furnished to the purchaser.

The purchaser claimed that he was entitled to a proper abstract of the vendor's title to the subject-matter of the contract, and in particular of the indenture alleged to bear date the 2nd of December, 1890, at the vendor's expense.

*R. Wright Taylor*, for the plaintiff.—The document should have been abstracted in chief, not merely recited in another abstracted instrument: Dart on Vendors and Purchasers, vol. 1, p. 341 (6th ed.).

*J. M. Gover*, for defendant, referred to *Oakden v. Pike*, 13 W. R. 673, 34 L. J. Ch. 620; *In re Ebsworth and Tidy's Contract*, 37 W. R. 657, 42 Ch. D. 23; *In re Johnson and Tustin*, 33 W. R. 43, 28 Ch. D. 84; *In re Stuart and Olivant and Seadon's Contract*, 44 W. R. 610, [1896] 2 Ch. 328.

NORTH, J.—The objection is well founded. The contract provides that the vendors shall deliver an abstract of their title to commence with the original leases. The abstract was delivered, but it did not contain an abstract in chief of the indenture of the 2nd of December, 1890, though there was a recital of

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

this document. Is that a compliance with the obligation imposed on the vendor by the condition to deliver an abstract commencing with the original lease? The rule with respect to the obligation to abstract deeds is correctly stated in Dart, p. 341: "All documents forming part of the title should be abstracted in chief; the introduction of them merely as recitals in other abstracted documents is, it is apprehended, clearly improper; were it not so, a copy of the conveyance to the vendor might in many cases take the place of an abstract; besides which, the omission to abstract a document in chief may proceed from a desire to avoid noticing matters of a suspicious character occurring in such document, but which are not noticed in the recital." This, I apprehend, is the well-known practice. This document must be abstracted in chief. It is said my own decision in *In re Etsworth and Tidy's Contract* conflicts with this. I do not find any such expression there. When the matter came before me the purchaser might have obtained all the information which he would have got if the will had been abstracted. I thought the objection technically right, but there was no substance in it. That decision shows that it is the vendor's duty to abstract the document in chief, though in that case the contents of the will were unimportant. In the present case the document is a deed which it is important to abstract. My opinion is that it ought to have been abstracted in chief, and verified in the usual way. Then it was said that I was precluded by sub-section 6 of section 3 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and by the decision in *In re Johnson and Tustin* from causing the expense of procuring and making an abstract of the deed to be borne by the vendor. But sub-section 6 assumes that a perfect abstract has been delivered, and deals with the matters subsequent to that. Here a perfect abstract has not been delivered, and the vendor is bound to make the abstract and verify it at his own expense.

Solicitor for the plaintiff, *W. Sanders Fiske.*

Solicitors for the defendants, *Smith, Fawdon, & Low*, for *Becke & Green*, Northampton.

---

Chan. Div. North, J. — Nov. 21, 22.

*In re* ANNE HARTLEY.
WILLIAMS *v.* WILLIAMS.
WILLIAMS *v.* JONES. (*a.*)

*Limitation Statutes — Powers of appointment under settlement—Money charged on lands—Express trust—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 8, 10—*Wills Act* (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 27—*Residuary bequest in will — Assets — Administration.*

*Powers of appointment over two separate sums of £2,000 were given to A. H. and G. W. respectively, the money to be raised on the death of each by trustees on an estate which they held in trust for a term of 500 years. G. W. died in* 1860 *and A. H. in* 1886. *The money was not raised on the death of either. An action was brought within twelve years of the death of A. H. to have both sums of £2,000 raised.*

*Held, that though the trustees could enter to raise the £2,000 due on the death of A. H., they could not raise the £2,000 due on the death of G. W., as the right to raise that, was barred by section* 10 *of the Real Property Limitation Act*, 1874.

*Held, further, that the gift of residue in the will of A. H. operated as an appointment of her £2,000, and that this sum was applicable for payment of her debts and legacies.*

By an indenture of settlement made the 13th of November, 1838, an estate known as Llwyn was conveyed to trustees for a term of 500 years without impeachment of waste upon trust to raise the sum of £2,000 as soon as conveniently might be after the decease of Anne Hartley, and the like sum of £2,000 as soon as conveniently might be after the decease of Griffith Williams, and to stand possessed of the said several sums of £2,000 upon trust as to the first £2,000 raiseable on the death of Anne Hartley for such person or persons, for such interest or interests, for such purposes and subject to such provisions and generally in such manner, as the said Anne Hartley by any deed or deeds with or without power of revocation and new appointment to be by her legally executed, or by her last will and testament or any testamentary instrument or instruments should from time to time direct or appoint, and in default of such appointment upon trust for the said Anne Hartley, her executors, administrators, and assigns, absolutely; and as to the second £2,000 raiseable on the death of G. Williams upon trust for all and every the child or children of the said G. Williams equally to be divided between or amongst such children.

Anne Hartley died on the 24th of February, 1886, and Griffith Williams died on the 10th of June, 1860.

The action *Williams* v. *Williams* was instituted on the 15th of February, 1898, within twelve years of the death of Anne Hartley, the object being to raise these two several sums of £2,000. It was admitted in the action that the £2,000 over which Anne Hartley had a power of appointment must be raised, but it was now contended that the other £2,000, to be raised on the death of Griffith Williams, was barred by the Real Property Limitation Act, 1874.

*Theobald, Q.C.*, and *A. R. Ingpen*, for the plaintiff, argued that as the £2,000 raiseable on the death of G. Williams was secured by a term of years, it was not secured by an express trust within section 10 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), and that the Act did not apply; and secondly, that the trustees could raise this £2,000, as they were entitled to have possession of the land to perform the trust as to the £2,000 due on the death of Anne Hartley. It was only the right of action to get the money which was barred by the statute, not the right to the money.

They referred to the following cases: *Cox* v. *Dolman*, 1 W. R. 93, 2 De G. M. & G. 592; *Lawton* v. *Ford*, 14 W. R. 575, L. R. 2 Eq. 97; *Hughes* v. *Coles*, 33 W. R. 27, 27 Ch. D. 231.

*Hon. E. C. Macnaghten, Q.C.*, and *Cann*, for the first defendant, L. N. Williams, argued that the right to the £2,000 due on the death of G. Williams was barred, as the action was not brought for thirty-eight years after his death.

*Arnold Herbert* and *J. G. Wood*, for other defendants.

*Dibdin* and *A. L. Ingpen*, for the trustees.

NORTH, J.—I think that the statute is a bar as regards the second two thousand pounds and I think it comes within the tenth section of the Act, which says, "After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

secured by an express trust." There seems to me to be a phrase introduced there for the purpose of altering the law as it is shown to have existed previously to the statute by the cases which have been referred to. Therefore this is a case in which the right to bring an action to recover this £2,000 is expressly prohibited, and that being so, the only point remaining is whether if the action was properly commenced in respect of the first £2,000, that mere fact authorizes me to treat the action as sufficient to make the second £2,000 raiseable, although if the first sum had not been recoverable the action could not have been brought now for the second. I do not think it does. I think I must look at the substance of the matter. The action is to recover two separate sums of £2,000 each. Suppose that two separate actions had been brought. Could it be said that if an action had been brought to recover one £2,000, and had succeeded, another action altogether, to raise the other £2,000 could not fail under the statute? If the first action had been originally decided in that way, as it might have been, the second action would without doubt have failed, and I do not think it can succeed because it is coupled with the suit to recover the first £2,000. The right of the trustees to enter and take possession and raise the money only extends to raising money which is lawfully raiseable and payable, and I do not think that the money is lawfully raiseable and payable although it is secured on land by express trust, having regard to the fact that it became raiseable nine and thirty years ago and nothing has been raised on account of it since that time.

Another question arose upon further consideration under the will of Anne Hartley. By her last will the testatrix Anne Hartley devised her real estates to trustees for a term of 1,000 years without impeachment of waste upon trust by sale or mortgage of the premises comprised in the said term or any part thereof for all or any part of the same term, or out of the rents and profits of the same premises, or by any other reasonable ways and means to raise such sum or sums of money as should be required in aid of her personal estate for payment of her debts, legacies, funeral and testamentary expenses. The testatrix, after bequeathing certain pecuniary legacies, bequeathed the residue of her personal estate to Margaret Williams (now Jones), L. A. Williams, and M. M. Williams. Testatrix had not exercised her power of appointment unless it was exercised by her in the residuary bequest in her will under section 27 of the Wills Act (7 Will. 4 & 1 Vict. c. 26). The personal estate was insolvent.

*Theobald, Q.C.*, and *Ingpen*, for the plaintiff, contended that the residuary bequest under the will operated as an appointment under section 27 of the Wills Act, and that the £2,000 was not available for the payment of Anne Hartley's debts until the real estate bequeathed for the term of years under the will for the payment of debts, had been exhausted.

*Arnold Herbert* and *J. G. Wood*, for defendants.

*Dibdin* and *A. L. Ingpen*, for the trustees, referred to *In re Wilkinson*, 17 W. R. 839, L. R. 4 Ch. App. 587.

NORTH, J., stated the facts and continued: Now, there is no exercise by the will in terms of the power of appointment which she had over the £2,000. The £2,000 was absolutely her own unless she appointed it away, and she had not done so; therefore, being her own, it would pass under these words. Then it is said that the Wills Act alters the whole state of things, and provided for her an appointment which she did not make by her will, and which would be at variance altogether with what she has said in the will, because if the £2,000 is technically appointed by her will to the persons named, they will take in such a way that the appointed fund cannot be applied in payment of debts and legacies till all the rest of the estate is applied. I do not follow the argument at all. I do not think, fortunately, in this case that the constructive introduction into the testatrix's mind of the provisions of the Act of Parliament ought to have the effect of altering or perverting the plain meaning of the will itself. Before I read the section I will mention again what the position of the personalty is. There are certain pecuniary legacies and certain annuities. I have not looked through the will to see whether there are any specific legacies or anything of that sort. It does not seem to me that they will be material at all, and I assume for this purpose that the words I have referred to contain all that deals with the personal estate. That being so, I will refer to the Wills Act (7 Will 4. & 1 Vict. c. 26). Section 27 says: "A bequest of the personal estate of the testator shall be construed to include any personal estate which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

Now, in this will there is the bequest of the personal property of the testatrix contained in the passage I have referred to. The personal estate is given to pay legacies, and then the residue of it is to be given to the persons who are named. I leave out of consideration the question whether there is a direction to pay debts. Probably a direction to pay debts would be implied from the other directions which I have read. But the words I have referred to, the gift of annuities, the gift of legacies, and the gift of residue, coupled with the implied direction to pay debts from the same sources, contain the whole and the only bequests of personal estate found in the will. Why should it be said that any particular part of that bequest is to be treated differently from any other part? If this bequest of the personal estate is to be read by the statute, it is to be read as a bequest of personal estate over which she had a general power of appointment. I will not say that the power is excluded because the exercise of it is unnecessary inasmuch as the £2,000 would pass as residue. I do not say that, but the exercise of the power is included in the disposition made of personal estate by the will. In other words, in dealing with the personal estate disposed of by the will you are to treat the subject of the power just as if she had added the words "that in thus disposing of my personal estate, I include any personal estate over which I have had a general power of appointment." The effect of the statute is to treat the will just as if it contained those words, and to make it unnecessary to put them in, because although in such circumstances similar words were very often put into the will, wills were very often made wihout any such words and the result was that the powers were left unexecuted. It was notorious that that was contrary to the general intention of testators, and this section was therefore passed with reference to both real and personal estate. Now, the statute makes the £2,000 part of the testatrix's personal estate, and it must pass by the only series of gifts which are found in the will of that personal estate. It forms part of the personal estate, and therefore it goes in exactly the same way as her other personal estate, because the statute and the will together include that part of her personal estate. There is not a trace of any intention that the £2,000 was to be left out of the will. On the contrary, she says she is dealing with it. She gives all her personal estate. That passes it. The bequest includes and comprehends any personal

estate she had power to appoint. Therefore the £2,000 will be applicable in the same way as the other personal estate for the payment of debts and legacies.

Solicitors, *Clayton, Sons, & Fargus*; *Woodcock, Ryland, & Co.*, for *Griffith, Son, & Adams*, Dolgelly; *Metcalfe & Sharpe*, for *H. P. Charles*, Neath; *Woosnam & Smith*, for *Minshall, Parry-Jones, & Co.*, Llangollen.

---

Chan. Div. Stirling, J. — Nov. 7; Dec. 6.

JOHNS *v.* PINK. (*a.*)

*Landlord and tenant—Distress—Mortgage by sub-demise —Liability for rent—*Elegit*—Sheriff—*1 *&* 2 *Vict. c.* 110, *s.* 11.

*The lessee for years mortgaged property by sub-demise and covenanted to pay the rent and perform the covenants in the lease. The defendant, the owner in fee simple, recovered judgment for rent due by the lessee, and issued a writ of* elegit, *under which the lands were delivered to the defendant. The mortgagee, the plaintiff, appointed a receiver, who entered into receipt of the rents and profits. The defendant levied a distress for rent subsequently accrued. The plaintiff brought an action to restrain the defendant from distraining on the premises.*

*Held, that the whole interest of the lessee was not taken by the judgment creditor, and that he was not a surety for the lessee* (Moule *v.* Garrett, 18 *W. R.* 697, *L. R.* 5 *Ex.* 132, *distinguished*); *that the land must be taken to have been delivered to the defendant under the* elegit *to the extent of the mortgagor's interest as mortgagor in possession, and not in respect of the mere dry reversion expectant on the determination of the sub-demise* (In re South, 22 *W. R.* 460, *L. R.* 9 *Ch. App.* 369, *applied*); *and that the defendant was entitled to distrain.*

This was a motion for an injunction to restrain the defendant Pink from distraining on eight houses in Wearside-road, Lewisham, and it arose in the following circumstances:

By eight indentures of lease dated the 30th of July, 1897, the eight houses in question were respectively demised to a Mrs. Cole for the term of 99 years from the 29th of September, 1896.

By an indenture dated the 31st of July, 1897, Mrs. Cole demised the eight houses to the plaintiffs for the term of 99 years granted by the respective leases thereof, except the last three days thereof, by way of mortgage, to secure the repayment of £1,800 and interest; and she entered into a covenant with the plaintiffs for the payment of the rents and performance of the covenants reserved by and contained in the leases.

By an indenture also dated the 31st of July, 1897, the eight houses were conveyed to the defendant in fee simple, subject to and with the benefit of the eight leases to Mrs. Cole.

At Christmas, 1898, two quarters' rent were due under each of the leases, from Mrs. Cole, and the defendant brought an action against her in the Queen's Bench Division for these arrears, and on the 9th of February, 1899, recovered judgment for £20 and £5 5s. costs. On the same day the defendant issued a writ of *elegit* against Mrs. Cole under the judgment. On the 17th of February, 1899, an inquisition was held under the writ, and by an instrument under the seals of the sheriff and the jurors it was stated that the jurors found that Mrs. Cole was possessed, as of her own lands and tenements, of the eight houses, which the jurors found to be of the annual value of £200; and that the sheriff on the day of taking the inquisition had caused these lands and tenements to be delivered to the defendant at reasonable price and extent in accordance with the writ. The writ and instrument were handed by the sheriff to the defendant's solicitors, but had not been filed in court, nor had the defendant proceeded further under the writ. At the date of the inquisition Mrs. Cole was in receipt of the rents and profits of the property; but on the 28th of March, 1899, the plaintiffs appointed a receiver of these rents and profits, who duly entered into receipt thereof. On the 24th of June, 1899, a further half-year's rent became due, and on the 28th of June the defendant levied a distress on all the eight houses for the recovery thereof. The present action was then brought and notice of motion given. It was agreed that the hearing of the motion should be treated as the trial of the action.

The questions of law arising upon the facts above stated appear from his lordship's judgment.

*Jenkins, Q.C.*, and *Johnston Edwards*, for the plaintiffs.

*Upjohn, Q.C.*, and *R. J. Parker*, for the defendant.

STIRLING, J., said that the grounds on which the plaintiffs' case was rested were—(1) that the defendant had become an assign of the term vested in Mrs. Cole, and was, as between her and himself, bound to indemnify her against the rent, while she was, by express contract contained in her mortgage deed, bound to indemnify the plaintiffs, and that the court, to avoid circuity of action, would enforce directly against the defendant at the instance of the plaintiffs the right which Mrs. Cole herself had; (2) that the defendant, being an assign of the term vested in Mrs. Cole, would be liable to the reversioner for the rent, and being himself reversioner could not enforce by distress the payment of the rent which he was himself liable to pay as assign of the lease. As regarded the first of these points, assuming that the defendant had become an assign of the term vested in Mrs. Cole, his lordship was unable to see that under the circumstances of the case the defendant had as between himself and Mrs. Cole become liable to indemnify her against the rent due to the judgment creditor. The primary relation between Mrs. Cole and himself was that of debtor and creditor, and not of assignor and assignee. He might have made himself liable to the lessor for the rent, and he might be unable to satisfy his judgment debt without payment of that rent, and, if so, the payment would be allowed upon a proper account being taken between himself and the judgment debtor; but if he could escape without paying the rent his lordship saw no reason as between him and the judgment debtor why he should not. The case relied on for the plaintiff was *Moule* v. *Garrett*. 18 W. R. 697, L. R. 5 Ex. 132, 20 W. R. 416, L. R. 7 Ex. 101, where it was held that an assignee of a lease is under an obligation to indemnify the original lessee, who has parted with all his interest, against the rent and covenants. The ground of the decision was thus stated by Channell, B.: "It is only reasonable to hold . . . that the liability of the lessee is as a surety for the assignee, and that there is an implied promise on the part of the assignee to indemnify the lessee against liability for breaches of covenant while he is assignee"; and by Willes, J.: "Where a party is liable at law by immediate privity of contract, which contract also confers a benefit, and the obligation of the contract is common to him and the defendant, but the whole benefit of the contract is taken by the defendant, the former is entitled to be indemnified by the latter in respect of the performance of the obligation." In this

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

case the whole interest of the lessee was not taken by the judgment creditor; it was only taken by him for a limited purpose and for a limited time—viz., until he could, and in order that he might, obtain satisfaction of his debt. There was no authority for treating the judgment creditor under such circumstances as a surety for the lessee, and it did not seem to his lordship to be reasonable. The second point raised a much more difficult question—viz., what was the nature of the interest of a tenant by *elegit* in a term delivered to him in execution of the writ? Where the land delivered was of freehold tenure it seemed clear that the judgment creditor had only a chattel interest, whose duration was measured by the satisfaction of the debt (see Burton's Compendium, p. 868), and the judgment debtor had remaining vested in him an interest which, in the case of *Dighton* v. *Greenvil*, 2 Vent. 321, was held to be a reversion. It was contended for the defendant that this doctrine ought to apply equally to the respective interests of the judgment creditor and debtor, where the land delivered was of leasehold tenure. The answer given on behalf of the plaintiffs was that there were authorities which showed this not to be so. In *Spencer's case*, 5 Rep. 16a, see p. 17*a*, the law was thus laid down: "If a man demises or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words (demise or grant) as on the express covenant. The same law is of tenant by statute merchant or statute staple or *elegit* of a term." That implied that the tenant by *elegit* had the whole term vested in him: see Platt on Leases 419. Again in *Carter* v. *Hughes*, 6 W. R. 212, 2 H. & N. 714, Martin, B., said: "In this case the execution debtor had only a term in the land, and upon the transfer of that the whole is spent, and what remains in him is not a reversion, but a right to the possession of the term after satisfaction of the first writ." Remembering that upon an alienation of a term by will or deed successive interests took effect, not by way of particular estate and remainder, but by way of executory interest (see *Manning's case*, 8 Rep. 94b; *Lampet's case*, 10 Rep. 46b; and *Wright* v. *Cartwright*, 1 Burr. 282), his lordship thought it might well be that the whole term was taken by a judgment creditor, but subject to a legal title in the nature of an executory interest in the judgment debtor which, like other such interests, could not be defeated by the act of the first taker. This would explain, on the one hand, the authorities cited, and, on the other, why (as was admitted to be the law) the term did not merge in a reversion vested in the judgment creditor. Assuming that to be so, his lordship had to consider, after all, what was delivered to the defendant. By the statute 1 & 2 Vict. c. 110, s. 11, the sheriff was authorized to deliver execution of lands of which the judgment debtor "is seised or possessed." An estate in remainder or reversion expectant on an estate of freehold could not be delivered in execution: *In re South*, 22 W. R. 460, L. R. 9 Ch. App. 369; *In re Harrison and Bottomley*, 47 W. R. 307, [1899] 1 Ch. 465. Under the law as it stood prior to the passing of the Act 1 & 2 Vict. c. 110, a moiety of the lands of the judgment debtor only could be extended; and it was held that if two writs were issued at the suit of different creditors, and a moiety of the freehold land of the debtor was extended under the first writ, the sheriff could not deliver a moiety of the entirety under the second writ, but only a moiety of the remaining moiety: *Huit* v. *Coyan*, Cro. Eliz. 483. It thus appeared that what was called in *Dighton* v. *Greenvil* the reversion of the judgment debtor in the first moiety could not be delivered. Since 1 & 2 Vict. c. 110, it had been held in *Carter* v. *Hughes* that where a judgment creditor issued three writs of *elegit* on successive judgments, and the sheriff delivered to him possession of land under the first writ, he had no power to extend the same land under the second and third writs. In the present case the inquisition found that Mrs. Cole was "possessed" of certain land of the annual value of £200. In point of fact she was so possessed; for though she had made a mortgage of the lands by way of sub-demise, the mortgagees had not taken possession at the date of the inquisition, and she was in receipt of the rents and profits, and was in that way entitled to the land for an interest which was valuable so long as it lasted, but which might be determined at any moment by the mortgagees. It appeared to his lordship that the land must be taken to have been delivered to the defendant to the extent of that interest, and not in respect of the mere dry reversion expectant on the determination of the sub-demise, as to which the doctrine of *In re South* appeared to apply. The mortgagees had afterwards entered into possession; the determinable interest had been put an end to, and the right of the defendant as tenant by *elegit* had either been extinguished or was suspended. In either case it seemed to his lordship that any liability on the part of the defendant to pay the rent reserved by the original lease had come to an end, and consequently he was entitled to distrain. The motion, therefore, failed, and the action would be dismissed with costs.

Having taken that view on the merits of the case, it was unnecessary for his lordship to enter upon the consideration of a question which had been much argued—namely, whether or not the interest vested in the defendant until the inquisition had been filed in court. But having regard to what had happened, his lordship thought it right, having made some inquiries, to say a few words about it. The writ was expressly directed to the sheriff in these words: "And in what manner you shall have executed this our writ make appear to us in our court aforesaid immediately after the execution thereof under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ." The proper and regular practice was that the sheriff should return the writ and have the inquisition and writ filed in the central office, and the only way in which the possession of the writ and inquisition by the solicitor to the defendant could be explained was, so far as his lordship could see, that he received it as agent for the sheriff with a view to filing. That practice had, his lordship understood, sprung up very recently, and the explanation of it appeared to be that upon filing a charge or stamp duty of 2s. 6d. became payable, which as the law stood was thrown upon the sheriff. With a view of escaping that obligation, and in the hope that the plaintiff would see his way to discharge the duty to the Exchequer, it had become the practice of the sheriff to hand over the writ to the plaintiff. It was very essential that the document which his lordship had before him should be filed in court, and if the solicitors to the defendant were willing to undertake to discharge the duty of the sheriff and file it, his lordship had nothing more to say. But, if not, he thought it must remain in the custody of the court, and he proposed to call upon the sheriff to show why the document, which ought to be in his custody, was not either in his possession or on the file of the court.

*The defendant's solicitors gave the required undertaking.*

Solicitors, *W. B. Palmer; Arkcoll, Cockell, & Chadwick.*

Chan. Div.
Byrne, J. } Oct. 28, 31.

*In re* LORD EVERSLEY.
MILDMAY *v.* MILDMAY. (*a.*)

*Will—Name and arms clause—Use of surname.*

*A devisee was directed to assume and use a prescribed surname "alone or together with" his own family name.*

*Held, that the use by the devisee of the prescribed surname before his own family name was a sufficient compliance with the direction.*

Adjourned summons.

This was a summons raising a question of construction of a "name and arms" clause in the will of the late Lord Eversley, who died in 1888.

By his will the testator devised his Heckfield Place Estate to the use of his daughter the Hon. Emma Laura Shaw-Lefevre and her assigns during her life, and after her death to the use of his daughter the Hon. Helena Lady St. John Mildmay and her assigns during her life, and after her death to the use of his grandson Gerald Anthony St. John Mildmay and his assigns during his life, with remainder to the use of the first and other sons of the said Gerald Anthony Mildmay as tenants in tail male, with divers remainders over.

The will contained a declaration that any person who should become entitled as tenant for life to the actual possession or receipt of the rents and profits of the said estate and who should not then use and bear the name and arms of Shaw-Lefevre should, within one year after he should so become entitled, take upon himself and use upon all occasions the surname of Shaw-Lefevre alone or together with his own family surname, and quarter the arms of Shaw-Lefevre with his own family arms, and should within the said one year take such steps as were requisite to authorize him to take, use, and bear the said surname and arms of Shaw-Lefevre. The testator further declared that in case any such person should refuse or neglect within the said one year to take, use, and bear such surname and arms, then the limitations thereinbefore contained to the use of such persons should absolutely determine.

Helena Lady St. John Mildmay died in September, 1897.

The Hon. Emma Laura Shaw-Lefevre died in April, 1899, when the present applicant, Mr. Gerald Anthony St. John Mildmay became tenant in possession, and the question now raised by him was whether according to the true construction of the said will, if within one year from April, 1899, he took and used the surname of Shaw-Lefevre immediately before his own, so as to call himself Shaw-Lefevre St. John Mildmay, that would be a sufficient compliance with the testator's directions, to prevent the limitations over from taking effect.

*Vaughan Hawkins*, for the tenant for life.—It is not here expressly provided whether the prescribed name shall be the last or only name; an option is given to the devisee, and it will be sufficient compliance with the terms of the gift if the tenant for life takes the name of Shaw-Lefevre immediately before his own name Mildmay.

He distinguished *D'Eyncourt* v. *Gregory*, 24 W. R. 424, 1 Ch. D. 441.

*Beaumont*, for the tenant in tail.

*Rowden, Q.C.*, and *Goddard*, for the trustees of the will.

BYRNE, J., after stating the facts and reading the name and arms clause as above set out, continued:

The plaintiff now asks the opinion of the court whether it will be a sufficient compliance with this condition if he takes the name of "Shaw-Lefevre" and uses it before the name of "St. John Mildmay." The will which is before me is an artificially drawn will and uses terms of art. It is obviously the work of a lawyer, or of someone familiar with conveyancing who has made use of one of the regular forms. It is not the will of a man using inartificial or untechnical expressions—what has sometimes been referred to as a home-made will.

These clauses have been known for many years and occur in text-books covering a considerable period of time. In Butler's Note to 2 Co. Litt. 327*a*, published in 1787, a form is given in which provision is made that the party is to take "the surname of Browne only, and take and use no other surname, and quarter the arms of Browne with their own respective family arms," and so forth. As drawn it is a form to be used where it is desired that the surname required to be taken shall be taken in substitution for the surname which may then be used. I find also in Appendix I. to the first volume of Sanders on Uses (5th ed.), which was published in 1844, at p. 447, a precedent entitled "Proviso shifting the use upon neglect or refusal to take a name and bear certain arms." There the form runs, "take and use the surname of L. only and no other surname, and to quarter the arms of L. with his own family arms." Mr. Bythewood in the third edition of his collection of precedents of wills, published in 1849, includes as a common form a clause which runs, "apply for and obtain an Act of Parliament or Her Majesty's licence authorizing him or her to use the surname of [testator's surname] either alone or in addition to his or her own surname." And then in brackets, obviously intended as an alternative form, occur these words, "but so, nevertheless, that the surname of —— shall be the last or principal name."

The last text-book to which I need refer is Davidson, and the particular volume is that containing the introductory observations on settlements published in 1873. These were the work of the late Mr. Waley, an eminent conveyancer. I find on p. 355 of this volume this passage: "The form in this collection requires the use of the prescribed surname, together with the former family surname; but the clause may give the option of assuming the prescribed surname by way of substitution or of addition, and in the latter case may require that it shall be the last and principal name." I think I am justified in looking at the text-books to which I have referred for the purpose of ascertaining what is and has been the practice of conveyancers in the matter of drawing clauses of this description. In the absence of any direct authority I look at these precedents and bear in mind the fact that the clause is a penal clause which has to be construed strictly, but fairly, of course, in the sense that the court ought not to strain the words if it is satisfied that the testator has given a legitimate expression of his intention to impose this obligation on the objects of his bounty. Bearing this in mind I am of opinion that this clause does not impose the obligation on the applicant to take and use the name of "Shaw-Lefevre" after the family surname of "St. John Mildmay."

It is, I think, an illustration of the option referred to in the passage which I have read from Davidson, and leaves the applicant at liberty to assume the surname of "Shaw-Lefevre" instead of his family surname, or to use the surname of "Shaw-Lefevre" in addition to his family surname, but without imposing on him the obligation that that addition is to be an addition at the end of or after his name of St. John Mildmay.

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Now, the only thing that has caused me any difficulty is the case of *D'Eyncourt* v. *Gregory*, before the late Master of the Rolls, but the name and arms clause in that case is of a different description and makes use of different language from that used in the clause before me; the material words are: "Assume and take upon himself . . . and use . . . the surname of 'Gregory,' and assume and take and use the arms of 'Gregory' either alone or quartered with his, her, or their own family arms," and in that case the Master of the Rolls said he was clearly of opinion that the use of the surname of "Gregory" before that of "Welby" was not a sufficient compliance with the conditions contained in the will. Now, in the present case there is this clear distinction—namely, that the testator gives an option to the applicant to use the prescribed name "alone or together with his or her family surname." That by itself would distinguish this case from *D'Eyncourt* v. *Gregory*, but as a matter of fact I do not think that the clause in *D'Eyncourt* v. *Gregory* can be regarded as a clause equivalent to the clause used in the present will; and upon the construction of the present will I have come to the conclusion that I am justified in making a declaration to the effect that the taking by the tenant for life of the name of "Shaw-Lefevre" before his family name of "St. John Mildmay" will be a sufficient compliance with the terms of this clause so as to prevent the gift over from taking effect.

Solicitors, *Warrens; Peacock & Goddard*, for *H. & C. Collins*, Reading.

---

Chan. Div.
Cozens-Hardy, J. } Dec. 12, 13, 20.

*In re* FICKERS.
FARINA *v.* FICKERS. (*a.*)

*Contract—Consideration of marriage—Representation—Testamentary intentions—"Share"—Performance.*

*Testator wrote to the plaintiff, his intending son-in-law: "You are, of course, aware that, with my large family, E. (his daughter) will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in a comfortable independence if I leave her a widow." The plaintiff married the daughter, relying upon the letter. The testator, dying subsequently, leaving eight children, left E. a legacy much less than one-eighth of his estate.*

*Held, that, if the letter was an offer, the court would presume it to be accepted; and*

*Held, also, that the letter was not an offer resulting in a contract, but a mere statement of intention as to the future, and which, although relied on, gave no right either to specific performance or damages.*

*Held, also, that, if the letter imposed an obligation upon the testator, it was satisfied by the bequest of the legacy.*

This was an action to enforce the statements made in a letter written by the father of a lady about to be married to his intending son-in-law as to his testamentary intentions in her favour.

In September, 1873, the plaintiff Johan Marie Farina, a German subject resident at Cologne, made a proposal of marriage to Miss Eliza Fickers, which she accepted, subject to the approval and consent of her father, the testator, William Fickers. Mr. Farina wrote to the testator a letter which was not forthcoming at the trial, and the testator, on the 21st of September, 1873, replied by a letter which contained the following passage:

"You are, of course, aware that, with my large family, Eliza will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow. I hear your business is an excellent one, and that you have considerable property independent of your business. I should wish you to make such settlement on Eliza as will befit your position and, in case of death, leave her provided for. All this I will leave until I see you, feeling assured you will agree with me that if possible the contingencies of life should be guarded against. I mention these matters, not in any mercenary spirit, but believing you will wish to do what is right and just, and that we should have everything explained in an open and candid manner." The rest of this letter did not deal with or allude to questions of money or property.

This letter was kept by Mr. Farina, and was the one upon which the action was based.

In February, 1874, a marriage contract or settlement in German, drawn up as a notarial act, was executed in London by Mr. Farina, Mrs. Farina (then Miss Fickers), and the testator, in the presence of a notary public, providing among other things that there should not be community of goods between the future married couple. The testator was expressed to appear for the purpose, and was found by his lordship to appear only for the purpose of giving his full consent to the intended marriage. The marriage took place the following day.

The testator died in 1898, having made his will giving his daughter, Mrs. Farina, a legacy of £2,000 only, and giving the residue of his estate and effects equally between six other children in equal shares.

The testator's wife died before him.

He left, including Mrs. Farina, eight children.

The statement of claim alleged the estate to be of the net value of upwards of £100,000.

The plaintiff claimed for a declaration that the letter of the 21st of September, 1873, constituted a binding contract for valuable consideration by the testator to give or leave to his daughter, Mrs. Farina, in the events which had happened, one equal eighth part of his property, after payment of his debts and funeral and testamentary expenses, and for consequential relief on that footing.

*Warmington, Q.C.*, and *P. F. Stokes*, for plaintiff.—The letter of Mr. Fickers before the marriage was an offer which was accepted by the plaintiff, who married upon the faith of it. It thus became a contract binding upon the writer: *Hammersley* v. *De Biel*, 12 Cl. & Fin. 45; *Synge* v. *Synge*, 42 W. R. 309, [1894] 1 Q. B. 466; *Coverdale* v. *Eastwood*, 21 W. R. 216, L. R. 15 Eq. 121; *Laver* v. *Fielder*, 11 W. R. 245, 32 Beav. 1. There is no need of express acceptance of the offer; it will be presumed: *Luders* v. *Anstey*, 4 Ves. 501. The word "share" here means equal share, which is its ordinary meaning. It is like the words "her share" in *Laver* v. *Fielder*, and "participate" in *Robertson* v. *Fraser*, 19 W. R. 989, L. R. 6 Ch. App. 696, where the shares were treated as equal ones.

*Astbury, Q.C.*, and *Methold*, for defendants.—The letter of the 21st of September, 1873, was not intended to be an offer, but a mere statement of intention. It cannot give rise to an action for representations, as intentions do not act by way of estoppel or create any legal obligation, but only those as to existing facts: *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 466; *Loxley* v. *Heath*, 8 W. R. 314, 1 De G. F. & J.; Fry on Specific Performance, 1892,

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

p. 143, s. 316. If the plaintiff succeeds he must prove a contract, but the testator never intended to enter into a contract. Moreover all previous negotiations were concluded by the notarial contract. A share means any share.

*Cur. adv. vult.*

Dec. 20.—COZENS-HARDY, J.—Questions of this nature have often come before the courts, and although it is not reasonable to construe the letter of the 21st of September, 1893, by reference to the construction put upon somewhat similar documents in other cases, it is important to have regard to certain principles which have been laid down as applicable to cases of this nature. A mere representation that the writer intends to do something in the future is not, though the person to whom it is made relies upon it, sufficient to entitle that person to obtain specific performance or damages. There must be a contract in order to entitle the party to any relief. This seems to me to result from the judgments in *Hammersley* v. *De Biel*, *Jorden* v. *Money*, 5 H. L. C. 185, and *Maddison* v. *Alderson*. In the next place, I think that if the letter amounted to an offer by the testator which would become a contract if and when accepted by Mr. Farina, I must presume that it was accepted, and that the marriage took place on the faith of it: *Luders* v. *Anstey*. I do not think that the mere fact that a settlement was executed by the husband, but not by the lady's father, the writer of the letter, suffices to rebut this inference. Moreover, I have seen Mr. Farina in the box, and I feel no doubt that he jealously kept the testator's letter, and relied upon it as giving himself some rights. It remains, however, to consider whether there was a contract; and if so, whether there was a breach. The material words in the letter are these: "You are, of course, aware that, with my large family, Eliza will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow." The plaintiff's contention is that the true meaning and effect of the letter is this: If you, Mr. Farina, will make a settlement on my daughter before her marriage I will give my assent, and, subject only to the rights of my widow, as to which I reserve to myself a free hand, I will bind myself to leave her by my will an equal share with all my other surviving children in my property, subject only to debts and testamentary expenses. Upon consideration I cannot bring myself to believe that this is the true effect of the letter. It is not, as in *Hammersley* v. *De Biel*, an "arrangement" proposed by the father and stated by him "to be sufficient" for the husband "to act upon." It is not, as in *Laver* v. *Fielder*, a statement that the writer would adhere to a "proposition" previously made. I regard it as in no sense a proposal or offer, but rather as a representation that the testator was not in a position to meet any proposal or to give his daughter anything at the time, but that he intended to give her something at his death. I do not regard it as an offer resulting in a contract by the testator. If, however, I am wrong in this view, it remains to consider whether there has been a breach. It has been argued that the words "my large family" mean "my children," and that the words "a share" means an equal share with my surviving children. If, for instance, at the testator's death there had been living Mrs. Farina and one other child of the testator, but there had been grandchildren, the issue of the six deceased children, it would follow that Mrs. Farina would be entitled to a sum equal to half the estate, and the other descendants could only get the remaining half between them. I cannot think that such a result was in the contemplation of the parties. The words are not "her share" as in *Laver* v. *Fielder*. I think "share" means "some part." The testator has given Mrs. Farina £2,000, and has satisfied the obligation, if any, imposed by the letter.

Solicitors for the plaintiff, *Parker, Garrett, & Holman.*

Solicitors for the defendants, *Emmet & Co.*, for *F. C. Gates*, Worthing.

---

Q. B. Div.
(Channell and Bucknill, JJ.) } Jan. 29.

JONES *v.* SHORT. (*a.*)

*Hackney carriage—Definition of—Driver—Standing or plying for hire—Street—Towns Police Clauses Act,* 1847 (10 & 11 *Vict. c.* 89), *ss.* 3, 38, 45.

*The respondent stood for hire with an unlicensed carriage upon a cab-rank situated in a road adjoining a railway station. The road was the property of the railway company, subject to a public right of footway over and along it. An information against the respondent for standing for hire with an unlicensed carriage having been dismissed by the justices,*

*Held (affirming the decision of the justices), that the road was not a street within section* 3 *of the Towns Police Clauses Act,* 1847.

*Held, also, that, in order to constitute an offence under section* 45 *of the same Act against the driver of a carriage, it must be proved that such carriage was a hackney carriage within the definition of hackney carriage in section* 38.

Curtis *v.* Embery, 21 W. R. 143, *L. R.* 7 *Exch.* 69, *followed.*

Case stated by justices of Gloucestershire.

An information was preferred by the appellant against the respondent, charging that on the 17th of July, 1899, at the parish of Cheltenham, he was found unlawfully standing for hire with a certain carriage within the prescribed distance in that behalf of the borough of Cheltenham, for which carriage a licence to ply for hire had not then previously been obtained, as required by the Towns Police Clauses Act, 1847, contrary to section 45 of the same Act.

It was proved or admitted that on the day in question the respondent was standing for hire within the prescribed distance in that behalf in the borough of Cheltenham with an unlicensed carriage on a cab-stand provided by the Great Western Railway on a piece of ground formerly a private road, and now metalled and paved like an ordinary road or street. The piece of ground adjoined and ran parallel with the arrival platform of the Great Western Railway passenger station at Cheltenham, and was the side approach to the station.

The piece of ground belonged to the railway company, having been acquired by them under the compulsory powers of the Great Western Railway (General Powers) Act, 1898 (61 & 62 Vict. c. clxxix.). By section 51 of that Act all rights of way over the piece of ground were extinguished except a public right of footway over and along the same which the railway company were, by section 41, restricted from stopping up or interfering with.

Section 38 of the Towns Police Clauses Act, 1847, defines a hackney carriage as "every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance," and by section 3 of

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the same Act, "street" is "to extend to and include any road, square, court, alley, and thoroughfare or public passage within the limits of the special Act."

Section 45 provides as follows: "If the proprietor or part proprietor of any carriage, or anyone so concerned as aforesaid, permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage . . . or if any person be found driving, standing, or plying for hire with any carriage within the prescribed distance, for which such licence as aforesaid has not been previously obtained . . . every such person so offending" shall be liable to a penalty.

The justices dismissed the information, being of opinion that the place in question was not a street within the meaning of the Towns Police Clauses Act, 1847, and that it was no offence to be found plying for hire with an unlicensed carriage on property other than a street, such carriage not being a hackney carriage within the definition of a hackney carriage in the Act.

*Roskill*, for the appellant.—In section 45 the cases of the proprietor of a carriage and the driver are separately dealt with. In the case of the driver it is not necessary to show that the carriage was used as a hackney carriage, because the words of the Act are "any carriage," not any hackney carriage. Assuming that is necessary to show that the carriage was a hackney carriage, this is proved in the present case, because the place where the respondent was standing for hire was a street within the Act. There was a right of footway over the whole of the ground and that made it a street. The case is therefore distinguishable from *Curtis* v. *Embery*, 21 W. R. 143, L. R. 7 Ex. 369.

*Danckwerts, Q.C.*, for the respondent.—The ground on which the cab-stand was is not a street, there being no right of carriageway over it. It is not enough to make it a street that there should be a right of footway. On the other point the argument for the appellant amounts to this, that a private coachman would be within the section and liable to a penalty as a person plying for hire with a carriage.

*Roskill* replied.

CHANNELL, J.—The appeal must be dismissed. The case is covered by *Curtis* v. *Embery*, in which it was held that the term "street" as used in the Act meant a public street, not a private one. It has been suggested that the place here was within the term street because a public footway went along it. It is possible that had the vehicle been standing in the footway it might have been held to be standing in a street, but, standing where it was, I do not think that it could be said to be standing in a street.

The other point that was argued is that, whereas in *Curtis* v. *Embery* the summons was against the proprietor of the carriage, the fact here is that the summons has been taken out against the driver, and that the offence is different in the case of a driver, inasmuch as it is not necessary to prove that the carriage was a hackney carriage. In *Curtis* v. *Embery* it was held that it was necessary in the case of the proprietor to prove that the standing or plying for hire should have been in a street. I think that the same proof is necessary in the case of the driver. It is difficult to put a construction on the words "driving, standing, or plying for hire with any carriage," except as meaning using a hackney carriage.

BUCKNILL, J., concurred.

*Appeal dismissed.*

Solicitor for the appellant, *H. E. Edmunds.*

Solicitors for the respondent, *Winterbotham & Co.*

---

Q. B. Div.
(Bruce and Phillimore, JJ.) } Jan. 19.

LONDON COUNTY COUNCIL v. EAST LONDON WATERWORKS CO. (a.)

*Water—Waterworks—Metropolis—Fire hydrants—Right of company to use—User for extinguishing fire—User for other purposes—Waterworks Clauses Act,* 1847 (10 & 11 *Vict. c.* 17), *ss.* 3, 37-43—*Metropolitan Fire Brigade Act,* 1865 (28 & 29 *Vict. c.* 90), *s.* 32—*Metropolis Water Act,* 1871 (34 & 35 *Vict. c.* 113), *s.* 34—*London County Council (General Powers) Act,* 1894 (57 & 58 *Vict. c. cxxii.*), *s.* 4.

*A waterworks company which, under statutory obligation, has provided hydrants at the request, and maintained and repaired them at the expense, of the London County Council, and which, by the various statutes above referred to, is bound to provide a supply of water for extinguishing fire and for certain other specified purposes, and to allow all persons to use the water for extinguishing fire without making compensation, may use the hydrants for other purposes in addition to the supply of water for extinguishing fires, and such additional user may take place without the consent of the London County Council, and the right may, with the permission of the water company, be exercised by other persons.*

Special case stated, in an action brought by the plaintiffs against the defendants asking for a declaration that hydrants, fire-plugs, and apparatus provided, or to be provided, by the defendants pursuant to section 32 of the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), and section 34 of the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), or pursuant to either of those sections, ought not, in the absence of any agreement under section 4 of the London County Council (General Powers) Act, 1894 (57 & 58 Vict c. cxxii.); or, alternatively, ought not, without the consent of the London County Council, to be used for any purpose other than the supply of water for extinguishing fires; or, alternatively, for any purpose other than the supply of water for extinguishing fires and the purposes specified in section 37 of the Waterworks Clauses Act, 1847; and for an injunction.

The action more particularly related to six hydrants, situated in five different roads. In and between the months of July and September, 1897, the streets in question were respectively in course of being paved with wood and channelled, and the defendants, from time to time during those months, without having obtained or asked the consent of the plaintiffs, used and allowed those engaged in the operations of so paving and channelling such streets to use the hydrants for the purpose of obtaining from the defendants' water-mains by means of such hydrants a supply of water for these operations.

The hydrants in question were provided by the defendants at the request in writing, dated the 14th of March, 1888, of the Metropolitan Board of Works, the plaintiffs' predecessors, such request being made under section 2 of the Metropolitan Fire Brigade Act, 1865, and section 34 of the Metropolis Water Act, 1871. The costs of the defendants for providing the hydrants were paid by the Metropolitan Board of Works, or by the plaintiffs as their successors.

The Acts of Parliament under which the undertaking of the defendant company is carried on incorporate all material provisions of the Waterworks Clauses Acts, which provide, *inter alia*, that the defendants shall allow all persons at all times to take and use water for extinguishing fire without making

(a.) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

compensation for the same, and further provide that the defendants and their undertaking shall be subject to the provisions of the Metropolis Water Acts.

Section 32 of the Metropolitan Fire Brigade Act, 1865, enacts that every water company "shall provide at the expense of the board in any mains or pipes within the metropolis, plugs for the supply of water in case of fire, at such places, of such dimensions and in such form as the board may require, and the fire brigade shall be at liberty to make such use thereof as they may deem necessary for the purpose of extinguishing any fire."

Section 37 of the Waterworks Clauses Acts, 1847, provides that the waterworks company shall provide and keep constantly laid on, unless prevented by frost, unusual drought, or other unavoidable accident, or during necessary repairs, a sufficient supply of water for the following purposes (that is to say), for cleansing the sewers and drains, for cleansing and watering the streets, and for supplying any public pumps, baths, or washhouses.

Section 38 provides that the waterworks company shall, at the request of the town commissioners (in the present case, the plaintiffs), fix proper plugs in the main and other pipes belonging to them.

Section 40 provides that the cost of such plugs and the expense of fixing, placing, and maintaining the same in repair are to be defrayed by the town commissioners.

Section 34 of the Metropolis Water Act, 1871, provides that section 32 of the Metropolitan Fire Brigade Act, 1865, shall operate subject and according to certain provisions. One of these is that in that section the term "fire-plug" and the term "plug" is to include hydrant and all other apparatus necessary or proper in connection with the company's pipes for a supply of water in case of fire.

By section 40 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the powers and duties and liabilities of the Metropolitan Board of Works were transferred to the plaintiffs.

By section 4 of the London County Council (General Powers) Act, 1894, it was enacted "That it shall be lawful for the council to enter into and carry into effect any agreement with the companies supplying water in London and the vestries and district boards of works in London, or any of them, respectively with respect to the use of fire hydrants for flushing and other purposes. . . . Provided that no agreement under this section with respect to any hydrant shall be valid unless the company owning the main or pipe with which the hydrant is connected, and the local authority (if any) to whom the hydrant belongs shall be a party thereto."

The questions of law for the court were:

(1) Whether hydrants, fire-plugs, and apparatus provided by the defendants pursuant to section 32 of the Metropolitan Fire Brigade Act, 1865, and section 34 of the Metropolis Water Act, 1871, or pursuant to either of those sections, may (in the absence of any agreement under the London County Council (General Powers) Act, 1894) lawfully be used for any purpose or purposes in addition to the supply of water for extinguishing fires.

And if the court shall as to any of such hydrants answer the preceding question in the affirmative, then:

(2) Whether such additional user is limited to the purposes specified in section 37 of the Waterworks Clauses Act, 1847, or to any and what purposes.

(3) Whether such additional user may take place without the consent of the London County Council thereto.

(4) Whether such right of user is confined to the defendants themselves, or may, with the permission of the defendants, be exercised by persons other than the defendants.

*English Harrison, Q.C.* (*Daldy* with him), for the plaintiffs.—The Acts of Parliament indicate a general intention that the water passing through the hydrants should be used for no purpose but extinguishing fires. These indications are found in sections 37-43 of the Waterworks Clauses Act, 1847, and also in section 32 of the Metropolitan Fire Brigade Act, 1865.

*Cripps, Q.C.*, and *Acland*, for the defendants.—The sections referred to impose special obligations on the waterworks company, but are not a limitation of their user of the hydrants for other purposes than extinguishing fires. There is no statutory limitation of such user. They referred to *Moore* v. *Lambeth Waterworks Co.*, 34 W. R. 559, 17 Q. B. D. 462, at p. 465.

BRUCE, J., said: In this case the question for the opinion of the court is whether the hydrants or fire-plugs provided by the defendants may, in the absence of any agreement under the London County Council (General Powers) Act, 1894, be used for any other purpose than for extinguishing fires. I am of opinion that that question should be answered in the affirmative. There is no provision in any clause of the Acts which limits the water company's rights to use the water from the hydrants. There are many obligations imposed on the water company with reference to the necessity of providing water for public purposes, but I see nothing to limit their rights of drawing water for any purpose required. Having answered that question in the affirmative, I answer the second question put by the case in the negative, the third in the affirmative, and the fourth in the negative.

PHILLIMORE, J., said: Various burdens are imposed by Act of Parliament on water companies, and one of these obligations is to provide at the expense of certain public authorities fire-plugs or hydrants for the purpose of being used for extinguishing fires They are bound to supply these, and to permit them to be inspected and repaired, and they are bound to allow water to be drawn from them, not only by the authorities of the city or town, but by every person who requires water for the purpose of extinguishing fires, and they are bound to allow the water to be drawn without making a charge for it. All these are obligations imposed on the water company, and the only inference to be drawn from their existence is that there are no other obligations than those imposed. The whole matter is the creation of statute and the statutes have stated what the obligations are.

It is said that the water company are not to be allowed to use the water from the hydrants for other purposes. If facts had been laid before us from which we were empowered to draw inferences, and we had drawn the inference that the use of the hydrants by the water company would prevent the plaintiffs from obtaining a supply of water, it might be different; but there is nothing in the case which suggests that any mischief would occur by the water being used by the company for the purposes for which they wish to use it. The hydrants are put up by the waterworks company at the expense of the London County Council, and their predecessors; they work in the company's pipes and are used for the purpose of conveying the water of the company.

I think, therefore, that the hydrants belong to the water company, though for certain purposes access and user and interference with the hydrants must be permitted to other persons.

Therefore I agree that there should be judgment for the defendants with costs.

*Judgment for the defendants.*

Solicitors, *W. A. Blaxland; Bircham & Co.*

Q. B. Div.
(Lord Russell of Killowen, C.J.) } Dec. 14.

BOSTOCK v. RAMSEY URBAN DISTRICT COUNCIL. (a.)

*Practice—Costs—Action against public authority—Trial with jury—Jurisdiction of judge to deprive successful authority of costs—Good cause—Public Authorities Protection Act,* 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (b)—*Ord.* 65, *r.* 1.

*The power given by ord.* 65, *r.* 1, *to the judge at the trial of an action to deprive a successful party of costs is not taken away or affected by section* 1 (b) *of the Public Authorities Protection Act,* 1893; *and, therefore, if in an action brought against a public authority for any act done in pursuance of any Act of Parliament or of any public duty or authority, judgment is obtained by the defendants after a trial with a jury, the judge has, for good cause, a discretion to deprive the successful defendants of costs; and in determining what is good cause the judge may take into consideration the antecedent conduct of the party which led to the litigation.*

Cree *v.* St. Pancras Vestry, [1899] 1 *Q. B.* 693, *not followed.*

Further consideration by Lord Russell, C.J., in an action tried with a jury.

The facts were thus stated in the judgment of the learned judge.

The action was for malicious prosecution and was brought by the plaintiff against the defendants, the local authority for the district, charging the authority with maliciously and without reasonable and probable cause causing the plaintiff to be prosecuted. The result of that prosecution was favourable to the plaintiff, the learned judge having directed the jury to find a verdict of acquittal.

The charge against the plaintiff, which was the subject of that prosecution, arose as follows: The plaintiff was the part proprietor of a travelling circus, and when the circus visited the town of Ramsey the representative of the plaintiff placed his vehicles in a part of a public thoroughfare where the local authority thought that such placing would cause an obstruction of the highway. The local authority took no steps to have the carriages removed from the public highway and the circus was held, as it had been held on previous occasions in the same place apparently without any objection on the part of the local authority.

The plaintiff himself was not present on the occasion, but after allowing the circus to be held without any notice to the plaintiff, the local authority preferred an indictment against him at the Huntingdonshire assizes for obstructing the highway. The plaintiff was tried upon this indictment, and when the case had proceeded a little way the judge—Wills, J.—decided that there was no evidence on which he could properly be convicted, and he was consequently acquitted.

The plaintiff thereupon brought the present action for malicious prosecution, and at the trial of the action Lord Russell, C.J., at the end of the case arrived at the conclusion that the plaintiff had failed to prove his case as he failed to show either that he had been prosecuted maliciously, or that there was an absence of reasonable and probable cause. The learned judge ruled that the plaintiff having failed to establish these two things, had made out no case against the defendants, and he gave judgment for the defendants, but in considering the question of costs he came to the conclusion that there was good cause for depriving the defendants of their costs upon the ground that the defendants had, in the circumstances of the case, acted unreasonably in preferring an indictment against the plaintiff instead of taking some other means, such as requesting policemen to remove the obstruction.

No question was raised at the trial as to the power of the learned judge to deprive the successful defendants of their costs, but it was afterwards arranged between the parties that the point should be argued on further consideration.

The question now argued was whether the learned judge had jurisdiction to deprive the successful defendants of their costs.

The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), provides—section 1: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

Ord. 65, r. 1, provides that the costs of an action shall be in the discretion of the court or judge, provided that where the action is tried with a jury the costs shall follow the event unless the judge by whom the action is tried, or the court, shall for good cause otherwise order.

*Blake Odgers, Q.C.* (*P. Rose-Innes* with him), for the plaintiff.—Ord. 65, r. 1, gives the judge a discretion, when the action is tried with a jury, to deprive, for good cause, the successful party of his costs. Section 1 (*b*) of the Public Authorities Protection Act, 1893, does not affect or take away that discretion. When that section says that a judgment for the defendants shall carry costs to be taxed as between solicitor and client, it does not mean that in all cases where a judgment is obtained by the defendants it shall carry costs, but it merely means that in a case in which costs ought to be given, then those costs ought to be costs as between solicitor and client. It in no way interferes with the discretion of the judge for good cause to deprive the successful defendants of costs. There was a similar provision in the Public Health Act, 1848, and also in section 264 of the Public Health Act, 1875, and notwithstanding the imperative words in section 264 that the action should "be tried in the county or place where the cause of action occurred, and not elsewhere," it was held in *Itchin Bridge Co.* v. *Southampton Local Board*, 6 W. R. 223, 8 E. & B. 801*n*, that these words did not take away the discretion of the court to change the venue; and it was also held in *Avery* v. *Wood*, 39 W. R. 577, [1891] 3 Ch. 115, that "full costs" in an Act meant merely costs as between party and party. This Act of 1893, although it repeals many Acts, does not repeal this rule, which is therefore applicable to this case. In *Robinson* v. *Workington Corporation*, 45 W. R. 453, [1897] 1 Q. B. 619, Cave, J., deprived the successful defendants of their costs, but the point was not raised or argued before him or the Court of Appeal. The question came before Stirling, J., in *Holford* v. *Acton Urban District Council*, [1898] 2 Ch. 240, 46 W. R. Dig. 169, and before Romer, J., in *Harrop* v. *Ossett Corporation*, 46 W. R. 391, [1898] 1 Ch. 525, and in *North Metropolitan Tramways Co.* v. *London County Council*, 46 W. R. 554, [1898] 2 Ch. 145; but it was not expressly decided in those cases. Bruce, J., expressly decided the point in *Cree* v. *St.*

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

*Pancras Vestry*, [1899] 1 Q. B. 693, 47 W. R. Dig. 166, where he held that the discretion of the judge to deprive the successful defendants of costs was entirely taken away by section 1 (*b*) of the Act. That was a decision of a judge sitting at *nisi prius*, and is not binding on this court.

*Lawson Walton, Q.C.* (*J. W. Cooper* with him), for the defendants.—The question is expressly decided in favour of the defendants by the judgment of Bruce, J., in *Cree* v. *St. Pancras Vestry*. That is the decision of a court of co-ordinate jurisdiction, and is binding on this court. That decision is express on the point that the discretionary power which the judge has under the rule is expressly taken away by section 1 (*b*). This Act of 1893 came after the rule, which came into operation in 1883, and if the Legislature had intended that the discretionary power of the judge should still exist then it would have been easy to have inserted words in section 1 (*b*) to show that intention, but they have not done so. The decision, therefore, in *Cree* v. *St. Pancras Vestry* is right. There is a second point—namely, that in determining whether there is good cause or not the judge is confined to the actual litigation and cannot take into consideration matters which were antecedent to the litigation, such as the conduct of the defendants in this case in the criminal prosecution.

Lord RUSSELL, C.J.—The question that is raised in this case is undoubtedly one of general importance, as to which it is desirable to have the authoritative opinion of the Court of Appeal. There are two points raised—first, whether in the circumstances of this case there was in fact good cause to justify me in exercising the power to deprive the defendants of costs, if I had the power to do so; and in the next place, whether, looking at the character of this action, and the public authority against which it was brought, I have in fact any authority or discretion in the matter. I have, therefore, to deal with both these points. [His lordship stated the facts, and proceeded:] At the trial before me the plaintiff was bound to establish two things—that he had been prosecuted maliciously, and without reasonable and probable cause. I came to the conclusion at the end of the case that neither of those two things had been made out, and I accordingly ruled that the plaintiff had made out no case against the defendants, and I gave judgment for the defendants, but without costs, as I then considered—assuming I had the power to deprive of costs—that the conduct of the defendants in not taking some simple steps, such as removing the obstruction or calling in a policeman to do so, was in itself good cause for depriving the defendants of costs. That question has now been argued, and it has been very properly urged for the defendants that although the conduct of the defendants may have been unreasonable in not taking the simple steps I have suggested to remove the obstruction instead of preferring an indictment against the plaintiff, yet that is not a cause which ought to operate in the mind of a judge in considering the question whether there is good cause for depriving of costs. It seems to me that the antecedent conduct of the parties does properly enter into the consideration of the question whether there was good cause or not. If the antecedent conduct of the party led in the first instance to the prosecution and brought about the necessity of the plaintiff to endeavour to vindicate himself against this charge, and if it was, in fact, such conduct which brought the litigation about, then, although it was not in fact conduct in the litigation, I think it was conduct which the judge, having to dispose of the question of costs, might properly take into consideration. I therefore made the order that the defendants should be deprived of their costs; but I agree that the point is well worthy of consideration whether the judge is to be confined to considering the question of the conduct of the defendant in the actual litigation, and whether he is precluded from extending his consideration to the antecedent events which led up to and were the occasion of that litigation. The view I take is that he is not so precluded.

Then the second question, which was the one mainly argued, is—assuming that there was good cause—had I the authority to deal with the question? The Legislature have for a considerable time afforded protection to local authorities, and they have done so because they are public authorities and not private persons. That protection has taken various forms, such as limitation, special provisions as to notice, and as to costs; and the main question in this case is whether the special provisions as to costs are intended by the Legislature, and are effective for the purpose of depriving the court of the discretionary power as to costs which in other cases it possesses. To begin with the power of the court to deal with costs as given by the rules of court, it is not necessary to go back further than ord. 65, r. 1, of the rules of 1883, which with a slight variation is the same as the corresponding order in the rules of 1875. The provision in ord. 65, r. 1, is that, "Subject to the provisions of the Acts and these rules the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge." It cannot be doubted that these words apply to all the proceedings in the Supreme Court and to proceedings against all classes of persons or bodies in the Supreme Court. But there is a limitation upon that: "Provided, also, that where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall for good cause otherwise order." That is a rule having the force of a statutory enactment, which in all cases gives the court discretion over the costs, but with a stipulation that in the case of a trial with a jury the costs are to follow the event unless the judge shall for good cause otherwise order. Then we come to the legislation in favour of public authorities. Previous to the Public Health Act, 1848, there were provisions in the same direction, if not to the same effect, but it is enough to begin with the Act of 1848. That Act contained a provision which in substance is repeated in the Public Health Act, 1875. As there is no material difference between these two I refer to the Act of 1875, and section 264 of that Act contains the provision I refer to. [His lordship read the section.] The section goes on to enact that: "Every such action . . . shall be tried in the county or place where the cause of action occurred and not elsewhere." That is a very emphatic provision. It says that the action "shall be tried"—not that the venue shall be laid—but that it shall be tried "in the county or place where the cause of action occurred," and then it adds with further emphasis "and not elsewhere." Then the section goes on—"and if . . . the jury find generally for the defendant . . . then the defendant shall be entitled to full costs of suit, and have judgment accordingly." This language as to costs is certainly not more emphatic than the clause as to where the action shall be tried. The construction of this part of the section came before the court in *banc* so far back as the year 1858 in the *Itchin Bridge Co.* v. *Southampton Local Board*, and the court came to the conclusion that those words, emphatic as they were, did not take away the discretion of the court where the convenience of the case and the needs of justice required the discretion of the court to change the venue. That is a decision which has lasted

for forty-one years, and which, so far as I know, has never been questioned, but has since been acted upon. Those words are not the words we have now to deal with, as the existing provision is contained in section 1 of the Public Authorities Protection Act, 1893. The question is, Do the words in that section take away the discretion of the court, where there is good cause, to deprive the successful defendant authority of their costs? The language is not more emphatic, perhaps not so emphatic, as the language in the Act of 1875 as to the venue, where it was held that the discretion was not taken away. It is quite right that where the public authority succeeds and is not in any way to blame for the proceedings in the litigation, the authority should be indemnified by getting costs as between solicitor and client and not merely as between party and party. But if the public authority has brought the litigation upon itself by its unreasonable course of conduct, why, any more than in the case of a private individual, should the discretion of the court not be exercisable in regard to that public authority. I fail to see any reason in principle why the Legislature should have had any such idea in its mind, and I do not know that there is any reason of public policy or good sense which suggests any difference. Then how does authority deal with this matter? While there are expressions unquestionably, in some of the cases cited, which would seem to indicate that—in the mind of Bruce, J., particularly—there was some fetter upon the discretion of the court, there is no decision in the cases cited before me, with one exception, which is to the effect that the discretion of the court has been taken away if good cause exists for exercising the discretion. The one case which is an authority, and a clear and distinct authority for the defendants, is the decision of Bruce, J., in *Cree* v. *St. Pancras Vestry*. Perhaps a stronger case of the unreasonableness of this legislation, if the view of that legislation put forward for the defendants is correct, could not be cited than the facts of that case, and the fact that Bruce, J., having formed the opinion that the discretion of the court was taken away, came to the decision much against his will that he was obliged to give the defendants their costs. Am I bound by that decision? I have unfeigned respect for the opinion of Bruce, J., and if that were a judgment of long standing and acquiesced in, I should feel that I ought to conform to it; but it is neither one nor the other, and, moreover, I do not find from the report of the case that this question was argued before him at all. I therefore do not feel bound to conform to that decision. I think it is not straining the language of the statute to say that it means no more than this, that wherever in such an action a judgment is obtained by the defendants, in such cases as they are entitled to costs those costs should be taxed as between solicitor and client—that is to say, that it leaves untouched the discretion of the judge in order to enable him in such cases as that before Bruce, J., to deal with the question of costs. I wish to guard myself against one possible suggestion. I am not by any means clear that even where the defendants get their costs, and the judge designed that they should get their costs, it would not be equally in the discretion of the judge to say that the scale might not be as between solicitor and client. I am not at all sure that the discretion does not override both the question of their getting costs and the question what those costs should be, but it is not necessary to discuss or decide that point. I therefore think that I have jurisdiction to deprive the defendants of their costs for good cause, and that there was good cause in this case, and I give judgment for the defendants, but without costs.

*Judgment for defendants without costs.*

Solicitor for the plaintiff, *Guilford E. Lewis.*

Solicitors for the defendants, *Stevens, Son, & Parkes*, for *Serjeant & Son*, Ramsey.

---

## IN BANKRUPTCY.

Q. B. Div.
(Wright and Channell, JJ.) Nov. 21.

*In re* WILTSHIRE.
*Ex parte* EYNON. (*a.*)

*Bill of sale—True statement of consideration—Money "now paid"—Promissory note not yet due—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

*A bill of sale stated the consideration therefor to be a sum of money "now paid" by the grantee to the grantor. Of the money paid by the grantee to the grantor a part was, in pursuance of a previous agreement between them, applied by the grantor to the retirement of a promissory note then current upon which the grantor and grantee were jointly and severally liable to a third party.*

*Held, that as the liability, to the satisfaction of which the money was agreed to be applied, was a liability to a third person and not to the grantee, the fact that the liability was not a debt already due did not render it obligatory to set out in the bill of sale the agreement as to the application of the money, and that the consideration of the bill was not untruly stated.*

Appeal from the county court of Glamorganshire.

On the 18th of September, 1897, the appellant Eynon signed as surety a joint and several promissory note with the debtor Wiltshire in favour of Lloyd's Bank for £100 payable three months after date. This note, not being met at maturity, was renewed for a further three months from the 22nd of December, 1897. In February, 1898, the debtor borrowed £100 from Eynon, and in March of the same year applied to him for a further loan of £200. Eynon granted this further loan upon the debtor agreeing to devote £100 to retiring the promissory note above mentioned, and to give a bill of sale to secure the whole of the sums advanced. The consideration for the bill of sale was stated therein as "£300 now paid."

The debtor became bankrupt in April, 1898, and the trustee in the bankruptcy moved in the county court of Glamorganshire for an order declaring the bill of sale void upon the ground that the consideration for the same was not truly stated.

The county court judge held, upon the authority of *Richardson* v. *Harris*, 37 W. R. 426, 22 Q. B. D. 268, that the consideration was not truly stated, and declared the bill of sale void.

Eynon appealed.

*H. Reed, Q.C.*, and *Bailhache*, for the appellant.—The case of *Richardson* v. *Harris* is clearly distinguishable; there the acceptances paid off were held by the grantee himself, but in this case the promissory note was in favour of a third party. A collateral agreement as to the application of the money lent does not form any part of the consideration for the bill of sale, and there is no need to set it forth: *Ex parte National Mercantile Bank, In re Haynes*, 28 W. R. 848, 15 Ch. D. 42; *In re Davies, Ex parte Equitable Investment Co.*, 4 Mans. 358, 46 W. R. Dig. 18; *Ex parte Challinor, In re Rogers*, 29 W. R. 205, 16 Ch. D. 260.

*Muir Mackenzie* and *Ivor Bowen*, for the respondent.—The consideration for the granting of the bill of

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

sale was not truly stated therein. It should be stated in such terms that anyone who searched at the office where bills of sale are filed would be able to ascertain the amount paid to the grantor: *Richardson* v. *Harris*. Further, in this case the promissory note in favour of Lloyd's Bank was not due at the date of the execution of the bill of sale, and its retirement was part of the consideration for the bill of sale and should have been stated. Only £100 was received by the debtor; the other cheque for £100 was payable to the order of Lloyd's Bank, and that cannot be regarded as payment to the debtor at all.

They referred to *Mayer* v. *Mindlewitch*, 59 L. T. Rep. 400, 37 W. R. Dig. 24; *Darlow* v. *Bland*, 45 W. R. 177, [1897] 1 Q. B. 125.

WRIGHT, J.—I think the learned county court judge mistook the effect of *Richardson* v. *Harris*. In my opinion it does not govern this case. There the liability on the bills of exchange was a liability to the grantee himself, and as the bills were current and the money was not then due, the retention by the grantee of the amount of the bills could not be treated as a payment to the grantor. Here the liability on the note was to a third person—namely, the bank; and if the money was in fact paid to the grantee to discharge the liability, it is immaterial whether that liability was a debt due or only one accruing. As to the point that the cheque drawn in favour of Lloyd's Bank was not a payment to the debtor at all, it is a sufficient answer that, as the debtor had an account at that bank both the cheques ought to be treated as paid to him. If he had not had an account then I might have felt compelled to decide otherwise.

CHANNELL, J.—I agree. I think that the case upon which the learned county court judge acted does not apply. The facts are that Eynon at the date of the bill of sale lent the debtor a further sum of £200 upon the condition that £100 of that sum should be applied in a particular way. But the agreement as to the application does not affect the loan. It is no part of the consideration. The effect of the cases seems to be this: that if, by the agreement, the money is to be applied in paying someone else, it does not matter whether the debt is due at the date of the bill of sale or not; but if it is to be retained by the grantee, then in order to justify the description of the consideration as money now paid, the debt must be already due. If the agreement had been that Eynon should pay the bank, then I think that the consideration would not have been truly stated.

*Appeal allowed.*

Solicitors for the appellant, *Bell, Brodrick, & Gray*, for *Linton & Kenshole*, Aberdare.

Solicitor for the respondent, *Solicitor to the Board of Trade.*

---

## Court of Appeal.

Appeal.
(A. L. Smith, Collins, and Vaughan Williams, L.JJ.) Dec. 2, 16.

HENSEY *v.* WHITE.
LLOYD *v.* SUGG & Co. (LIMITED).
WALKER *v.* LILLESHALL Co. (LIMITED). (*a.*)

*Master and servant—Employers' liability—"Accident" to workman—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

*"Accident" in section* 1, *sub-section* 1, *of the Workmen's Compensation Act*, 1897, *implies something fortuitous and unexpected.*

*The definition of "accident" by Lord Halsbury in* Hamilton *v.* Pandorf, 36 *W. R.* 369, *at p.* 370, 12 *App. Cas.* 518, *at p.* 524, *adopted.*

HENSEY v. WHITE.

Appeal from the decision of the Bedford County Court judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897.

The appellant was the widow of Charles Hensey, who was at the time of his death in the respondent's employment. It appeared that the respondent's workmen had to begin their work in the morning by starting a gas engine. Upon the first working day after the Christmas holidays, 1898, Hensey and three other men proceeded to light the gas in the engine, and in order to start it it was necessary to turn a large wheel. Hensey tried to hoist the wheel, while the three other men tried to pull it down on the other side. Owing to the lapse of time since the engine had been last used air had got into it, and caused a difficulty in starting the wheel. The men made one unsuccessful attempt to move it, and upon the second attempt they succeeded in doing so, when Hensey suddenly put his hand to his stomach and left the place where the engine was. He was found immediately afterwards vomiting blood, and he died. The deceased man had been employed on the work for several years. According to the medical evidence death was caused by rupture of the small blood-vessels of the stomach and intestines. A post-mortem examination was made, and the medical evidence showed that the deceased man had been suffering from chronic indigestion, which had weakened the blood-vessels of the stomach and intestines, and that there were symptoms of congestion and inflammation. The only question in the case was whether the death was caused by an accident. Medical evidence was given on both sides as to the cause of death. The county court judge held that to make it an accident there must be something beyond the mere fact of a disease suddenly taking a fatal turn; for instance, some break in the machinery, some fall of the workman, or something else out of the ordinary and normal course of the workman's employment. It was not enough that ordinary hard work, carried on by the workman in the manner intended, had, as he worked, suddenly caused his disease to take a fatal form. He found as a fact that the death was caused by exudation of blood from the stomach, the result of congestion and chronic inflammation of the internal coat of the stomach caused or accompanied by congestion of the numerous small blood-vessels there. He accordingly made an award in favour of the respondent.

Dec. 2.—*Montague Shearman*, for the appellant.—The actual immediate cause which produces the effect is the only cause the law will look to. The predisposing cause cannot be looked at. The county court judge did not distinguish between the two. The actual immediate cause of death was the strain; the predisposing cause was the disease of the stomach. The county court judge had in effect only found that without the disease the strain would not have caused death. That was not enough. The strain was the proximate cause of death, and therefore the death was caused by an accident.

He referred to *Winspear* v. *Accident Insurance Co.*, 29 W. R. 116, 6 Q. B. D. 42; *Lawrence* v. *Accident Insurance Co.*, 29 W. R. 802, 7 Q. B. D. 216; *Hamlyn* v. *Crown Accident Insurance Co.*, 41 W. R. 531, [1893] 1 Q. B. 750; *Pugh* v. *London, Brighton, and South Coast Railway Co.*, 44 W. R. 627, [1896] 2 Q. B. 248.

*E. Morten*, for the respondent, was not called upon.

A. L. SMITH, L.J.—The sole question we have to consider is whether upon the findings of the county court judge the death of the workman was caused by accident. The man was at his ordinary work, his duty being to assist in starting the gas engine, and this was done by setting the wheel in motion. The engine not having been used during the Christmas holidays, the wheel had become stiff, and there was some difficulty in setting it in motion. The deceased man was attempting to hoist the wheel, when he suddenly put his hand to his stomach and immediately afterwards he died. The post-mortem examination showed that his stomach was not in a sound condition. Medical evidence was given on both sides as to the man's condition, and the county court judge upon the evidence found that the death was caused by the disease, owing to the bursting of the blood vessels in the stomach, the result of the man's ordinary work, though on this occasion the work was a little more arduous than usual. The judge came to the conclusion that the man died from the disease and not from an accident. We cannot disturb that finding of fact. Cases on accident policies have been cited to us. We do not in any way infringe upon any of those decisions, the judge here having found that disease and not accident was the cause of death. The appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. It is clear upon the findings of the county court judge that the element of accident is entirely wanting. The injury arose in the ordinary course of the deceased man's work, though there may have been more exertion than usual used by him in that work on the occasion in question. In *Hamilton* v. *Pandorf*, 36 W. R. 369, at p. 370, 12 App. Cas. 518, at p. 524, Lord Halsbury said: "I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident.'" That element is wanting in the present case. In the cases which have been cited a fortuitous and unexpected element existed which was the proximate and ultimate cause of death.

VAUGHAN WILLIAMS, L.J., concurred.

*Appeal dismissed.*

LLOYD *v.* SUGG & CO. (LIMITED).

Appeal from the decision of the Westminster County Court judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897.

The respondent, George Lloyd, was a smith in the employment of the appellants at their engineering works at Westminster. The respondent was at the time of the accident holding a flatter on an anvil for another workman, called a hammerer, to strike the flat end of the flatter, when the hammerer by accident struck the rod or round part of the flatter and jarred the respondent's hand. In consequence the hand became swollen, and gout in the hand was brought on. The doctor who attended the respondent, and who was called as a witness by the appellants, said that he had attended the respondent previously to the accident for gout in the hand and elbow, that the respondent had gouty diathesis, and that he thought the swollen hand was caused by gout brought on by the jar. The doctor's certificate stated that the respondent was suffering from a weak hand caused partially by the injury. At the end of his notes of the evidence the county court judge reported that he awarded the respondent 15s. a week, stating that the respondent came within the Act.

Dec. 2.—*Spencer Bower*, for the appellants.

*Duckworth*, for the respondent, was not called upon.

A. L. SMITH, L.J.—As these appeals can only be brought upon some question of law, I desire to say that it would be a great convenience to this court if county court judges would certify as particularly as they can what are their findings of fact in each case. In the present case the judge has only reported at the end of his notes that he awarded the respondent 15s. a week, and we have been told that the judge said that the respondent came within the Act. The point now taken is that there is no evidence that the injury to the respondent was occasioned solely by the accident. It seems, also, to have been argued before the county court judge that there was no accident. That point seems to me to be a bad one. It was the respondent's duty to hold the flatter on the anvil for another man, called a hammerer, to strike the flat end of it, but the hammerer struck the rod or round part of the flatter, and thereby jarred the respondent's hand. That mis-hit was an accident, and if it had broken the respondent's hand or arm the case would have been admittedly within the Act. That point was not argued here, but it was argued that the injury to the hand was caused by gout and not by the accident. The doctor's certificate, however, stated that the respondent was suffering from a weak hand caused partially by the injury. Anyone may have a weak hand. Is it to be said that only workmen with strong hands come within the Act? No such proposition is tenable. The injury to the hand was caused by an accident. The appeal must therefore be dismissed.

COLLINS, L.J.—I am of the same opinion. The case seems to me to be a perfectly clear one. The jar to the hand was occasioned by the hammerer hitting the rod of the flatter instead of the flat end. The essential element of an accident causing injury exists. We must assume that the county court judge found all the facts necessary to support his decision in favour of the workman. It is argued that the injury supervening upon the jar would not have been nearly so great if it had not been for the gout. To my mind that is quite immaterial. There is the accident and the consequent injury. The extent of the injury must always depend upon the constitution or condition of the injured person at the time of the accident. The principle which is always followed in cases where compensation for personal injuries caused by negligence has to be assessed, so far as regards the causes which contribute to the disability, applies to cases under the Workmen's Compensation Act, 1897. Take the case of a delicate lady receiving a shock in a railway accident. The injury to her is much greater than in the case of a lady in perfect health. In each case the court has to deal with the then existing condition of the injured person, and has to award compensation for the ultimate result.

VAUGHAN WILLIAMS, L.J.—I agree.

*Appeal dismissed.*

WALKER *v.* LILLESHALL CO. (LIMITED).

Appeal from the decision of the Bow County Court judge in proceedings to assess compensation under the Workmen's Compensation Act, 1897.

The appellant was an engine-fitter in the employment of the respondents, who were engineers and ironfounders. The appellant on the 17th of April 1899, was engaged in fixing some machinery. He was working at steampipe joints, it being the duty of a labourer to put red lead on the joints, the appellant having then to screw the pipes into position. The appellant had in the previous week blistered one of the fingers of his right hand while chipping steel plates for a large engine at the same works. On the day of the accident the appellant showed the

blister to the foreman, and said that he thought it was hardly fit for him to do the job. The foreman replied that he must do it, as the engine had to work that afternoon. The appellant accordingly did the work. The next night the finger became inflamed from the red lead and oil.

The county court judge said that the appellant had received a serious injury whilst working in the respondents' employment in the ordinary way with the usual materials and appliances, and that there was no accident within the meaning of the Act of 1897. He accordingly made an award in favour of the respondents.

Dec. 16.—*Bassett Hopkins*, for the appellant.

*T. W. Chitty*, for the respondents, was not called upon.

A. L. SMITH, L.J., said that to bring it within the Act there must be, by section 1, sub-section 1, personal injury by accident arising out of and in the course of the workman's employment. The sole question is whether there has been an accident. The personal injury is beyond all question. The appellant's finger had been blistered, and upon the occasion in question his finger came in contact with red lead and oil while he was working in the ordinary way and with the usual materials, and was seriously injured. There are two cases, decided a fortnight ago, in which a similar question arose. In *Hensey* v. *White*, *ante*, p. 257, the workman was suffering from congestion and chronic inflammation of the stomach, which caused the blood-vessels to become congested, and the man died through the bursting of the blood-vessels while at his ordinary work, though at the time of his death the work was more arduous than usual. The county court judge found as a fact that the man died of inherent weakness of the blood-vessels and not from an accident, and this court dismissed the appeal. Collins, L.J., in that case said that "it was clear on the findings of the county court judge that the element of accident was entirely wanting. The injury arose in the ordinary course of the deceased man's work, though there might have been a little more exertion used by him in that work on the occasion in question than was usual. In *Hamilton* v. *Pandorf*, 12 App. Cas. 518, at p. 524, Lord Halsbury said that he thought that the idea of something fortuitous and unexpected was involved in the word 'accident.' That element was wanting in the present case. In the cases which had been cited a fortuitous and unexpected element existed which was the proximate and ultimate cause of death." I entirely adopt that proposition. The other case is *Lloyd* v. *Sugg & Co.*, *ante*, p. 258, where the workman was holding a flatter on an anvil for another man to hammer. The duty of the latter man was to hit the flat end of the flatter, but he struck the rod or round part and jarred the other workman's hand. That was an injury caused by a mis-hit, it was entirely fortuitous, and was therefore an accident. In the present case there was no accident.

COLLINS, L.J., agreed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. I do not at all mean to decide that if such a point as I am going to suggest had been made at the trial there might not have been an accident within the meaning of the rule stated by my brother Collins. The appellant had got his hand in such a state that it was advisable to avoid bringing it in contact with the poisonous lead. If he had thought that he could do his ordinary work, and at the same time avoid bringing his hand in contact with the poison, and yet from want of care he brought his hand in contact with it and injury ensued therefrom, I do not say that that would not have been an accident. The point, however, was not taken, and does not now arise.

*Appeal dismissed.*

Solicitors, *Purkis & Co.*, for *Piper & Piper*, Bedford, for the appellant, and *Halliday & Stimson*, for the respondent, in the first case; *Wynne Baxter & Keeble*, for the appellant, and *A. Slater*, for the respondent, in the second case; *Edward Clarke*, for the appellant, and *Hargreave & Heaton*, for the respondents, in the third case.

---

From Q. B. Div. (A. L. Smith, Collins, and Vaughan Williams, L.JJ.) — Nov. 16, 24; Dec. 11.

MERSEY DOCKS AND HARBOUR BOARD v. ASSESSMENT COMMITTEE OF BIRKENHEAD UNION. (*a*.)

*Poor law—Rating—Lairages—Profit-earning capacity—Evidence of receipts and expenditure—Structural value—Ordinary method of ascertaining rental value unavailable—Principle of assessment.*

*The appellants were the owners and occupiers of certain lairages, consisting of lands and buildings situated on the side of the River Mersey. These hereditaments were assessed to the poor rate. In ascertaining the rental value of these premises for the purpose of assessing the rate it was not possible to compare them with other similar hereditaments, as no other lairages existed in the neighbourhood; nor by merely considering the structural value of the buildings and the value of the land on which they stood was it possible to ascertain the rent a hypothetical tenant from year to year would give. The profit-earning capacity of the hereditaments, together with the structural value, were therefore taken into consideration, and evidence of the receipts and expenditure of the appellants in the conduct of the business of the lairages was admitted.*

*Held, that such evidence was admissible, and that the proper principle of assessment had been adopted.*

This was an appeal by the Mersey Docks and Harbour Board from the judgment of the Divisional Court (Lawrance and Channell, JJ.) on a case stated by the quarter sessions at Birkenhead.

The case is as follows:

1. Upon an appeal by the above-named appellants against a certain rate and assessments made for the relief of the poor of the township of Birkenhead, in the county of Chester, on the 16th of May, 1896, which said appeal came on for hearing at the general quarter sessions of the peace in and for the borough of Birkenhead on the 5th and 6th of January, 1898, and the 25th of March, 1898, when upon hearing counsel for both parties the court allowed the said appeal by ordering the said assessments appealed against to be reduced by reducing the rateable values stated therein from £17,400 and £4,251 to £12,622 and £3,414 respectively, subject to the opinion of the Queen's Bench Division of her Majesty's High Court of Justice upon the following case.

2. The appellants are a corporation incorporated and regulated under various Acts of Parliament, under which they hold and manage docks and other property on both sides of the River Mersey. The Acts relevant to this appeal are the Mersey Docks and Harbour Act, 1857, the Mersey Dock Acts Consolidation Act, 1858, and the Mersey Docks Harbour (Works) Act, 1858, which are taken as part of this case.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

3. The appellants are the owners and occupiers of certain lairages situate on the Birkenhead side of the River Mersey, a portion of which lairages is known as the Woodside lairages, and is entirely within the township of Birkenhead, and the other portion of such lairages is known as the Wallasey lairages, and only a part thereof is within the township of Birkenhead.

4. On the 16th of May, 1896, a rate of 1s. 4d. in the £ for the relief of the poor in the town of Birkenhead was duly made and allowed, and in the part of the rate relating to the lairages of the appellants in the Birkenhead township the appellants are named as owners and occupiers thereof, and the property is rated separately as follows: (1) Woodside lairages, £19,333 gross, and £17,400 rateable value; (2) quay space, roadway for cattle, &c., from landing stages to township boundary and sheds connected with Wallasey lairages, £5,223 gross, and £4,700 rateable value.

5. The appellants gave notice of objection to the assessment committee of the Birkenhead Union, who made no reduction in the assessment of the Woodside lairages, but reduced the assessment of the part of the Wallasey lairages in the Birkenhead township to the figures following: Gross estimated rental, £4,723; rateable value, £4,251. The appellants thereupon gave notice of appeal to the quarter sessions of the borough of Birkenhead, who adopted the figures of the gross estimated rental appearing in the rate-book, but reduced the rateable values in respect of the Woodside and Wallasey lairages as stated in the first paragraph hereof, and the present case is stated by such court.

6. The lairages are buildings of brick and wood, roofed partly with felt and partly with slate, used for the reception and slaughter of cattle and sheep brought from abroad, and for the cooling and preservation of the carcases. Two of the buildings now used as lairages were originally warehouses—one a warehouse of several storeys and another a warehouse of two storeys, erected and formerly used for the storage of general produce. Certain sloping galleries were constructed outside the warehouses with entrances thereto to enable the cattle to walk up to the various storeys, and the warehouses are fitted with pens and other fittings necessary for lairages, slaughter-houses, cooling-rooms, and stores. The other buildings are designed and constructed for the purpose of lairages, slaughter-houses, cooling-rooms, and stores, and are fitted with pens and other fittings necessary for the above purposes, and are for the most part of one storey. The cattle are landed at Woodside and Wallasey landing-stages, and are driven direct from the ship into the lairages, and, after a shorter or longer interval, never exceeding ten days, are slaughtered, and the meat is subsequently removed by the respective consignees. The lairages and premises comprised in the assessments, including the buildings formerly used as warehouses, and the parts of the Woodside and Wallasey landing-stages used for the landing of cattle, are separated by a continuous fence from the rest of the dock estate, and the premises within the fence are defined as mentioned in paragraph 7. The said premises are the only place in the neighbourhood at which foreign animals can be landed except under penalties as provided by the Diseases of Animals Act, 1894 but there are lairages for foreign animals at Deptford, Manchester, Hull, Cardiff, Bristol, Glasgow, and other places.

7. The premises of the said Woodside and Wallasey lairages are the part of the Port of Liverpool defined as a foreign animals wharf by an order of the Board of Agriculture made the 4th of January, 1896, in pursuance of the Diseases of Animals Act, 1894. Such order forms part of this case.

8. The said lairages were erected and are worked and carried on by the appellants under the provisions of their statutory powers, and not as a local authority under the Diseases of Animals Act, 1894. No local authority has been appointed under such Act in respect of the Port of Liverpool. Only the part of the lairages which is within the township of Birkenhead is within the municipal area of Birkenhead. The lairages are carried on subject to the provisions of the Foreign Animals Order of 1896, which order is referred to and taken as part of this case.

. . . . . .

10. In pursuance of the appellants' statutory powers certain bye-laws have been duly passed for regulating, governing, and managing the stages, wharves, and landing-places at which foreign animals are from time to time permitted to be landed on the estate of the Mersey Docks and Harbour Board, and in further pursuance of such statutory powers the appellants have prescribed a schedule of charges in respect of such animals. Such bye-laws and schedule of charges form part of this case.

. . . . . .

10A. In the course of the hearing of the appeal the respondents tendered in evidence certain accounts made up from the books of the appellants showing the receipts and expenditure of the appellants in the conduct of the business of the lairages for the three years ending the 1st of July, 1896, and the averages thereof. The appellants objected to the admission of any evidence as to the amount of the receipts and expenditure, but I held such evidence admissible, and admitted the evidence tendered by the respondents accordingly.

11. The court (the Recorder of Birkenhead) delivered the following judgment, in which the contentions of the appellants and respondents are stated:

"This is an appeal from the rate made on the 16th of May, 1896, in respect of the lairages at Woodside and Wallasey, which involves the determination of the amount at which those tenements ought to be assessed. The chief controversy between the parties in the appeal turns upon the principle applicable to the assessment of a tenement used for carrying on the business of a lairage, the valuations given in evidence with one or two exceptions not being made the subject of cross-examination by either side. The contention of the appellants is that the assessment should be based upon the structural value of the buildings, plus the value of the land, as in the case, for instance, of an ordinary warehouse; whereas the respondents maintain that the assessment should be based upon the actual average receipts and expenditure in the conduct of the business of a lairage. I am of opinion that in the exceptional circumstances of this case it is not possible to ascertain what a tenant would give for the occupation of these tenements by merely considering the structural value of the buildings and the value of the land, or otherwise than by investigation of the actual average annual receipts and expenditure involved in carrying on the business of a lairage. (I did not assess the rate upon the profits of the tenant, but I used them together with other evidence to test the values given by the appellants and respondents respectively. Having taken into consideration all the evidence before me as to the actual receipts and expenditure of the occupiers who carried on the business, the nature of the business, and the chances of its permanence, the structural value of the buildings, the value of the land, and all the surrounding circumstances, I came to the conclusion that the gross values given by the respondents were too low, but I felt that I had no power in this appeal to

put them up. I therefore accepted these values as the nearest to the true gross values I could arrive at, and proceeded to determine the amount of the deductions to be made therefrom in order to arrive at the net annual values by a consideration of the evidence before me, most of which was given by the appellants.) As both parties desire to obtain the opinion of the High Court upon the true principle of assessment applicable, and for the purpose of stating a case, I find the following facts: (1) The tenements subject to assessment are capable of separate beneficial occupation apart from their connection with the rest of the appellants' property. (2) Their value is enhanced by their proximity to and connection with the docks and rails belonging to the appellants. (3) There are tenants other than the appellants available for the occupation of the tenements for the purpose of carrying on the business of a lairage. (4) There are no similar tenements in this neighbourhood with which a comparison can be made.

"If the assessment ought to be made on the mere structural value of the buildings, plus the value of the land, and without reference to receipts and expenditure, I find as follows: Lairage in Woodside, gross estimated rental, £13,381; lairage in Woodside, net annual value, £8,964; lairage in Wallasey, gross estimated rental, £3,728; lairage in Wallasey, net annual value, £2,419.

"The appellants admit that if the principle of assessment contended for by the respondents is correct, the gross estimated rentals of the two hereditaments in question appearing upon the rate book are not too high, and the respondents admit that in this appeal they cannot be increased. Consequently I adopt these figures and find the true rateable value as follows: Lairage in Woodside, gross estimated rental, £19,333; lairage in Woodside, net annual value, £12,622; lairage in Wallasey, gross estimated rental, £4,723; lairage in Wallasey, net annual value, £3,414. The result is that as the net values are reduced the appeal is allowed, and the rate must be made upon the aforesaid net values of £12,622 and £3,414 instead of the figures £17,400 and £4,251. As each party to the appeal has succeeded in part there will be no order as to costs."

12. The questions for the opinion of the court are: (1) Whether the assessments referred to in 10*a* were properly admitted; (2) whether the principle adopted in the aforesaid judgment is correct. If the answers to both questions are in the affirmative, then the gross and rateable values as found by the court of quarter sessions are to stand. If the answer to either question is in the negative, and the appellants' contention is correct, then the assessments are to be as follows: Lairage at Woodside, gross estimated rental, £13,381; lairage at Woodside, rateable value, £8,964; lairage at Wallasey, gross estimated rental, £3,728; lairage at Wallasey, rateable value, £2,419.

The Divisional Court (Lawrance and Channell, JJ.) affirmed the decision of the recorder.

The Mersey Docks Board appealed.

*F. Marshall, Q.C.* (*Horridge* and *Hugo Marshall* with him), for the appellants.

The following cases were cited: *London County Council* v. *Erith Assessment Committee*, 42 W. R. 330, [1893] A. C. 562; *Clark* v. *Overseers of Fisherton-Angar*, 29 W. R. 334, 6 Q. B. D. 139; *Reg.* v. *Verrall*, 24 W. R. 139, 1 Q. B. D. 9; *Dodds* v. *Assessment Committee of South Shields*, 43 W. R. 532, [1895] 2 Q. B. 183; *Cartwright* v. *Sulcoates Union*, [1899] 1 Q. B. 667, 47 W. R. Dig. 148; *Mayor of London* v. *Assessment Committee of Greenwich*, 48 L. T. Rep. 437, 31 W. R. Dig. 143; *Commissioners of Lancaster* v. *Overseers of Barrow-in-Furness*, [1897] 1 Q. B. 266; 45 W. R. Dig. 113; *Mersey Docks and Harbour Board* v. *Overseers of Liverpool*, 22 W. R. 184, L. R. 9 Q. B. 84.

*Pickford, Q.C.* (*A. Tobin* and *R. H. Montgomery* with him), for the respondents.—The right principle has been adopted here, and the evidence of receipts and expenditure was rightly admitted. The business attached to the premises must be taken into consideration in fixing the assessment. The structural value of the premises and the profits of the business may be considered together.

The following cases were cited: *Rex* v. *Proprietors of Liverpool Exchange*, 1 A. & E. 465; *Rex* v. *Trustees of the Duke of Bridgewater*, 9 B. & C. 68; *Reg* v. *London and South-Western Railway Co.*, 1 Q. B. 558; *Reg.* v. *Abney Park Cemetery Co.*, 21 W. R. 847, L. R. 8 Q. B. 515; *Reg.* v. *London and North-Western Railway Co.*, 22 W. R. 263, L. R. 9 Q. B. 134; *Denaby and Cadeby Colliery Co.* v. *Assessment Committee for Doncaster*, 78 L. T. Rep. 388, 46 W. R. Dig. 126.

*Cur. adv. vult.*

A. L. SMITH, L.J.—When the facts found in this case by the learned Recorder of Birkenhead are understood, in my opinion the answers to be given to the questions asked of us involve no real difficulty. The first question is whether the published accounts of the Mersey Docks and Harbour Board in relation to their receipts and expenditure in conducting the lairages of which they are occupiers were rightly received in evidence upon the hearing of the appeal at quarter sessions brought by the appellants, the Mersey Docks and Harbour Board, against an assessment of their lairages to the poor rate; and the second is whether the principle adopted by the recorder in arriving at the rateable value of the lairages as appears upon the special case is correct. The learned recorder states that he did not assess the rate upon the profits of the tenant, but that he used them, together with other evidence, to test the value given by the appellants and respondents respectively. The material facts found by the recorder are these: First, that the lairages consist of lands and buildings in the occupation of the appellants within the ambit of the rating authority; secondly, that the lairages are the only places in the neighbourhood at which foreign cattle can be landed except under penalties, as provided by the Diseases of Animals Act, 1894; thirdly, that the lairages were erected and are worked by the appellants under statutory powers which enable them to exact charges for the lairages they provide for imported animals; fourthly, that there are no similar hereditaments in the neighbourhood with which the lairages can be compared in order to ascertain what rent a tenant from year to year would be likely to give for the lairages, and that they fall within the category of cases which in rating law are known as exceptional cases; fifthly, that it is not possible to ascertain what rent a tenant from year to year would give for the occupation of the lairages by merely considering the structural value of the buildings and the value of the land upon which the buildings stand; and lastly, that to ascertain what rent such a tenant would give the actual average annual receipts and expenditure obtained and incurred in carrying on the work of the lairages must be investigated.

Now, first of all, it is manifest that the rental value of these lairages cannot be ascertained by adopting the ordinary method of ascertaining what rent the hypothetical tenant from year to year would be likely to give for the hereditament about to be assessed—viz., by comparing that hereditament with similar hereditaments in the neigh-

bourhood, and ascertaining what rent the other hereditaments command, and thus arriving by comparison at an approximation as to what rent a tenant from year to year would be likely to give for the hereditament in question. As this method, which is, as I have said, the ordinary method for ascertaining rateable value, cannot be adopted, some other method has to be resorted to. What, then, in such a case, is the next method usually brought into play? It is to take the structural value of the buildings and the value of the land on which they stand, and to calculate what would be the interest upon the capital sum which would have to be expended if the occupier had become the purchaser and not the tenant. For instance, if the cost of the buildings, plus the value of the land, was, say, £10,000, the interest thereon, say, at 4 per cent., being £400 a year, the assumption is made that the hypothetical tenant, being desirous of occupying the premises, not purchasing, but becoming a yearly tenant, might be willing to pay as rent a sum in some degree represented by the interest upon the money he would have had to expend had he become a purchaser instead of a tenant. This is a method which is adopted when the comparison of the hereditament with other similar hereditaments is impracticable. But suppose, as in the present case, in addition to the rent which a tenant might ordinarily be likely to give there is a capacity in the hereditament itself of making a profit not personal to the tenant, but which is attached to the hereditament, why is not this capacity to be considered as an element when seeking to ascertain what the hypothetical tenant would be likely to give by way of rent? Surely a proposing tenant would take this additional element into consideration when calculating what rent he could give for the hereditament he was about to take; and why, then, is this not also to be taken into consideration by the tribunal which has to ascertain, as best it can, what rent the tenant, as a tenant from year to year, would be likely to give? There is, as it seems to me, no reason whatever why this capacity attached to the hereditament itself should not form an element in the consideration, and there is good authority, as I will show in a moment, that this can be taken into consideration. I will take two of the cases to which Mr. Pickford has called our attention, which sufficiently show when a capacity of making profit cannot and when it can be taken into account. In the case of *Rex* v. *Trustees of the Duke of Bridgewater* the trustees were by statute empowered to take tolls upon the tonnage of goods passing along the Bridgewater Canal, and they in addition carried on the trade of carriers thereon, receiving freight for the goods so carried. The court held that the tolls were to be taken into consideration when arriving at the amount at which the occupation of the trustees was to be assessed, but not the profits made by them in the carrying business, because as Bailey, J., in delivering the judgment of the court said: "I lay out of consideration the fact of the trustees being carriers, because the occupation only is to be considered. The profits of carrying goods are the profits of their trade. The tonnage is the profit of the land occupied by them." And, therefore, this tonnage profit, being attached to the land, had to be considered when arriving at the rateable value of the hereditaments—*i.e.*, the canal. Again, in the year 1842, in the case of *Reg.* v. *London and South-Western Railway Co.*, it was held that the defendant company was liable to be rated for its land improved in value by the profits accruing from the railway, which in this case was held to include both the tolls and the carrying trade, because, as Lord Denman, C.J., pointed out when delivering the judgment of the court, the defendants were "occupying buildings and lands on an entire line of railway and carrying on a trade, not merely therein and thereon, but thereby." This, as it appears to me, applies to the present case upon this ground. I think the recorder was right. I now come to two cases which fall within the definition of exceptional cases, of which the present case is one. In the year 1875 *Reg.* v. *Verrall* was decided. It was a case of rating a racecourse, an undoubted exceptional case, and it was held by Sir Alexander Cockburn, C.J., and Field, J., that in ascertaining its rateable value the accounts showing the receipts and expenditure in respect of the racecourse were legitimate evidence, and were clearly elements for the consideration of the justices when arriving at the value of the occupation of the racecourse. So, again, in the case in 1880 of *Clark* v. *Overseers of Fisherton-Angar* Field and Bowen, JJ., held that, in ascertaining the rateable value of refreshment rooms upon a railway station, there being no means for a comparison, the receipts and expenditure during the past year ought to be received in evidence as an element in ascertaining the rateable value. In the case of *Dodd* v. *Assessment Committee of South Shields Union* this court approved of the last two cases, and it is clear from the report that Lord Esher must have been alluding to a case other than *Clark* v. *Overseers of Fisherton-Angar* when he said he did not understand it. This court in *Cartwright* v. *Sulcoates Union* said nothing as to the accounts of receipt and expenditure not being received in evidence in a case like the present, and in my opinion that case has no application to a case where a profit is attached to the hereditament itself. For the reasons above I am of opinion that in this case the accounts of the Mersey Docks and Harbour Board were rightly received in evidence by the learned recorder, and that he was right when he took evidence of the structural value of the buildings and land, and also admitted in evidence the receipts and expenditure of the lairages for the past year, each, in my judgment, being elements fit for his consideration when ascertaining as best he could what rent the hypothetical tenant from year to year would be likely to give for the lairages. He did not take the profits as the basis whereon to assess the rateable value, and then add thereto the structural value, but he took evidence of the profits merely to test the values given by the appellants and respondents respectively. The point made by Mr. Horridge upon a passage in Lord Herschell's judgment in the case of *London County Council* v. *Churchwardens of Erith*, in my opinion, has no applicability here, because the recorder has found that there were tenants other than the Mersey Docks and Harbour Board available for the occupation of the lairages. For these reasons I think that the judgment of my brothers Lawrance and Channell must be affirmed, and this appeal dismissed.

COLLINS, L.J.—I am of the same opinion. I think the learned recorder has regarded both structural value and the profit-earning capacity of the hereditament in arriving at his conclusion, and I think both these elements were legitimate, and indeed necessary factors in determining in this case what rent the hypothetical tenant would give for it. The profit-earning capacity of the hereditament, if it exists, must always be an important factor in the annual value, and it is just as much present in a value based on a comparison of rents fetched in the open market by similar hereditaments when the materials for such a comparison exist as though it could be isolated and quantified. (See the observations of Lord Watson in *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh*, [1894] A. C. 456.) When there

is a market rent for similar hereditaments there is no need to look for any other standard. Every element of beneficial occupation is embraced in such a rent, and therefore it would be a useless and probably misleading inquiry to examine into the profits actually made by the occupier. Such profits would depend possibly as much on the skill of the occupier as on the special facilities inherent in the hereditament itself, and a just appreciation of each element would therefore have to be made in order to make the proper deductions, and so to arrive at an estimate of the rateable value, a result which has already been much more accurately ascertained by the market rent. Hence the rule that in ordinary cases when the standard of rent is applicable evidence of actual profits made cannot be received. But it is equally true that when no such standard of comparison exists it is legitimate to inquire into the profits actually earned; a series of cases which were referred to in argument have established this. When due allowance is made for all elements peculiar to the occupier this is the best available means of appraising the profit-earning facilities of the hereditament itself. It is clear, therefore, that it cannot be laid down as a matter of law that the profits cannot be looked at in ascertaining rateable value. The rule which excludes them in ordinary cases rests not on the fact that the object of the inquiry is illegitimate, but that the end sought has already been reached and measured in the market rent. In the case before us are certain profit-earning advantages linked with the occupation of the hereditament itself, and no assessment which did not embrace them would be just. It is obvious that structural value might be no measure at all, or a very imperfect measure, of the value of such advantages. The buildings and appliances might be just as costly whether the special advantages existed or not. The test of structural value, therefore, though frequently useful when the beneficial occupation does not embrace profit-earning facilities is incomplete when such facilities are the most important factor in the annual value. If a complete and satisfactory estimate of rent which the hypothetical tenant would give could be made from an examination of the profits actually earned, there would be no need to look further or consider structural value, as *ex hypothesi* the rent would include all elements of value. But it is because, as already pointed out, an examination of such profits is not a complete test, but only a means, and an imperfect one, of arriving at a conclusion as to the true rent which the hypothetical tenant would pay, that it may be useful to apply the standard of structural value also. It is itself an element which such tenant might properly take into consideration, and it also furnishes a parallel and independent mode of checking the conclusions arrived at from an examination of profits. There is no incompatibility between them, and I think it would not be safe to omit either in the present case. I understand the learned recorder to have done no more than this, and I am of opinion, therefore, that his decision, and that of the Divisional Court, was right.

VAUGHAN WILLIAMS, L.J.—I agree that this is an exceptional case, in which you cannot apply the ordinary test consisting of comparison with the values or rentals of similar hereditaments in the district, or by the mere test of structural value. I agree with the judgments just delivered on the assumption that the finding of the recorder does not mean that, having the actual receipts and expenditure of the occupiers as the basis or measure of the rent which the hypothetical tenant would be willing to pay, he then added to the sum thus arrived at something for the structural value of the buildings and the value of the land, but means only that, having arrived at the structural value, plus the value of the land, he then took into consideration the facilities which land improved by the structures would afford for the lairage business conducted by the appellants, for if once you make the balance of receipts over expenditure—*i.e.*, the net profits—the basis of the rent which the hypothetical tenant would be willing to pay, you can add nothing to the rent after applying this exhaustive measure. It is as if having to value a man's labour, and having taken evidence of the piece-rate and the time-rate (evidence of both of which rates would clearly be admissible for the purpose of arriving at the value), you then applied the piece-rate as the measure of the value of his work, and proceeded to add something to the sum thus arrived at by taking into consideration the value as based on time-rate. Thus in the present case it seems to me that you cannot measure the rent which the hypothetical tenant would pay by the standards of the net profits which he would make and then add something for structural value. You must in such a case, I think, exclude structural value from consideration altogether as an item going to make up the sum of the rent which the hypothetical tenant would be ready to pay. The contention of the respondents as set forth in the case was that the assessment should be based upon the actual average receipts and expenditure in the conduct of the business of a lairage, and the recorder goes on to state that in his opinion in the exceptional circumstances of this case it is not possible to estimate what a tenant would give for the occupation of these tenements by merely considering the structural value of the buildings or otherwise than by investigation of the actual annual average receipts and expenditure involved in carrying on the business of a lairage. He then says, I did not assess the rate upon the profits of the tenant, but I used them (the profits) together with other evidence (*inter alia*, the structural value of the buildings) to test the values given by the appellants and the respondents respectively (*i.e.*, the value arrived at by the appellants based upon the structural value of the buildings plus the value of the land and the value arrived at by the respondents based upon the actual average receipts and expenditure of a lairage). The court is asked by question 2 to say whether the principle thus adopted by the recorder is correct. We have not seen the figures of the items by which the recorder arrived at the net annual value on the principle of assessment which he states was applied by him; if, however, he took as an item in the sum the balance of receipts over expenditure and then added something for structural value, I think he was wrong. It may be, however, that he arrived at a minimum rental value which the tenant would certainly be willing to pay, having regard to the structural value, and then added something on the ground that the evidence of the receipts and expenditure showed that the lairages occupied by the appellants were likely to command a good business. The case we have to consider is, in my judgment, an exceptional case, in which it is not possible to get at the rateable value in the ordinary way by calling an expert and comparing the hereditaments proposed to be rated with some hereditaments in the neighbourhood, so that it is legitimate to get at the rateable value by getting at what trade is being done and calculating what the hypothetical tenant would be likely to give for the opportunity of carrying on business there; but when you have made that calculation you have arrived at the rateable value and there is an end of the matter, you can add nothing to it. In the case of *Reg.* v. *Verrall*, and in *Clark* v. *Overseers of Fisherton-Angar*, there was a rent from which

the calculation started; in the former case the rent was said to be too low, and the fact that large profits were made was relied upon as proof that the rent was too low to represent the value. The sessions held that the books could not be called for, but the court held the books to be admissible evidence, not as an absolute test, but as a material element in determining the value, material that is, as I understand, as negativing the *primâ facie* assumption that the rent was a fair test of the value. When the case got back to sessions it might be that the rent test being displaced some other test might be found, and if not, the case being an exceptional one, the net profit test would be applicable as a sole test. So in *Clark* v. *Overseers of Fisherton-Angar* the books were put in to show that the rent was too high, being above the value. These cases show that receipts and expenditure may be given in evidence to show that the value by the ordinary test applied was not satisfactory, and that the value must be enhanced or reduced as the case might be, but to my mind show nothing more. Both cases relate rather to the admissibility of the evidence than to the ultimate measure to be applied. As to the first question I have no doubt but that the evidence of the receipts and expenditure was admissible.

*Appeal dismissed.*

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.*, for *A. T. Squarey*, Liverpool.

Solicitors for the respondents, *J. E. & H. Scott*, for *Thompson, Hughes, & Mathison*, Birkenhead.

## High Court of Justice.

Chan. Div. North, J. — Nov. 18, 25.

*In re* ROSS.
ASHTON v. ROSS. (*a.*)

*Administration — Insufficient estate — Abatement of annuities—Married woman—Restraint on anticipation —Capital value of annuity—Legal personal representative.*

*Where a married woman was entitled restrained from anticipation, to an annuity, from an insufficient estate, and agreed to an abatement thereof, the capital value of the annuity abated by an order of the court being laid out in the purchase of an annuity; and where she died before the purchase of the annuity,*

*Held, that the capital of the abated annuity should be paid to her legal personal representative, and formed part of her estate.*

By his will dated the 29th of April, 1885, Thomas Ross bequeathed several legacies and annuities, including an annuity of £200 to Farlow Sergeant and his wife Margaret during their joint lives, and from and after the decease of either of them an annuity of £100 to the survivor during his or her life, and if Margaret Sergeant should survive then for her sole and separate use free from marital control and without power to anticipate the growing payments thereof.

In November, 1885, an administration action was commenced, as the testator's estate was insufficient for payment in full of the legacies and annuities.

Judgment in the administration action was obtained on the 23rd of January, 1886. As the result of an arrangement between the legatees and annuitants (with the exception of a few to whom legacies and annuities were fully paid) an order was made in the action on the 14th of August, 1899, to abate *pro rata* the amounts which they were respectively entitled to, and it was ordered that T. N. Ashton (the sole surviving trustee and executor of the will) should join with Margaret Sergeant in a contract with the Commissioners for the Reduction of the National Debt to purchase two separate annuities on the life of the said M. Sergeant.

The annuities would together have amounted to £95, but before the purchases had been made Margaret Sergeant died on the 28th of August, 1899.

By her last will M. Sergeant appointed Farlow Sergeant her sole executor, and the will was duly proved by him on the 25th of October, 1899.

The sum of £1,049 1s. 3d. was the capital value of the annuities to be bought, and this amount was, pursuant to an order of the 27th of September, 1899, carried over to a separate account called "the account of annuity bequeathed to Margaret Sergeant (since deceased)." Farlow Sergeant presented a petition praying for a declaration that he was entitled, as legal personal representative of his wife, to have the sum in court paid out to him.

*Vernon Smith* and *R. J. Parker*, for Farlow Sergeant, referred to *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357; *Carr* v. *Ingleby*, 1 De G. & Sm. 362; *Long* v. *Hughes*, 1 De G. & Sm. 364; *In re Mabbett, Pitman* v. *Holborrow*, 39 W. R. 537, [1891] 1 Ch. 707; and *In re Sinclair, Allen* v. *Sinclair*, 45 W. R. 596, [1897] 1 Ch. 921.

*Hon. E. C. Macnaghten, Q.C.*, and *Northcote*, for the residuary legatee, referred to *Hatton* v. *May*, 24 W. R. 754, 3 Ch. D. 148.

*Hon. T. H. Watson*, for another annuitant.

*Jason Smith*, for the trustee.

NORTH, J., stated the facts, and said: I think in this case the husband is entitled to take the money carried over. If an estate is not sufficient to pay an annuitant in full, he is entitled to have the proportionate value of his annuity paid in cash. If the estate is ample to pay the annuity in full that is another matter. In the case of the petitioner's wife a difficulty arose as to paying over the capital value of the annuity because she was restrained from anticipation, and I could not see my way clear to allow the money to be paid over to her. There was no restraint on anticipation affecting the fund after her husband's death, had she survived him, and in that event she could have taken the capital. In *Long* v. *Hughes*, where an annuity abated owing to an insufficiency of assets, the amount of the abated valuation was ordered to be paid to the legal personal representatives of the deceased annuitant. That case was much the same as the present, except for the temporary inability of the lady to take the capital.

Solicitors, *Collyer-Bristow & Co.*, for *Goy & Cross*, Barton-on-Humber; *Hicks & Son*, for *Allison & Co.*, Louth.

Chan. Div. Buckley, J. — Jan. 19, 20, 22.

PANNELL v. CITY OF LONDON BREWERY CO. (*a.*)

*Landlord and tenant — Lease—Forfeiture—Breach of covenant—Notice to remedy several breaches—Validity —Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14 (1).

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

*A notice to a lessee under the 14th section of the Conveyancing Act, 1881, to remedy a number of alleged breaches of covenant is not bad merely because in respect of one or more of them the breach cannot be established.*

Lock v. Pearce, 41 *W. R.* 369, [1893] 2 *Ch.* 271, *followed.*

Horsey Estate v. Steiger, 47 *W. R.* 644, [1899] 2 *Q. B.* 79, *and* In re Serle, 46 *W. R.* 440, [1898] 1 *Ch.* 652, *distinguished.*

Action.

The defendant company were assignees of a public-house known as the "Denmark" with a garden comprised in and demised by an indenture of lease of the 10th of October, 1868, for the term of ninety-nine years from the 29th of September, 1868.

The said lease contained the following covenants on the part of the lessee: (1) On or before the 13th of November, 1868, to complete and finish the messuage or tenement and buildings thereby demised with suitable offices, sewers, drains, gardens, and fences to the satisfaction of the lessor. (2) During the said term to well and substantially repair, maintain, and keep the said demised premises with the appurtenances in such good and substantial repair as should be necessary for the occupation of a tenant at a rack-rent, and to so yield up the same at the end of the said term. (3) To paint the outside wood and iron work once in every four years of the said term with two coats of good oil colour. (4) To effectually repair and amend the demised premises within three calendar months after the lessor should have given to the lessee notice in writing to repair and amend the same. (5) Not to make any alteration in the plan and elevation of the demised messuage or erect any additional building on any part of the ground demised without the previous consent in writing of the lessor. (6) Not to use for any other purpose than as a tavern.

The said lease contained a proviso that if the lessee or his assigns should fail in the observance and performance of any of the covenants therein contained it should be lawful for the lessor and his assigns into and upon the demised premises to re-enter and the same to have again, repossess, and enjoy as if the said demise had not been made.

On the 31st of January, 1899, the plaintiff caused to be served upon the defendant company a notice addressed to them specifying divers breaches of covenant alleged to have been committed by them, and requiring them to remedy the said breaches and to make compensation therefor.

The terms of the said notice were as follows: "As solicitor and agent for and on behalf of E. Pannell, (the plaintiff) being the person entitled to the reversion of the above-mentioned premises (the 'Denmark' Tavern) expectant on the said lease, I hereby give you notice that you have committed breaches of the covenants contained in the said lease: First, that you have not kept the said premises in good and substantial repair; secondly, that you have not painted the outside wood and iron work of the said premises with two coats of good oil colour once in every four years; thirdly, that you have not kept the gardens and fences to the said premises in good and substantial repair, and have permitted the fences and party-walls thereto to be cut or broken or pulled down; fourthly, that, without the licence of the freeholder, a brick-built and roofed erection used for the purpose of a dung-shoot has been built in the garden to the said premises; and, lastly, that the manner in which the said garden is used has become a nuisance and annoyance and detrimental to the business of the licensed premises. And I hereby require you to remedy the said breaches by executing and doing the repairs and things specified in the schedule hereto within three calendar months from this date. And I also require you to pay to the said E. Pannell the sum of £10 10s., being the costs and expenses incurred by her for surveyors' fees and solicitors' charges in respect of the said breaches of covenant above mentioned. And I hereby further give you notice that if you make default in remedying the aforesaid breaches of covenant in manner above mentioned or in making the compensation hereby required, the said E. Pannell will enter and take possession of the said premises," dated the 31st of January, 1899, and duly signed. Then followed a schedule giving the particulars of the repairs and things required to be done by the notice, which were thirteen in number. The plaintiff having failed to establish some of the breaches alleged in the said notice, the question arose whether the whole notice was thereby rendered bad, and the following judgment was given on this part of the case which does not otherwise call for a report.

*H. Terrell, Q.C.*, and *Gilks*, for the plaintiff.

*Astbury, Q.C.*, and *G. F. Mortimer*, for the company.

*G. Cave* and *R. Edmondson*, for other defendants.

BUCKLEY, J.—There is no question that reasonable time was given to comply with this notice. But it is said that the notice is bad, because the plaintiff has failed to establish all the breaches alleged in the notice. The argument is that if a lessor gives notice of three breaches, as to one of which he is right and as to the others wrong, he must wholly fail in his case. If that be the law, a lessor would, in order to protect himself, be obliged to serve a separate notice in respect of each breach alleged. That would be a very inconvenient state of things, but the question is whether on the authorities I must hold that a lessor is placed in this unfortunate position. Under the old law a tenant would be entitled to particulars of alleged breaches, but if the lessor were wrong in respect of one or more, he would not on that account alone be disentitled to succeed in ejectment. Why should the notice as a whole be defeated in such a case? There seems to be no reason for it *primâ facie*. Then the 14th section of the Conveyancing Act, 1881, enacts that a lessor's right of re-entry for breach of covenant shall not be enforceable unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and requiring the lessee to remedy and make compensation for the breach, and the lessee fails within a reasonable time to remedy the breach and make reasonable compensation. The lessor here has done everything necessary to bring himself within the words, and I think within the reason of the section. It is true that he was not entitled to claim the surveyor's charges and solicitor's costs under this section: see *Skinners Co.* v. *Knight*, 40 W. R. 57, [1891] 2 Q. B. 542, but that was altered and the right given by the Conveyancing Act, 1892, s. 2 (1). In *Lock* v. *Pearce*, 41 W. R. 369, [1893] 2 Ch. 271, the notice required payment of £2 2s. for surveyor's fees and solicitor's charges, and as the law then stood that was wrong. It was, therefore, too large a notice. It was admitted in argument that the claim so made was illegal, but no point was made that the notice was bad on that account, and Lindley, L.J., adopted that view, saying: "It is true that he asked for £2 2s. for the surveyor's fees, and there is a case which decides that he could not recover them, but in fact he told them what compensation he wanted. The notices are as good as any notices could possibly be." That is a decision of the Court of Appeal that a notice may be good when it calls

for something to be done that is not authorized. But it is said that is inconsistent with the later decision of the Court of Appeal in *Horsey Estate* v. *Steiger*, 47 W. R. 644, [1899] 2 Q. B. 79, where the judgment was delivered by Lord Russell, C.J. He says (47 W. R., at p. 646, [1899] 2 Q. B., at p. 92): "It is now admitted that the plaintiffs were not in a position to rely upon the alleged breach for non-repair. In these circumstances can this be said to be a proper notice within the Act? On the whole I think not. In the first place, if the entering upon liquidation had alone been put forward, the defendants would have had the opportunity of considering whether they had any answer," and so on. That passage is addressed to the contents of the notice. Then he says: "Further, the statute clearly contemplates that a reasonable interval shall elapse after service of notice and before action. Can two days' notice be said in all the circumstances to be a reasonable notice? I think not." That is addressed to the validity of the proceedings based on the notice. Then he concludes: "On the whole, therefore, I am of opinion that the notice was bad." I understand this to refer to the proceedings on the notice and not to its contents, and do not read it as conflicting with *Lock* v. *Pearce*, which was not cited in the case. The decision, then, amounts to this, having regard to the shortness of the time between service of notice and the writ, the proceedings were bad, but not the notice. The only other case I need mention is *In re Serle, Gregory* v. *Serle*, 46 W. R. 440, [1898] 1 Ch. 652, which is not a decision on the point before me, but on insufficient particulars, and is therefore inapplicable. I therefore hold that the notice is a good notice.

Solicitors for the plaintiff, *Moon, Gilks, & Moon.*

Solicitors for the defendants, *Western & Sons; Hulberts, Hussey, & Metcalfe; R. H. Hargreaves.*

---

Q. B. Div.
(Lord Russell of Killowen, C.J., and Bigham and Darling, JJ.)

Nov. 17, 18; Dec. 21.

LOGSDON (*Appellant*) *v.* BOOTH (*Respondent*). (*a.*)

*Common lodging-house—Charitable institution—Salvation Army shelter—Non-registration—Penalty for keeping—Common Lodging Houses Act*, 1851 (14 & 15 *Vict. c.* 28)—*Common Lodging Houses Act*, 1853 (16 & 17 *Vict. c.* 41), s. 3.

*The respondent had opened and kept a lodging-house for men of the poorest class, known as a Salvation Army shelter, which, though not kept for the purpose of gain, was conducted upon business principles. The house was not registered, nor had it been inspected and approved by the local authority in accordance with section* 3 *of the Common Lodging Houses Act*, 1853.

*The facts as found in the case were substantially the same as those in* Booth *v.* Ferret, 38 *W. R.* 718, 25 *Q. B. D.* 87, *and the magistrate held himself bound by that decision, and dismissed the summons against the respondent charging him with the offence of keeping an unregistered common lodging-house.*

*Held that* Booth *v.* Ferrett *was wrongly decided, and that these shelters, being of a class of lodging-house in which persons of the poorer sort were received for short periods, and, although strangers to one another, were allowed to inhabit one common room, were common lodging-houses; and therefore the magistrate should have convicted the respondent.*

---

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Case stated by Sir F. Lushington, chief metropolitan magistrate.

The respondent was charged by the appellant, an official of the London County Council, with keeping a shelter known as the "Harbour," Stanhope-street, St. Clement Danes, belonging to the Salvation Army, without having been registered as the keeper of a common lodging-house. The place in question was kept by the respondent for the reception and lodging of men only admitted by the officials in charge under certain regulations in connection with certain social work under a general scheme. Persons were admitted at 4d. a night, or 2s. a week, for a bed, and the use, in common with other occupants, of the rooms of the shelter. The officials in charge had a discretionary power to admit persons without payment or at a less payment. The respondent was not entered on the register of common lodging-houses kept under the Common Lodging Houses Acts. On the 16th of May last there were in the house 157 beds or bunks. Occupants had to provide their own food, but were entitled to cook it at the fire provided in the kitchen. Only men were admitted to this shelter, and those who were drunk or disorderly were refused admittance.

The occupants were of the same class as those who usually frequent registered common lodging-houses, save that some of the persons admitted into the house were so dirty that they could not be received at an ordinary lodging-house.

It appeared from the accounts of the working of all the shelters used in connection with the scheme throughout England that there was a loss on them of over £600 in one year, although the prices charged were similar to those charged by common lodging-houses which were kept for making a profit.

The magistrate held that the facts admitted or proved were indistinguishable from those in *Booth* v. *Ferret*, 38 W. R. 718, 25 Q. B. D. 87, and that this shelter therefore was not a common lodging-house within the Common Lodging Houses Acts, 1851 and 1853. He accordingly dismissed the summons.

The London County Council appealed.

*Arthur Jelf, Q.C.*, and *Ryde*, for the appellants.—The matter came before the magistrate as a *quasi*-criminal case, and therefore there was no appeal from this court to the Court of Appeal. As the question depended upon whether *Booth* v. *Ferret*, decided nine years ago, ought now to be followed, an application was made to have this appeal heard by a specially-constituted court. The case raised a point of great public importance. On the one hand there were the Acts which provided for the sanitation, the good government and regulation of common lodging-houses in which the very poor herd together, and on the other hand there were these gentlemen of the Salvation Army who from philanthropic motives have started houses called shelters, who claimed on the authority of *Booth* v. *Ferrett* that the shelters did not come within the Acts. The powers given sanitary authorities under the Acts had been transferred to the county council, and they feel bound to take these proceedings. The question whether a building in which a number of poor persons congregated should be registered, and thereby open to inspection by skilled public officials, who would see that cleanliness, ventilation, and other sanitary precautions were enforced, ought not to depend upon whether the house was carried on as a philanthropic or as a commercial institution. If a man obtained admittance to an unregistered shelter suffering from an infectious disease the local authority could not properly deal with the matter. *Booth* v. *Ferrett* was decided on a wrong principle.

*Pollard*, for the respondent.—The Salvation Army were not fighting from mere caprice, as they were fully alive to the necessity of enforcing all sanitary precautions. Since *Booth* v. *Ferrett* was decided they have spent £40,000 in improving these shelters. If the shelters were registered the county council regulation of 300 or 400 cubic feet of air space for each inmate of a common lodging-house would be applicable to these shelters. Unless each inmate paid 4d. for his night's lodging this could not be done, and many poor wretches who were now allowed in on payment of 1d. or 2d. would have to pass the night on the stones. After a hearing lasting eight days before the magistrate, in which experts were examined, an agreement was arrived at with the local health authorities (which had been loyally kept) whereby no more persons were to be given shelter than the shelter would allow of giving to each inmate 180 cubit feet of air space.

*Cur. adv. vult.*

Dec. 21.—Lord RUSSELL, C.J., who delivered the judgment of the court, after referring to the facts set out in the case, said: The questions which arose for our determination are as follows: (1) Is *Booth* v. *Ferrett* in principle distinguishable from this case; (2) if not, was that case rightly decided; and (3) if not rightly decided, ought we now to review it? [His lordship then discussed minutely the facts of the case, and stated that, in the opinion of the court, the present case was not distinguishable in principle from *Booth* v. *Ferrett*. He then proceeded:] The next inquiry is, Was that case rightly decided? The learned judges in *Booth* v. *Ferrett* came to the conclusion (but with hesitation) that a similar house, and similarly conducted to the present, was not a common lodging-house, on two grounds—(1) that it was not carried on as a business for the sake of profit, but as a humane or charitable enterprize; and (2) that it was not open to all comers as (it was stated) a common lodging-house was. Before examining these grounds of decision more closely it will be well to examine the scheme of legislation on this subject and endeavour to get a clear conception of its object. [His lordship, after referring in some detail to the provisions of the Common Lodging Houses Acts, 1851 and 1853, and pointing out that they must be regarded as measures of sanitary protection, continued:] Applying these conditions to the first ground on which the decision in *Booth* v. *Ferrett* was based, it seems impossible to admit that the fact that the house or building in question was carried on for charitable objects and not for gain would take it out of the measure of sanitary protection if otherwise it would be within it. The question is not with what object or prompted by what motive the house is carried on, but whether the house is such, and is so carried on as a lodging-house as to be within the provisions of the Act, as it is clearly within the mischief aimed at by the Act. It is to be observed that the learned judges in *Booth* v. *Ferrett* differentiate the house in that case from a common lodging-house only on the two grounds I have mentioned. If large numbers of the most wretched class are lodged in common sleeping rooms insanitary conditions are, in the absence of inspection, supervision, and control, likely to arise, and it was the object of the law to secure that inspection, supervision, and control. We fail to see the relevance in this connection of the motive actuating the keeper of such a house, whether it be philanthropic or mercenary. But the second ground of the decision is that the "Harbour" is not within the statute on the ground that a common lodging-house is open to all comers in this sense, that the keeper of such a house cannot refuse admission to any applicant. Is this so? To give to a common lodging-house this character is to attach to its keeper obligations analogous to that of a common carrier or a common innkeeper. We are unaware of any authority for this proposition. The language of Lindley, J., in *Langdon* v. *Broadbent*, 37 L. T. Rep. 434, is referred to where he speaks of a common lodging-house as one "open to all comers"—that is, as we understand the language, where practically all comers are received without discrimination; but that is a very different thing from saying that the keeper is under an obligation to receive all comers. We see no reason to doubt that the keeper of a common lodging-house might refuse to admit drunken or disorderly or uncleanly men or men of known evil reputation, as thieves and the like, or indeed any persons whom he chose to exclude. Further, it seems to us on the facts before us that the "Harbour" might properly be described as open in the same sense to all comers. The very "outcasts of society" are objects of the humane solicitude of the respondent. Even verminous subjects who are willing to submit to cleansing operations are admitted, and in the case before us it is stated that the occupants of the "Harbour" are of the same class as those who frequent common lodging-houses, but that into the "Harbour" are received persons who would usually be refused admission into registered common lodging-houses. The only restrictions on admission which may suggest a difference between the "Harbour" and registered common lodging-houses are the regulations (1) that men who are able to pay for better accommodation are not allowed to make the "Harbour" their permanent home, and (2) that the "Harbour" is not to be used to assist idle men to live a lazy life. We cannot assent to the view that this is sufficient to differentiate the two classes of houses. We know of no better description of a common lodging-house than that given many years ago by the law officers, Sir Alexander Cockburn and Sir W. Page Wood, to the effect that a common lodging-house was that class of lodging-house in which persons of the poorer class are received for short periods, and, although strangers to one another, are allowed to inhabit one common room. If this be the proper description of a common lodging-house, as we think it is, we cannot see in what material respect it differs from the respondent's shelter. [His lordship then, after intimating that the court was prepared to overrule *Booth* v. *Ferrett*, and dealing with an argument of the respondent based on the Public Health (London) Act, 1891, concluded as follows:] The result is that the appeal will be allowed, and that the case will be remitted to the learned magistrate with an intimation of our judgment upon it. Under the circumstances there will be no costs of the appeal, and having regard to the decision of *Booth* v. *Ferrett*, on which the respondent was justified in acting, the learned magistrate will, no doubt, think that the smallest nominal fine will meet the justice of the case. We desire to say that we should regret if the result of our decision were seriously to interfere with the humane work of the respondent. We do not think it will or can, but whether it does or not the law must be observed. We have read the careful regulations framed for the good government of the "Harbour" and the respondent's other similar houses, and noticed the anxiety manifested in those rules, not only to ensure observance of all conditions necessary to secure cleanliness and good health and to prevent the growth and spread of disease, but also to observe the law, whatever that law may be. Indeed, the regulations expressly provide that every shelter shall be fitted up in accordance with the requirements of the sanitary authority of the district. On the other hand, we trust that those who are charged with the enforcement of the law will do all they can consistently

with their duty and consistent with effecting the objects of the law to avoid anything like harshness or unreasonableness in its enforcement.

Solicitors for the appellants, *W. A. Blaxland.*

Solicitors for the respondents, *Ranger, Burton, & Frost.*

---

Prob. Div. & Adm. Div. Divorce. } July 18, 27, 1899.

SICKERT *v.* SICKERT. (*a.*)

*Divorce — Desertion — Adultery by husband—Offer of forgiveness if discontinued—Continuance of adultery insisted on—Refusal by wife to continue cohabitation —Separation.*

*To constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other; it is not always or necessarily the guilty party who leaves the matrimonial home.*

*A husband was committing acts of adultery which, on discovery by his wife, he admitted had continued from the time of the marriage, and he refused to discontinue these acts, although his wife said she could not live with him unless he did so; and they separated and lived apart for more than two years, when a suit was commenced by the wife for dissolution on the ground of adultery and desertion for more than two years.*

*Held, that the husband had been guilty of desertion.*

Hearing before the court itself of the wife's petition for dissolution of the marriage, on the ground of her husband's desertion and adultery.

The facts are fully stated in the judgment.

July 18.—*Bargrave Deane, Q.C.*, and *Llewellyn Davis*, for the petitioner.—It is not necessarily the guilty party who leaves the home. Here the wife was compelled to cease cohabitation by the husband's conduct, and the husband refused to discontinue the adultery, although he knew his wife would not continue the cohabitation unless he did so; therefore he deserted her.

*Cur. adv. vult.*

July 26.—BARNES, J., delivered the following written judgment: The petitioner in this case prays for a dissolution of her marriage with the respondent, on the ground of his alleged desertion and adultery. The adultery, which occurred in April, 1898, and May, 1899, was proved, but an important question is raised with regard to the alleged desertion. The facts appear to me to be that the petitioner was married to the respondent, who is an artist, on the 10th of June, 1885, and that they lived together until the 29th of September, 1896. The effect of the evidence is that in 1895 the petitioner had strong suspicions that the respondent was leading an improper life; that in 1895 she found a letter to him from a woman, and that he admitted two cases in adultery, one with that woman and one with another woman, but, as he promised to have nothing more to do with them, she forgave him; that in May, 1896, there was a short separation between them, in consequence of his conduct, but that he rejoined her in Switzerland; that on the 29th of September, 1896, while they were at Fluellen, on the Lake of Lucerne, he made a statement, the effect of which was that it was of no use concealing the fact that he had never been faithful to her, and never could be; and that the petitioner said that as long as the respondent lived that sort of life she could not live with him, but was willing to do so if he would give it up, but he declined to do so. They therefore separated, and have ever since lived separate. On the 8th of December, 1898, the petitioner wrote to the respondent as follows:

"Dear Walter,—In spite of your having told me, when we parted in Switzerland in September, 1896, that, immediately after our marriage and ever since, you have lived an adulterous life, and that you felt sure you could never live a different one, I have been hoping against hope that you would abandon it, but all that I have heard of you during the last two years has forced me to give up all possible hope for the future. "Yours truly,

"E. M. SICKERT."

To this letter the respondent replied, on the 14th of December:

"My dear Nellie,—I have received your letter of the 8th of December. It is quite true that I have not been faithful to you since our marriage and it is equally true that during the two years since we parted I have been intimate with several women. As I told you long ago, I cannot continue a life of dissimulation. I have chosen my mode of life and I am unable to alter it. An undertaking to do so on my part would be misleading.

"Ever your profoundly attached

"WALTER SICKERT."

Shortly afterwards—viz., in May, 1899, this suit was commenced.

There have been a number of cases on this question of desertion, but as they were mostly undefended, and as the question raised upon the facts in this case is of considerable importance, I reserved my judgment. A wife is entitled to obtain a divorce from her husband if he has been guilty of, *inter alia*, adultery coupled with desertion, without reasonable excuse, for two years and upwards. In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. In most cases of desertion the guilty party actually leaves the other, but it is not always necessarily the guilty party who leaves the matrimonial home. In my opinion the party who intends to bring the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to the state of cohabitation and does so by leaving his wife, and that of a husband who, with the like intent, obliges his wife to separate from him. This view of the law, applicable to desertion, has been taken in the cases of *Dickinson* v. *Dickinson*, 62 L. T. Rep. 330, 38 W. R. Dig. 69, and *Koch* v. *Koch*, [1899] P. 221, 47 W. R. Dig. 51. In the first of these cases the husband brought to the house a woman with whom he had immoral relations. The wife refused to admit her, but the husband insisted. The wife remained a short time in the house, and then told her husband that either she or the woman must leave the house. The husband told her that she might do as she liked, but that the woman would remain. The wife thereupon left and never afterwards cohabited with her husband. Sir Charles Butt held that the husband was guilty of deserting his wife.

In the second case, which was heard before myself, the husband was guilty of immoral relations with a servant in the house. The husband refused to break off these relations or discharge the girl, and the wife thereupon left the house. The husband continued to live for years with the servant. I held the husband guilty of desertion. In these two cases the adulterous intercourse which the husband refused to put an end to was being carried on in the

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law

matrimonial home; but in the earlier case of *Graves* v. *Graves*, heard by Lord Penzance in 1864 and reported in 12 W. R. 1016, 3 Sw. & Tr. 350, and 33 L. J. P. & M. 66, the adulterous intercourse, though carried on for a time in the house occupied by the petitioner and respondent, was not discovered by the petitioner until after the parties had separated. The report in the Law Journal is the fuller of the two, and the head-note is as follows: "Shortly after a marriage the husband, with the intention of bringing about a separation, so treated his wife as to compel her to leave him. She subsequently made several offers to return, but he refused to receive her. She continued willing to return until she found that he was carrying on an adulterous intercourse which had subsisted since the marriage. She then refused to return except upon condition that such intercourse should cease. Held, that such conduct before the wife became aware of his adultery amounted to desertion, and that such desertion was not put an end to by her unwillingness to return while the adultery continued." The present case is scarcely distinguishable from the case of *Pizzala* v. *Pizzala*, reported only in 12 Times L. R. 451. There the husband was carrying on an adulterous intercourse with another woman, but not in the matrimonial home, and refused to break it off, although his wife told him that unless he did so she must leave him. The wife then left him, and he continued to live with the woman for ever two years. The President held the husband guilty of desertion.

These cases all appear to me to have been decided in accordance with the principles shortly stated above, and no distinction has been made whether the adulterous intercourse was carried on in the matrimonial home or elsewhere. A wife whose husband is carrying on an adulterous intercourse with another woman or other women is not bound to remain in cohabitation with him. She can at once obtain a judicial separation. She may, however, be willing to remain with her husband provided he will give up the connection complained of, and if he refuses to do so, a wife with any self-respect has only one course to take—that is, to withdraw from cohabitation. The husband in such a case must be taken to intend the consequences of his action—that is to say, that his wife shall not live with him. The situation then produced is just the same as if the guilty husband left his wife. Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. It may be committed by a husband acting as I have just said, and if the attitude of the parties remain the same for two years the offence of desertion contemplated by the statute is complete. I may add that the American writer Bishop, in his work on the law of marriage and divorce, has the following passage on the subject of desertion (edition 1891, vol. 1, section 1710): "It is immaterial which of the married parties leaves the matrimonial home, the one who intends bringing the cohabitation to an end commits the desertion." I am of opinion that, upon the facts proved in evidence before me in the present case, the respondent has been guilty of adultery, coupled with desertion for two years and upwards, and I pronounce a decree *nisi*, with costs.

*Decree* nisi, *with costs.*

Solicitors, *Sharpe, Parker, Pritchards, & Barham*, for *Matthews, James, & Co.*, Birmingham.

## House of Lords.

From C. A. (England). Dec. 15.

DE NICOLS v. CURLIER. (*a*.)

*Domicil—Husband and wife—Matrimonial domicil—French law—Contract of marriage—Movable goods—Change of domicil—Community of goods.*

*Two French subjects, born and domiciled in France, married there without a contract of marriage, and became, therefore, subject to the system of "community of goods." They afterwards acquired an English domicil, and the husband died in this country possessed of movable property.*

*Held, that the change of domicil did not affect the rights acquired by their marriage in France, and consequently the French law of "community of goods" was still applicable; so that the husband's power of disposition by will was limited to a moiety.*

*Decision of* Court of Appeal, In re De Nicols, De Nicols *v.* Curlier, 46 *W. R.* 532, [1898] 2 *Ch.* 60, *reversed.*

Lashley *v.* Hog, 4 *Paton's Sc. App. Cas.* 581, *distinguished.*

Appeal from order of Court of Appeal (Lindley, M.R., Rigby and Collins, L.JJ.), 46 W. R. 532, [1898] 2 Ch. 60, reversing decision of Kekewich, J., 46 W. R. 326, [1898] 1 Ch. 403.

In 1854 M. and Madame De Nicols, French subjects, were married in Paris. No contract or settlement was made by the parties on their marriage, in which case by French law their rights with respect to property were regulated by the law of "community of goods."

In 1863 M. De Nicols came over to England with his wife.

In 1865 they became naturalized as English subjects. M. De Nicols, with the assistance of his wife, carried on a business in England, whereby he acquired a large fortune.

M. De Nicols died on the 28th of February, 1897, having by his will dated the 22nd of March, 1895, given his residuary estate real and personal to trustees upon trust for sale and to hold the proceeds upon trust for his wife for her life and after her death upon trusts for the daughter of the marriage and her husband and children.

The wife, however, claimed a moiety as her own absolute property under the French law, and an originating summons was taken out to determine this among other questions. Kekewich, J., decided that a change of domicil did not affect the rights acquired by Mons. and Madame De Nicols in each other's unsettled movable property by their marriage in France. The Court of Appeal, however, held otherwise, reversing Kekewich, J., on the authority of *Lashley* v. *Hog*, 4 Paton's Sc. App. Cas. 581.

Madame De Nicols appealed.

*Graham Murray* (*Lord Advocate*) and *Westgate, Q.C.* (*Renshaw, Q.C.*, and *Ingle Joyce* with them), for the appellant.

*Dicey, Q.C.*, and *Whinney*, for respondents other than the executors and trustees.

*E. J. Elgood* and *F. J. Maugham*, for the executors.

The authorities referred to are set out at length in the report in the court below. The German New Code, 1900, was also mentioned.

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Earl of HALSBURY, L.C.—It is not necessary to state with great minuteness how the question in the present appeal arises. It is enough to say that two French subjects were married according to the laws of France on the 30th of May, 1854.

No marriage contract or instrument in writing was executed by either of the parties.

The parties lived together, and in the year 1863 they came to England, and in the year 1865 the husband obtained the status of a naturalized British subject.

The whole dispute turns on the question whether the changed domicil and naturalization of the husband affected the wife's rights so as to give the husband the power to dispose of all the movable property by will instead of being restricted to the power of disposing of only one half of it, as he undoubtedly would have been so restricted by the French law if the French law is decisive of the question.

The parties, as I have said, were married according to French law, and the first thing to do is to see how the matter would be dealt with in respect of such a marriage by the French law. There is no real conflict between the learned persons who have given evidence on this question. One of them indeed, besides giving evidence as to what the French law is, upon which he is an authority entitled to respect, has also gone on to express an opinion upon how that law should be treated in this country, upon which subject he is no authority at all, and indeed such a question is not the subject of evidence at all, but pure matter of English law for English comity to decide.

The law of France as applicable to the matter now in debate is deposed to by M. Paul Lax, a licentiate of law in the University of France, an advocate who has practised in the Court of Appeal in Paris, and his evidence upon the subject is not really questioned by the gentlemen on the other side. M. Lax says:

"2. According to the law of France, and in particular articles 1393 and 1401 of the Code Civil, parties having intermarried without entering into a formal pre-nuptial contract are governed so far as their present and after-acquired property is concerned by the legal system of community of goods as defined by articles 1401 to 1496 in Title V. of the same Code, which title is headed 'Du Contrat de mariage et des droits respectifs de époux.'

"3. The husband and wife having so intermarried without entering into a pre-nuptial contract in writing are placed by the sole fact of the marriage and stand in exactly the same position in all respects as if previously to their marriage they had in due form executed a written contract, and thereby adopted as special and expressed covenants all and every one of the provisions contained in articles 1401 to 1496 above referred to.

"4. Subject to the exceptions specified in the next following paragraph the community of goods includes (1) all personal property belonging to the husband and wife at the date of the marriage, or having devolved upon either of them during coverture; (2) all interest or income of whatever nature and source accrued or received during coverture; (3) all real estate acquired during coverture (article 1401 Code Civil).

"5. Real estate possessed by either spouse at the time of the marriage or that may during coverture devolve upon him or her by way of inheritance, gift *inter vivos*, or will, exclusive of real property acquired during coverture by any other means whatever, does not become common property, but remains the separate property of the spouse so possessing the same or upon whom the same has so devolved, and any real estate is deemed to be common property unless it is clearly proved that either husband or wife possessed the same previous to the marriage or became entitled to it during coverture by way of inheritance, gift *inter vivos*, or will as aforesaid (articles 1402 and 1404 Code Civil).

"6. The administration of the common property belongs to the husband alone, who may sell, deal with, and mortgage the same without the wife's concurrence (article 1421 Code Civil). The common property real as well as personal stands or is invested in the name of the husband alone.

"7. In the case of a legal community of goods any trade or business carried on either by the husband alone or by the husband and wife jointly is necessarily carried on for the account and benefit or at the risk of the community of goods. The whole assets of the said community, also the husband's separate real estate, if any, and the husband himself personally *in infinitum* are liable for the debts of such trade or business, the wife not being liable for the same except to the extent of her share in the common property. The name of the husband alone appears in the firm or style of any trade or business carried on as aforesaid.

"8. In case any real estate which remains the separate property of either spouse has been disposed of and the purchase consideration has not been re-invested in the name of the one to whom such real estate belonged, but has been merged in the common property, the spouse whose separate property the real estate so disposed of was is on the winding up of the community of goods preferentially entitled to receive out of the common property the amount of the purchase consideration referred to (article 1470 Code Civil).

"9. The community of goods when once constituted between husband and wife, and whether created by an instrument in writing or by the operation of articles 1393 and 1400 of the Code Civil, cannot cease or be determined by mutual consent or by any cause or event whatever except the following—that is to say, (1) decease, (2) divorce, (3) judicial separation, (4) separation of estates decreed by a competent court of justice."

If this is the law by which the matter is to be governed, it cannot be denied that the appellants here must succeed, and it is a little difficult to understand upon what principle contracts and obligations already existing *inter se* should be affected by an act of one of the contracting parties, over which the other party to the contract has no control whatever. And, indeed, it is not denied that if, instead of the law creating these obligations upon the mere performance of the marriage, the parties had themselves by written instrument recited in terms the very contract the law makes for them, that in that case the change of domicil could not have affected such written contract. I am wholly unable to understand why the mere putting into writing the very same contract which the law created between them without any writing at all should bar the husband from altering the contract relations between himself and his wife, when if the law creates that contract relation then the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction.

A written contract is after all only the evidence of what the parties have agreed to, and it would seem to be of no superior force as evidencing the agreement of the parties than a known consequence of entering into the married status. I not only do not understand, but I should decline to assent to any such view, unless I am compelled by authoritative decision or statute to adopt a view which to my mind is so entirely unreasonable. And it does not appear to me that any court before whom this question has come would disagree with me as to its being unreasonable.

The Master of the Rolls himself says: "It is not altogether satisfactory to hold that a change of domicil cannot affect an express contract embodying the law of the matrimonial domicil, but that a change of domicil does affect the application of that law if not embodied in an express contract."

I should think that in order to be binding on your lordships a previous decision must be in principle, and as applicable to the same circumstances, identical, and it appears to me that the case by which the Master of the Rolls thought himself bound (*Lashley* v. *Hog*) is quite distinguishable both in principle and circumstances.

To omit other questions, the cardinal distinction between the French and the Scotch law is not, I think, without an important bearing upon the very question in debate, and I think it may be stated shortly thus:

If the wife by the marriage in Scotland acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicil as following the ordinary rule that the law of a person's domicil regulates the succession of his movable property. But if by the marriage the wife acquires as part of that contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what was not his, and herein, I think, is to be found the key to Lord Eldon's judgment in *Lashley* v. *Hog*. He says:

"The true point seems to be this, whether there is anything irrational in saying that as the husband, during the whole of his life, has the absolute disposition over the property, that, as to him, whom the policy of the law has given the direction of the family as to the place of its residence, that he who has therefore this species of command over his own actions, and over the actions *and property which is his own*, and which is to remain his own, or to become that of his family according to his will—why should it be thought an unreasonable thing, that where there is no express contract, the implied contract shall be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy in case the husband thinks proper to die intestate."

It will be observed that the whole point of what Lord Eldon argues—that the whole of the property, apart from express contract, is absolutely and entirely the husband's, and that as by law he can dispose of it as he will it is not unreasonable that he should be at liberty to do something which by its legal effect will change what, I think, are inaccurately described as the rights of the wife, but are accurately described as what would have been the rights of the wife if no change had taken place, because in substance she has no rights at all.

Doubtless it is true that, according to the authorities on Scotch law, the right of the wife is no right at all in its strict sense. When speaking of the *jus mariti* it is described as a legal assignation to the husband, and in commenting on this authority the late Mr. Fraser, while at the Scotch bar, in his book on the Law of Husband and Wife (2nd ed.), vol. 1, p. 677, says:

"At a very early period of our law, the distinction between the two rights was recognized. The right of administration was regarded as being nothing more than its name imports—a right of administering the property of the spouses, while the *jus mariti* was something separate and superior, its purpose being to transfer the property from one spouse to the other. The distinction is settled and taken in a number of cases, ranging from an early period to the present time, and has not been so clearly marked in some institutional works, solely from the desire of the writers to reconcile it with the notion of an absolute veritable *communio*." . . . "The distinction is thus stated in argument in the Session Papers of *Gowan* v. *Purcell*: The *jus mariti* over the movables is a right during the existence of the marriage of absolute property. The husband may sell, or squander, or wastefully destroy the movables that fall under communion."

How different the position of the wife is under the French law is sufficiently indicated in contrast to the above extract by section 1443 of Code Civil, which enacts that:

"1443. A separation of property can only be judicially sued for by the wife whose dowry is in danger, and when the disorder of the husband's affairs is such that there is reason to fear that his property will not be sufficient to satisfy the wife's rights and claims. Any voluntary separation is void."

And if the propositions are put shortly—that the wife acquires no proprietary rights by marriage under the Scotch law at all, but under the French law acquires a real proprietary right, the distinction between the two systems is evident enough. The *communio bonorum* in Scotland is a mere fiction. In France it is a reality, and in England, as the Master of the Rolls says, the parties to the litigation now being discussed, Mr. and Mrs. Hog, were both English, married in England, where her unsettled property, existing and after acquired, became the property of Mr. Hog by the mere fact of the marriage, and gave Mrs. Hog no proprietary right whatever to the movable property in question.

Once it is admitted that the marriage gives a proprietary right, and therein is the importance of the distinction Lord Eldon took between what was inaccurately argued in that case, as a proprietary right conferred by the fact of marriage and a real proprietary right conferred by specific contract, the anomaly pointed out by the Master of the Rolls and sought to be explained, becomes at once intelligible.

It is only material as illustrating what was the prevailing train of thought in the minds of Lord Eldon and Lord Rosslyn. Both of them speak of the words "implied contract," by which I presume they mean implied from the relation of husband and wife, and not unnaturally they deduce the conclusion that if it is implied from that relation only, the husband's change of domicil may bring with it the consequential change from such relation.

Here, however, as I have endeavoured to point out, the French marriage confers not only an implied but an actual binding partnership proprietary relation fixed by the law upon the persons of the spouses, the binding nature of which, it appears to me, no act of either of the parties contracting marriage can affect or qualify.

I can only account for the absolutely inaccurate use of the Scotch term *jus relictæ* as arising from a reference to a dispute that appears to have existed in the Scotch authors as to whether those rights flowed from the communion; whereas, to quote again from Mr. Fraser's book, p. 671, where he says:

"It has been found, in accordance with the opinions of the French commentators, of Dirleton, and other lawyers of our own country, that the *jus relictæ* and *legitim* are in all respects the same; that they are mere casual contingent rights during the subsistence of the marriage, existing then only in hope, and coming into proper right merely at its dissolution, that they are not rights of division of a fund already held in common, but rights of debt against the husband's executors, constituting the widow and the

children creditors, whose right comes into being by the husband's death, and secondary creditors too, for all other debts must be paid before theirs."

It is therefore, as I understand the case, that when once Lord Eldon came to the conclusion that the husband and wife had become Scotch domiciled spouses, the rights not affected by a previous complete and irrevocable right would properly be distributed according to Scotch law.

It follows, therefore, if I am right, that that case is not binding on your lordships, and that we are at liberty to decide the question now in dispute in accordance with reason and common sense.

I therefore move your lordships that the order appealed from be reversed, and that the respondents do pay to the appellants their costs both here and below.

Lord MACNAGHTEN.—In 1854 Mr. De Nicols, the testator, and the appellant, who is now his widow, intermarried in Paris. They were both French by birth and both domiciled at the time in France. They married without a contract of marriage, and consequently under the law of France they became subject to the system of community of goods.

In 1863 Mr. and Mrs. De Nicols left Paris and came to London. They acquired an English domicil, and in 1865 Mr. De Nicols obtained a certificate of naturalization in this country. From that time forward their residence in England was continuous. Mr. De Nicols became a restaurant proprietor in London. He was successful in business, and amassed a large fortune consisting of both movable and immovable property.

Mr. De Nicols died in February, 1897, having made a will in the English form and language.

The question for your lordships' consideration is whether Mr. and Mrs. De Nicols continued subject to the system of community of goods after they became domiciled in England. On the one hand, it is contended that the change of domicil from French to English destroyed the community altogether, and therefore that the testator's will operated upon the whole of the property vested in him which, but for that change, would have been common. On the other hand, it is said that the community continued notwithstanding the change of domicil, and that Mr. De Nicols remained bound by the article of the Code Civil which provides that a testamentary donation by the husband cannot exceed his share of the community.

If the case were not embarrassed by the judgment of this House in *Lashley* v. *Hog*, which was discussed so fully at the bar, it would not, I think, present much difficulty.

Putting aside *Lashley* v. *Hog* for the moment, the only question would seem to be what was the effect according to French law of the marriage of Mr. and Mrs. De Nicols without a marriage contract? Upon that point there cannot, I think, be any room for doubt. It is proved by the evidence of M. Lax, the expert in French law called on behalf of the appellant, that, according to the law of France, a husband and wife intermarrying without having entered into an ante-nuptial contract in writing are placed by the sole fact of the marriage, and stand precisely in the same position in all respects as if previously to their marriage they had in due form executed a written contract, and thereby adopted as special and express covenants all and every one of the provisions contained in articles 1401 to 1496 in Title V. of the Code Civil, headed "Of Marriage Contracts and the respective Rights of Spouses." In support of this conclusion M. Lax refers to the relevant articles of the Code and to a decision of the highest authority pronounced by the Cour de Cassation in January, 1854. The case as reported by Sirey presents the argument so clearly and so concisely that I may be pardoned for referring to it more in detail. The summary in Sirey's Reports is as follows: "The conjugal association as to property once formed at the time of the marriage by the operation of the law of the domicil or nationality of the husband cannot be altered later on either by a change of nationality or by the acquisition of a new personal domicil subsequently to the marriage": Tables Générales (Contrat de Mariage), paragraphe 8. The case was this—an Englishman and an Englishwoman—a Mr. and Mrs. Boyer were married in England without any settlement. Afterwards they went to France and jointly acquired immovable property there. The husband became a French citizen. The wife died first. On her death duty was demanded and paid on one-half of the property as having devolved upon her children as her next-of-kin. An action was brought for return of the duty. The tribunal of Lille ordered repayment, holding that "the matrimonial compact in respect of property is as immutable as the marriage itself of which it is an accessory." The Revenue authorities appealed. The Cour de Cassation affirmed the decision. They founded their judgment upon their view of English law, which seems right enough, and upon the following considerations—that "the rule of the marriage of the spouses Boyer has followed them to France when they went there to settle and there acquired property," and that "the said rule has the same force as if a formal contract had been entered into between the said spouses for the regulation of their fortune." Although this reasoning may not seem quite in accordance with the opinion which Lord Eldon expressed in *Lashley* v. *Hog* as to the effect of an English marriage without a settlement, it indicates, I think, conclusively the view which according to French law would be taken of the compact as to property constituted by a French marriage under the Code Civil without an ante-nuptial agreement. The expert who was called on behalf of the executors does not attempt to contravene this conclusion of law. He endeavours to minimize its effect by treating it as a self-evident proposition—as, in fact, being nothing more than what the Code declares. He adds, however, that in his opinion the effect of a change of domicil or nationality upon the community system was never considered by the framers of the Code. That may be so. But if there was a valid compact between the spouses as to their property, whether it was constituted by the law of the land or by convention between the parties, it is difficult to see how that compact can be nullified or blotted out merely by a change of domicil. Why should the obligations of the marriage law under which the parties contracted matrimony, and which according to the law of the country where the marriage was celebrated are equivalent to an express contract, lose their force and effect when the parties become domiciled in another country? As M. Lax points out, change of domicil and naturalization in a foreign country are not among the events specified in the Code as having the effect of dissolving or determining the community. Let us suppose a case the converse of the present one. Suppose an Englishman and an Englishwoman having married in England without a settlement go to France and become domiciled there. Suppose that at the time of the acquisition of the French domicil the husband has £10,000 of his own. Why should his ownership of this sum be impaired or qualified because he settles in France? There is nothing to be found in French law, nothing in the Code Civil, to effect this alteration in his rights. Community of goods

France is constituted by a marriage in France according to French law, not by married people coming to France and settling there. And community must commence from the day of the marriage. It cannot commence from any other time. It appears to me, therefore, that the proposition for which the executors contend cannot be supported on principle. That, I think, was the view of the Court of Appeal. But they considered that the judgment of Lord Eldon in *Lashley* v. *Hog* compelled them to decide in favour of the executors. I must say I rather agree with Kekewich, J., that it is difficult exactly to know what Lord Eldon meant. Mr. and Mrs. Roger Hog, an Englishman by domicil and an Englishwoman, intermarried in England without a settlement. Mr. Hog made a fortune in England, settled in Scotland and became domiciled there. After this change of domicil the wife died in the lifetime of the husband. Some years later the husband died a domiciled Scotchman. There was a good deal of litigation as to the administration of Mr. Hog's estate, and there were several appeals to this House. In one of these appeals among other things this House determined that Mrs. Lashley, who was one of the children of the marriage, had "a claim in the right of her mother, the wife of the said Mr. Roger Hog, who at the time of her death had his domicil in Scotland, to a share of the movable estate of her father at the time of her mother's death." No doubt if the law had not been altered by the Act 18 Vict. c. 23, s. 6, that decision would be binding upon this House in a similar case. But when you are asked to apply the decision to a case where the circumstances are different, it seems to me that the proper course is to ascertain, if you can, the principle of the decision, and then to see if that principle is applicable to the circumstances of the case under consideration. This is the case of a French marriage with a settlement presented and constituted by the law of the land and followed by naturalization in a foreign country; *Lashley* v. *Hog* was the case of an English marriage without a settlement and a change of residence to another part of the United Kingdom. Now, what was the principle on which Lord Eldon proceeded? After a long discussion Lord Eldon comes to the point by asking this question: "Why should it be thought an unreasonable thing that where there is no express contract the implied contract should be taken to be that the wife is to look to the law of the country where the husband dies for the right she is to enjoy in case the husband thinks proper to die intestate?" Then his lordship goes on to say: "This has been the principle which, it seems to me, has been adopted, as far as we can collect what has been the principle adopted in cases in those parts of the island with which we are best acquainted, and not being aware that there has been any decision which will countervail this; thinking that it squares infinitely better with those principles upon which your lordships have already decided in this case, it does appear to me, attending to the different sentiments to be found in the text writers upon the subject, that it is more consonant to our own laws, and more consonant to the general principle, to say that the implied contract is that the rights of the wife shall shift with the change of residence of the wife, that change of residence being accomplished by the will of the husband whom, by the marriage contract in this instance, she is bound to obey."

I may observe in passing that in that passage Lord Eldon was referring to the difference of practice in the administration of intestates' effects then prevailing in the different provinces of York and Canterbury, and also to a previous decision in the case of *Lashley* v. *Hog* on the question of *legitim*. It is not, I think, very easy to see how the principle which Lord Eldon selects as the ground of his decision could in the case of an English marriage and the subsequent acquisition of a Scotch domicil be legitimately extended so as to deprive the husband of his own property, and transfer it in his lifetime to the next-of-kin of his wife. It seems to me that that result can only be reached by one or other of two alternatives. Either it must be held that the implied contract on the part of the husband is that in case of a change of a domicil the wife shall enjoy all the rights of a woman married in the country where the new domicil is established, and that he will surrender in her favour so much of his rights as may be inconsistent therewith; or else it is assumed that marriage in Scotland is not required to create communion of goods, but that communion of goods is incidental to the status of married persons in Scotland; or, as Lord Eldon puts it, "the law of Scotland 'recognizes' communion of goods 'in the married state.'"

Now, if that assumption be necessary in order to support Lord Eldon's conclusion in *Lashley* v. *Hog* it is obvious that there is so wide a divergence between the law of Scotland, or what is assumed to be the law of Scotland, and the law of France as to make the decision wholly inapplicable to the present case. If on the other hand Lord Eldon's conclusion is a legitimate extension or development of the principle on which his argument is founded, it seems to me that there is no room for the application of the principle in the circumstances of the present case. The principle, as Lord Eldon explains, is founded on the notion that upon an English marriage without an express settlement there is an implied contract that the expectations of the wife are to depend upon the domicil of the husband. Lord Eldon admits, and it was conceded at the bar, that if there had been a written contract dealing with the whole property of spouses present and future, the principle of *Lashley* v. *Hog* could not apply. Now the effect of what took place on the occasion of the French marriage, so far as it amounted to a compact in respect to property, must be determined by French law, and it has been proved by the evidence in this case that what did take place was to all intents and purposes equivalent to a written contract.

It appears to me, therefore, that the case is not governed by the decision in *Lashley* v. *Hog*, and I think the appeal ought to be allowed.

Lord MORRIS and Lord SHAND agreed with the Lord Chancellor's judgment.

Lord BRAMPTON.—In the year 1854 the plaintiff, Mrs. De Nicols, and her now deceased husband, both being natives of France, domiciled there from their birth, and of full age, were duly married according to the law of that country at the Mayor's office in Paris under the System of Community of Goods contained in the Code Civil.

They remained so domiciled until the year 1863, when they came to reside in, and changed their domicil to, England; and in this country they remained until the husband's death in 1897, the plaintiff, his widow, still continuing her residence here.

By means of such little capital as they were possessed of when they arrived in London, and their own united personal intelligence and industry, they accumulated in England a large fortune, consisting of both movable and immovable property. To-day we are only concerned to deal with that which was movable.

At the time of his death the husband was in ostensible possession of the whole of the joint property; having in March, 1895, made his will purporting to dispose of every part of it, as if it were

all his own absolutely. The plaintiff alleges that he was not justified in doing so, claiming that as his surviving spouse she became on his death entitled, under article 1474 of the System of Community, to one-half share of its then available assets. The law of France relating to marriage contracts and the rights of spouses is contained in Title V. of the Code Civil, passed and promulgated in February, 1804, chapters 1, 2, and 3, comprising articles 1387 to 1494 inclusive.

From the general provisions contained in chapter 1, I gather that one great object of the Legislature was to ensure, as far as possible, that, contemporaneously with every celebration of marriage in France, some definite and binding regulation or settlement of the property of the spouses respectively shall be brought into operative existence, leaving it, however, absolutely and without restriction open to the spouses mutually to determine and agree what shall be the character, substance, and provisions of such regulation, provided only that it shall not be contrary to morality, and shall not derogate from certain marital and other rights in no way affecting this present case.

Another object was to provide as much facility as possible for ready, easy, and inexpensive obedience to this requirement by those who are disposed to accept such aid. With a view to these ends, in chapters 2 and 3, the Code sets out in minute detail for the consideration and for the adoption, if they please, of those contemplating marriage, two systems—one called the System of Community, for the regulation of all their movables, both present and future, during the whole period of their coverture, the other, "the dotal system," to which I need not further refer.

In the event of the intending spouses not being willing that their properties shall be regulated by the System of Community, article 1387 provides that they may make a special agreement for themselves as they may deem proper, such special agreement, as a "matrimonial agreement," is by article 1394 required to be reduced into writing, and executed before a notary prior to the celebration of the marriage. The reason for this requirement is very obvious. The system, which was framed with a view to embody such a regulation or settlement as would be acceptable, and best adapted to the requirements of the great majority of French intending spouses, had already been carefully prepared and set forth in detail in the Code, so that it can be easily understood and readily and inexpensively adopted; but no draftsman, however skilful and ingenious, could possibly devise and frame by anticipation a form of settlement to meet the variety of views and caprices of those who preferred to make their own settlement; such could only be prepared when the wishes and intentions of the parties were made known to those whose duty it might be to prepare the instrument in each particular case.

A moment's consideration will suffice to show how absolute and unlimited is the freedom in choice of a settlement to spouses who desire to exercise it, and how erroneous it is to suppose that any particular regulation of their property is forced upon them against their will.

It will be convenient to bear in mind the general features of this system; I have therefore thought it may be useful at once to set out a short epitome of the most important articles.

It is contained in chapter 2 of the Code, and in section 2 is described as a "conjugal partnership," an expression strongly savouring of contractual relations.

By article 1401 the property to be administered under it, described as "community assets," is composed (*inter alia*) of all the movable property of which the spouses are possessed at the time of the celebration of the marriage, together with all the movable property which comes to them during coverture. By article 1409 the liabilities include the personal debts of the spouses owing at the time of the marriage, the debts incurred by the husband during the community, or by the wife with his assent, the household expenses of the spouses, and the maintenance and education of their children.

The husband is constituted the sole administrator of the assets, and considerable powers of disposition are conferred upon him; but he cannot by a testamentary donation exceed his share.

Article 1441 provides for the dissolution of the community by the death of either of the spouses, and in several other events, immaterial to the consideration of the present question.

On the dissolution of the community by the death of one of the spouses, after all legitimate claims upon the assets have been satisfied the surplus is to be divided by halves between the surviving spouse and those who represent the deceased.

Article 1400 declares that *this system is established by the simple declaration that the parties marry under it*, or in *default of a contract*, meaning, of course, such an agreement as is contemplated in articles 1387 and 1393.

I pause here to emphasize the fact that this system operates upon no spouses unless by their mutual assent.

It was under this system, which had been for nearly half a century a very familiar and approved form of settlement, the nature and provisions of which the parties as French subjects must be presumed to have had knowledge, they were married, and upon the faith and under the belief that its provisions would regulate the property of both so long as their married life continued, and that on the death of either it would be divided between the survivor and the representatives of the deceased, the wife placed in the possession of her husband as part of the capital of their "conjugal partnership" such little property as she could then call her own; and from that time until the death of her husband it was never suggested that with the change of domicil to England the rights of property the wife had acquired by her marriage in France vested in her husband as absolute owner, as if they had been married in England without any settlement at all.

The Married Women's Property Acts do not, in my opinion, affect the present case.

The case of *Lashley* v. *Hog*, 4 Paton Sc. App. Cas., at p. 603 (A.D. 1804), has all along been relied upon by the defendants as decisive in their favour. Kekewich, J., thought that authority inapplicable, and gave judgment against them. The Court of Appeal, however, adopted the defendant's view and reversed his judgment.

I have the misfortune to differ from the Court of Appeal; it appearing to me that the two cases are distinguishable in very material particulars, and that no part of Lord Eldon's observations in delivering the judgment of the House of Lords can be said to determine this matter. In order to make these distinctions apparent I propose briefly to recapitulate the material facts of that case.

Roger Hog was a native of Scotland, he came to England to better his fortune, and in 1737, being then domiciled there, married Rachel Messing, an English lady. No settlement affecting this case was made on their marriage, but with his wife Mr. Hog received £1,000, which according to the law of England became his sole absolute property, upon the principle that in England a wife can by the common law have no separate legal existence.

They remained resident in England until 1752,

when they removed to Scotland, where undoubtedly they became domiciled before 1760, when their coverture was dissolved by the death of the wife. The husband survived until 1798, when he also died, still domiciled in Scotland, possessed of considerable personal property. After his death Mrs. Lashley, who was a daughter of the marriage, as representing the right of her deceased mother, made claim in the Scotch courts upon her father's estate to a share of the personal property, which, as she alleged, her father held in community, according to the then law of Scotland, at the dissolution of the coverture. For Mrs. Lashley it was contended that the Scotch law of community of goods attached itself upon the property of Mr. Hog on his becoming domiciled in Scotland, notwithstanding the fact that his marriage to her mother took place in England without any settlement many years before. This absence of a settlement is a very important feature in that case; which, it is contended for the plaintiff, is absent from the one now before us.

The judgment of the House of Lords was in Mrs. Lashley's favour. Lord Eldon in delivering it had to deal also with a variety of other questions which necessitated a lengthy and complicated discussion, but so far as regarded the matter now before us it is to my mind clear, intelligible, and convincing. He held, first, that the Scotch law of community attached itself upon all the personal property of which Mr. Hog was or thereafter might become possessed during his domicil in Scotland; and secondly, that on the death of Mr. Hog the distribution of his personal estate, including the share of the pre-deceased wife, which up to that event had not been severed, must be regulated by the succession law of Scotland, where his death occurred. As regards the first of these rulings it had been contended for those who opposed Mrs. Lashley's claim that in the absence of a written contract the rights of husband and wife must be regulated by the law of the country where they were domiciled at the time of the marriage; and secondly, that there was on the marriage an implied contract between the spouses that they would be bound to all those conditions and consequences which the law of the country made to follow upon their consent to the marriage itself, and that no change of domicil could alter this matrimonial law or implied matrimonial contract.

Both these contentions were overruled for reasons stated at length in the judgment. The complete absence of any settlement affecting the property was evidently the basis of the decision. The law of England made none; it merely gave to the husband all his wife's property, placing upon him no restrictions. When, therefore, he thought fit to change his domicil to Scotland he took with him, as it were, all his movable property absolutely free and unfettered. The law of *communio bonorum* would clearly have attached to it if his marriage had been celebrated in that country, but that law became equally attached upon spouses who "in the married state" became there domiciled, at least for so long as that domicil continued, which in the case of Mr. and Mrs. Hog was continuously until they were both dead. In the teeth of these circumstances it is difficult to suggest to oneself how the judgment could have been other than it was. There is nothing in *Lashley* v. *Hog* which seems to me to affect this case, but I have dealt with it at some length because it has been so much relied on against Mrs. De Nicols' claim. Of course the grave distinction between that case and this is to be found in the fact that there the change of domicil was from a country in which neither the law nor the parties had made any settlement, to one in which there was in some sort a settlement by the law in the shape of the community of goods. In this case the change was from a country where the most elaborate and binding settlement by the law of France and by contract, as contended, was made on and by marriage, to a country (England) the law of which makes no settlement at all, but ignores the separate legal existence of the wife altogether.

In every civilized country marriage is treated as a contract of grave importance. It is the voluntary union for life of the parties to it. It is created by the bare ceremony of marriage according to the form prescribed by the law of the country in which it is celebrated. It involves incidentally an agreement that the spouses will mutually respect and fulfil those marital rights and obligations which are imposed upon them by that law, as incidents inseparable from their matrimonial union. Among such incidents of a marriage under the law of France is the establishment, or bringing into active operation, of some regulation of their personal property. One mode of accomplishing this is the establishment, by one and the same ceremony which makes them man and wife, of the system of community which could not be attached upon their property without the mutual consent of the spouses—that is to say, by marrying under it; which must be testified either by a declaration of the spouses, or by their omission to make a special written agreement. But once established, the system becomes the regulation or settlement of their choice; and the expression of their mutual intention to be bound by its provisions, creating mutual legal rights and obligations binding upon each, throughout their married lives. In the present case, if credit is to be given to the fourth paragraph of Mrs. De Nicols' affidavit, their so marrying was the result of a provisional agreement between them that it should be so.

It is true this last-mentioned agreement could not, standing alone, be relied on as proof of the contract now sought to be incorporated in the marriage contract; for this simple reason, it was a mere executory agreement which had of itself no effect in establishing the system; that could only be effected by the actual celebration of the marriage. It was, nevertheless, valuable as evidence, if evidence were needed, that the spouses knew (apart from the ordinary presumption of knowledge of the law of their own country) what were the legal obligations towards each other they were about to contract respecting their property, and that they voluntarily undertook them with a knowledge that they would, and a common intention that they should, be binding upon them so long as they both lived.

No set form of words was necessary, nor was any writing required by the law of France; for I take it to be clear that the "matrimonial agreements" mentioned in article 1394 have reference only to the special agreements mentioned in article 1387, and described in article 1393 as "derogating from," or "modifying" the system of, community.

In these voluntary and mutual intentions and acts are to be found all the essential elements of a legal contract, rendered so complete and obligatory by the law of France that nothing could in that country annul or give it greater force.

It is conceded that had the provisions of the system been embodied in the very words of the code in an instrument signed by the parties expressing their intention to marry under it, it would be unobjectionable, and as valid in an English court as a special agreement of the parties made under article 1383. This may at least be taken as an admission that there is nothing in the system itself repugnant to the law of England, and this reduces the objection

to one merely of *form*. What then is the weight of this objection if all required by the law of France has been observed? I have always been under the impression that the form required for a contract by the law of the place where it is made, is both sufficient and requisite for its validity in England. In this case every form required by the Code Civil has been complied with, and I see nothing to prevent the operation of the rule that where there is a marriage contract or settlement the terms of such contract or settlement determine the rights of husband and wife in respect of all movables to which it applies. As a rule the rights of spouses conferred by the law of one country change with every change of domicil, for the law of one country can have no intrinsic force, except within the territorial limits and jurisdiction of that country. But the comity of nations, with a view to the comfort and convenience of their respective subjects, has rightly conceded that there should be some exceptions to this strict rule of the territorial law. By one of such exceptions it is universally admitted that where upon marriage a marriage contract or settlement is made regulating the property of the spouses, such contract or settlement shall have effect given to its provisions, wherever the spouses may afterwards be domiciled.

When *Lashley* v. *Hog* was decided in July, 1804, the Code Civil had only been promulgated about five months; this may account for no mention having been made of it. What might have been held had the question then arisen in an English court, as to how far it should be allowed to operate under circumstances similar to those before us, I cannot of course say, for in itself it was an untried novelty. It seems strange that no such question has been raised and decided in an English court hitherto. In dealing with it to-day we have the benefit of nearly a century's experience before us, of the cheerful and ready submission to and approval of this system and enactment so admirably calculated to satisfy the requirements of French spouses by millions of the subjects of a great and powerful country. I am sanguine enough under such circumstances to entertain a hope that your lordships will, in declaring the law of this land, think it right to accord to this system and enactment a place with contracts and settlements as exceptions to the rule of territorial law—even apart from the question of contract, which I have discussed—and carry out the real wishes and advance the interests of the many subjects of France whose properties in their own country are, and in the future will be, regulated by it. Thinking as I do that this case falls within the exceptions engrafted by the comity of nations upon the strict rule of the territorial law, I am of opinion that the judgment of the Court of Appeal should be reversed, and that of Kekewich J., restored, and that judgment should be entered for the plaintiff with costs.

*Order appealed from reversed and order of Kekewich, J., restored; costs here and below to be costs in the summons.*

Solicitors for appellant, *Hicks, Arnold, & Morley.*

Solicitors for the respondents, *Tyrrell Lewis, Lewis, & Broadbent.*

## Lunacy.

(Lindley, M.R., and Vaughan Williams and Romer, L.JJ.) Jan. 15.

*In re* TYE. (*a*.)

*Lunacy—Person of unsound mind not so found by inquisition—Pauper lunatic—Application of property—Jurisdiction—Discretion—Lunacy Act,* 1890 (53 *Vict. c.* 5), *ss.* 116 (4), 117, 299, 300.

*A wandering lunatic not so found by inquisition was detained in a county asylum, and maintained there at the expense of a union. By an order of the Master in Lunacy, a sum exceeding* £300, *which had been found upon the lunatic's person, and represented his entire savings, had been lodged in court, with directions to raise by periodical sales thereout the sum of* £35 *a year for the maintenance of his destitute wife and daughter. The guardians of the union applied for a small sum in respect of the lunatic's past maintenance and for an allowance of* £26 *a year for his future maintenance, over and above some provision for the wife.*

*Held, that, as section* 299 *of the Lunacy Act,* 1890, *only gave a power to justices to act summarily in certain cases, and did not interfere with the discretionary power of the Lords Justices to direct the property of the lunatic to be applied for his maintenance, the reasonable application of the guardians should be complied with.*

This was an application of the Guardians of the Halifax Union for an order that they might be [illegible] the sum of £6 10s. for the past maintenance of [illegible] Tye, a person of unsound mind not so found by inquisition, as from the 11th of July, 1899, and that a sum of £26 per annum might be allowed for his future maintenance and a sum not exceeding £25 per [illegible] for the future maintenance of his wife and [illegible] The lunatic was a master gardener carrying [illegible] business at Elland, in which business he was [illegible] by his wife, who claimed to have contributed by [illegible] labours to the savings which the lunatic had [illegible] at the time of his lunacy, amounting to about [illegible] The lunatic sold his business in February, [illegible] about £50, and from that time to the time of his [illegible] taken charge of as a wandering lunatic his [illegible] was erratic, as he wandered about with the [illegible] including his savings, in his pocket, while [illegible] being left destitute, became chargeable [illegible] union and received out-door relief to the [illegible] a week.

On the 7th of August, 1899, on the [illegible] of the wife, she was appointed committee [illegible] estate of the lunatic, with the powers [illegible] under section 116 of the Lunacy Act, [illegible] that occasion the claim above mentioned was [illegible] forward on behalf of the Guardians of the [illegible] Union, at whose expense the lunatic was [illegible] maintained at the Wakefield Asylum [illegible] he had been transferred from the [illegible] Asylum. The master declined to [illegible] application, but instead he made an order [illegible] lodgment and investment of the [illegible] ing to £336 19s., found upon the [illegible] he was taken charge of, and made an [illegible] to the wife of £35 a year, to be [illegible] periodical sales out of the fund in [illegible] was upwards of sixty years of age [illegible] she was not able to earn any money [illegible] had several sons who made no provision [illegible] she was attended by her daughter [illegible] twenty, who lived with her. In the [illegible]

(*a*.) Reported by WARWICK H. [illegible] Barrister-at-Law.

evidence on the point, it was intimated that the lunatic was about sixty-five years of age, and there was only a bare possibility of his recovery.

The master, in his judgment, gave a detailed consideration to the sections of the Lunacy Act, 1890, and to section 16 of the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), in which the limitation contained in section 299 of the Lunacy Act, 1890, is not contained; he distinguished the case from those relied on by the guardians—viz., *In re Webster, Guardians of the Derby Union* v. *Sharratt*, 27 Ch. D. 710, 33 W. R. Dig. 151; *In re Newbiggin*, 36 W. R. 69, 36 Ch. D. 477; and *In re Winkle*, 42 W. R. 513, [1894] 2 Ch. 519, and made the order as stated.

The guardians appealed.

*Younger, Q.C.*, for the guardians, stated the facts. [LINDLEY, M.R.—The initial mistake seems to have been that no provision at all was made for the lunatic.]

*Methold*, for the wife.—Under section 299 of the Lunacy Act, 1890 (the only section giving the guardians any authority to recover), directly a receiver is appointed, and where the fund is only large enough just to support the family, then the guardians cannot recover for provision made for the lunatic, else the wife and children will become chargeable on the rates. Moreover, under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 24, the guardians have 4s. a week from the Government, so they would be paid twice over. [LINDLEY, M.R.—I do not think that section 299 is intended to do more than give the justices power to act summarily in certain cases; it does not interfere with the discretion of this court in cases of this kind. *Methold*.—The point is a new one.]

LINDLEY, M.R.—I do not think that we need to go through the Acts of Parliament or the authorities any more closely than we have already done. We have had the advantage of considering the master's judgment and we have looked into the Acts. The case is a peculiar one and I do not know that it is likely to be of any value as a precedent, but it stands in this way: we are asked to say that which I confess startles me very much, that is to say, that a lunatic who has property is not to contribute to his own support out of that property. I am not prepared to go to that length at all. It is quite obvious if you look at the Acts of Parliament that there is nothing in them which directs us to go to that length, and it does seem a startling proposition that a person who has the misfortune to be a lunatic and has money should be supported out of the rates. That seems very strange. The fund here is small. It is between £300 and £400, and the master's order is to the effect that the lunatic shall be supported by the guardians and that his wife and family shall have £35 a year, to come, of course, out of the capital as long as it lasts. That leaves the lunatic therefore to be supported out of the rates, though he has money enough to keep him. I do not think that that is in accordance with the way the discretion of the court has been hitherto applied in dealing with a lunatic's property. It is quite new to me that the court ever allows a lunatic who has property to be supported out of the rates. It has applied the property first in support of him. I do not say that this is for the benefit of the lunatic; I do not know that it is. It is not contrary to his interest, of course. But the guardians must support him if the court does not. That is plain; and having regard to the smallness of the fund, the question is, what is to be done so far as the amount goes. Now, one way of doing it (and certainly we have authority to do it) would be to leave him where he is, in the lunatic asylum—the best place for him probably, and to grant him such an allowance out of the capital as would assure him greater comfort than at the rate of 10s. per week. We have ample power to do it. That would leave the wife to be supported out of the rates very likely, she not being able to support herself. That would be one way of looking at it for her benefit and not for the benefit of his family. But I think we ought to look at it a bit closer, and considering the ages of the people and the smallness of the fund, and the kind of life to which these persons have been accustomed, the proposal made by the guardians appears on the whole the best thing to be done—that is to say, not to allow her to be supported out of the rates, but to apply his property so long as it lasts to the extent of 10s. per week to his maintenance in the lunatic asylum (there is no better place for him) and then let his wife have £25 a year so long as the fund lasts. When the fund is exhausted they will both be supported out of the rates, there is no help for it. Then as regards the costs. I do not look upon it as a case of legal rights. I think that the guardians ought not to have any costs, but I do not think they ought to pay any. The receiver is to have her costs out of the fund. If we give all the costs out of the fund there would be very little left, it would all go in costs. The order will be varied by directing £26 a year to be paid to the union and £25 a year to the wife, the wife to have her costs out of the fund. The guardians' claim for £6 10s. for the past maintenance of the lunatic will also be allowed.

VAUGHAN WILLIAMS, L.J.—I agree, but I think there is very considerable difficulty. In this case Mr. Tye is in the asylum as a pauper lunatic. Now, we have the power to make such order as in our discretion we may think right for the maintenance or benefit of the lunatic or of him and his family. As long as the lunatic continues to be maintained as a pauper lunatic, I have some difficulty myself in saying that we should be entitled to make an order for the appropriation of these moneys for his maintenance. For aught I know, if we did so, there might be considerable difficulty when the accounts of the asylum came to be audited, but I do not understand that we are making the order upon the basis that this lunatic in form is to continue a pauper lunatic. The guardians have made a very reasonable and sensible suggestion in this case and they have told us what they mean to do about this man. I daresay there is no difficulty in carrying out their proposal, but I doubt myself very much whether this man will continue to be a pauper lunatic when our order has been made, and speaking for myself I should have considerable hesitation in making the order if I thought that after we made it this man was to continue a pauper lunatic, because I do not think that in any proper sense of the word the order would then be for the maintenance of the lunatic. On the other hand, the order would really be an order to recoup the union the expense that they incur in the maintenance of the pauper lunatic. Of course we have a discretion, if we think it a right thing to do, to make an order for a sum to be appropriated to the payment of the man's maintenance in the asylum as a lunatic whose maintenance is paid for, and the guardians as I understand are willing to treat him in that way, and under those circumstances I think that we have power to make the order.

ROMER, L.J.—I agree with the Master of the Rolls in his judgment in this case. Suppose the lunatic had not been sent to the county lunatic asylum, but we had to consider what to do with regard to his keep and maintenance, ought we then, seeing that he has a few hundred pounds of his own, to say we will not apply any portion of that sum in maintaining him,

but will apply it for the benefit of his wife and family so as to drive him into the union lunatic asylum? I think not. I do not think it would be right in the exercise of our discretion to say that in that point of view it would be for his benefit that he should be made a pauper lunatic, and that by applying the whole of his property for the benefit of his wife and family. It seems to me that it makes no difference that as a matter of fact he has been dealt with as a pauper lunatic. What ought we to do in that case now he has been made a pauper lunatic? It appears to me there are one or two courses. One course would probably be to apply to take him out of that asylum and maintain him in some private asylum. That would be very expensive indeed. Another way would be to apply a sum for his maintenance in keeping him as a private patient in the asylum, and that would be perhaps a strictly appropriate course to pursue. But we have a discretion in the administration of this small fund, and we bear in mind the interest of the lunatic in respect of the wife and family, and the question is, Is it more to his benefit that he should cease to be in any point of view a pauper lunatic, and his wife and family (practically it is the wife) go wholly unsupported, or is it the best to let him, to a certain extent it may be, be called or dealt with as a pauper lunatic, and apply a portion of the sum towards his maintenance and a portion of the fund to the maintenance of the wife and children? Seeing the peculiar circumstances of this case and the smallness of the fund, it appears to me on the whole, in exercising the discretion which we undoubtedly possess, that the best thing would be to do with this small fund what has been suggested and pointed out by the Master of the Rolls.

Solicitors, *Bower, Cotton, & Bower*, for *Longbotham & Sons*, Halifax; *Rowcliffes, Rawle, & Co.*, for *Ramsden, Sykes, & Ramsden*, Huddersfield.

## Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 5.

JONES v. BARNETT. (*a.*)

*Vendor and purchaser—Sale by order of the court—Purchaser for value without notice of superior title—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 70, *sub-section* 1.

*An order of the court under the Conveyancing Act*, 1881, *s.* 70, *sub-section* 1, *which purports to deal with property belonging to the vendor, which turns out not to be his, does not confer a good title on the purchaser.*

*Decision of* Romer, J. (47 *W. R.* 493), *affirmed.*

This was an appeal against a decision of Romer, J. (47 W. R. 493).

The facts were as follows: On the 31st of May, 1894, one Isaac Jones, being indebted to Philip Jones, the husband of the plaintiff, Mary Jones, executed a deed whereby, after reciting the will and death of an uncle, one John Williams, and that Isaac Jones was one of the legatees named in the will and was indebted to Philip Jones in the sum of £350, and had agreed to assign to the plaintiff all his share, right, title, and interest under the will, he, the said Isaac Jones, thereby assigned unto Mary Jones, and Philip Jones thereby confirmed, all the share, right, title, and interest to which Isaac Jones in his right was then, or should, or might thereafter be entitled under the will, to Mary Jones absolutely. Subject to a question whether the words of the grant operated to pass more than a life interest to the plaintiff in the freeholds, the property included a reversion expectant on the death of a life tenant in a leasehold shop and two freehold cottages at Aberavon, near Swansea.

On the 26th of February, 1895, the defendant Barnett obtained judgment against Isaac Jones for £450 in an action in the Queen's Bench Division of *Barnett* v. *Jones*, and on the 14th of March, 1895, by an order in that action, a receiver was appointed of Isaac Jones's reversionary interest in the above-mentioned freehold and leasehold property. On the 10th of July, 1895, a petition was presented on behalf of Barnett before Chitty, J., entitled *In the Matter of Isaac Jones and the Judgments Act, 1864*, praying a sale of the interest of Isaac Jones in the property of which the receiver had been appointed. By an order made on this petition on the 24th of July, 1895, accounts were ordered to be taken of what was due to the petitioner under the judgment of the 26th of February, 1895, of what interests of Isaac Jones had been delivered in equitable execution by the appointment of a receiver, an inquiry whether there were any and (if any) what liens, charges, or incumbrances on the interest in land of Isaac Jones, their amounts and priorities, and of those which were prior and subsequent to the receivership order, and which, if any, created subsequent to that order, were before the registration of that order created in favour of a purchaser for value; and it was ordered that Isaac Jones should pay what should be certified to be due within one month after the chief clerk's certificate, and it was ordered that in default of Isaac Jones paying the amount so certified, his said interests in land should be sold, with the approbation of the judge, free from all liens, charges, or incumbrances created subsequent to the order of the 14th of March, 1895, except any such created in favour of a purchaser for value before the registration of that order.

On the 20th of January, 1896, the chief clerk certified that £509 19s. was due, that the property consisted of the leasehold shop and freehold cottages above mentioned, and that there were no charges or incumbrances on Isaac Jones's interest therein. Isaac Jones having paid no part of his debt, Barnett subsequently obtained an order authorizing him to bid for the property, which was put up for auction on the 16th of December, 1896. Barnett was the highest bidder for £375, and by an order dated the 19th of February, 1897, it was ordered that a person should be appointed to convey the interest of Isaac Jones in the houses to Barnett.

The tenant for life died on the 16th of March, 1897, and Barnett then took possession, and the deeds relating to the property were subsequently handed over to him by the executors of the will of John Williams. Neither Barnett nor his solicitors had any notice or knowledge of the assignment to the plaintiff until a letter came from the plaintiff's solicitor to Barnett's solicitor on the 15th of April, 1897, claiming that the plaintiff, Mary Jones, was entitled to the property under the assignment of the 31st of May, 1894.

The Conveyancing and Law of Property Act, 1881, s. 70, sub-section 1, provides: "An order of the court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not."

Romer, J., held that this section did not operate to give the defendant a better title to the property than

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

that of the plaintiff, which was prior in date, and that her interest was not affected by the order for sale, and she was entitled to recover possession of the property.

The defendant appealed.

*Nevill, Q.C.*, and *W. F. Phillpotts*, for the defendant, the appellant.

*Bramwell Davis, Q.C.*, and *T. B. Napier*, for the plaintiff, the respondent.

LINDLEY, M.R., said there was no real difficulty in the case, unless the court were asked to redraft section 70 of the Conveyancing Act, 1881. In making the order for sale the court supposed that it was dealing with an interest of Isaac Jones in the land. It turned out that the land was not his, and then it was said that the purchaser had obtained a good title by means of section 70. None of the cases already decided upon the effect of that section touched this aspect of it. The court was now asked to go much further. The section was only intended to cure irregularities, and did not apply to a case in which an order had been made to sell land on the supposition that it belonged to A. when it really belonged to B.

RIGBY, L.J., said that section 70 was not intended to entrap the court into dealing with property with which it had no idea of dealing.

VAUGHAN WILLIAMS, L.J., concurred.

*Appeal dismissed.*

Solicitors, *Richard White*, for *D. Seline*, Swansea; *Riddell, Vaizey, & Smith*, for *J. L. Howell*, Swansea.

---

From Prob. Div. & Adm. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Jan. 27.

"THE SNARK." (*a.*)

*Ship—Damage—Collision caused by running foul of sunken barge—Liability of owner of wreck, where not abandoned, for negligence of independent contractor employed by him to raise wreck.*

*The owner of a vessel sunk in the fairway of a navigable river, who has not abandoned the wreck, but has agreed to have her raised by an independent contractor, is answerable in damages for the loss sustained by the owners of another vessel running foul of the wreck without negligence, in consequence of the wreck being improperly lighted.*

*Decision of* Barnes, J., 47 *W. R.* 398, *affirmed.*

Appeal from a decision of Barnes, J. (reported in 47 W. R. 398).

The plaintiffs were the owners of the steamship *Vesta* and the defendants were the owners of the barge *Snark*. The action was *in personam* to recover damages for injuries sustained by *The Vesta*, owing to her having run upon *The Snark*, which had been sunk in the fairway of the Thames. *The Snark* had, without negligence on her part, been sunk by a collision with a steamer on the 1st of August, 1897. The owners of *The Snark* employed a contractor named Forrest, who was familiar with that class of work, having been frequently employed by the Thames Conservancy, to raise the wreck for a fixed sum. Forrest went to the Thames Conservancy and gave them notice of the wreck, and on the 2nd of August the Thames Conservancy sent a mark-boat to the spot, for which they were paid by the defendants. Forrest, having got his plant ready, relieved the Thames Conservancy of the task of marking the sunken barge, and the Thames Conservancy's boat was removed. Forrest was guilty of negligence in marking the barge, and in consequence *The Vesta* ran upon the wreck and was damaged.

Barnes, J., gave judgment for the plaintiffs.

The defendants appealed.

*Laing, Q.C.* (*Batten* with him), for the appellants.—There was no duty on the defendants to raise the barge. They might have abandoned her altogether. They had also a right to abandon possession of the barge to a contractor for the purpose of raising her, and they would not be liable for the contractor's negligence. The same principle must apply as in the case of handing over a barge afloat. In the case of a highway upon land, a person could not leave an obstruction on it, but a person was not responsible for leaving a ship accidentally sunk at sea. In such cases as *Hardaker* v. *Idle District Council*, 44 W. R. 323, [1896] 1 Q. B. 335, the work which the contractor was employed to perform was itself dangerous, and so it was held that a person could not escape liability by employing an independent contractor. In the present case the work was perfectly harmless. The sunken barge was the danger, not the raising of it.

They referred to the cases of *Rex* v. *Watts*, 2 Esp. 675; *Brown* v. *Mallett*, 5 C. B. 599; *White* v. *Crisp*, 2 W. R. 624, 10 Ex. Ch. 312; *The Douglas*, 30 W. R. 692, 7 P. D. 151; *The Utopia*, [1893] A. C. 492; *The Crystal*, [1894] A. C. 508, 43 W. R. Dig. 173; *Holliday* v. *National Telephone Co.*, 47 W. R. 658, [1899] 2 Q. B. 392.

*Carver, Q.C.* (*Stubbs* with him), was not called upon.

SMITH, L.J., in giving judgment, said: This is an action brought by the plaintiff, who is the owner of the steamship *Vesta*, to recover damages against the owners of a barge called *The Snark*, which was sunk in the River Thames on the 1st of August, 1897. What happened was this: The owners of *The Snark* wanted to get their barge up again; they never intended to abandon possession or control of their barge in any shape or way. They got into communication with a man whom I believe is undoubtedly efficient—a man called an under-water man; that is, a man who goes down under water to get up sunken vessels—and they entered into a contract with him to get up this barge. The evidence, as stated by Barnes, J., in his judgment which is under appeal, is this: The officials of the Thames Conservancy were told by Forrest of the sunken barge, and for a short time before the man Forrest brought *The Rhoda* (that is, I understand, a barge lent by the owners of *The Snark*), a boat belonging to the Thames Conservancy, with a flag on it, was made fast to *The Snark*. For this service the defendants paid the Thames Conservancy, and that is done with, long before this accident happened. Then Forrest brought *The Rhoda* and took charge of the sunken barge, and Forrest and his men alone remained. Forrest was paid for the job which he was executing for the defendants the sum of £25. It has been found in the Admiralty Court that Forrest was guilty of negligence in this, that he did not light the sunken barge in a proper manner. The lights had drifted away from where they ought to have been. They did not notify to the steamers coming up or going down the Thames where the sunken barge in fact was, and the result was that the plaintiff's steamer, *The Vesta*, coming up the Thames, was of opinion, from the position in which the lights were, that it was all right to go where

(*a.*) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

she went, and ran into the sunken barge and sustained damage. Thereupon an action was brought in the Admiralty Court, in these circumstances, and the first question which had to be decided by the learned judge of that court was whether or not this barge had been properly lighted by Forrest, the man I have mentioned. He found that it was not, and he found that by reason of its not being properly lighted the plaintiff's steamship got the damage complained of. Another question arose—namely, were the defendants liable for this? Now it is said and argued stoutly and vigorously, on behalf of the defendants, that they are not liable. One ground taken before the learned judge in the Admiralty Court was that the defendants were not liable because they delegated the job—and, in doing that, the process of lighting this sunken barge till she was got up—to the man Forrest, who comes within the term, well known in this court, of "independent contractor," and therefore they were not liable for the negligence of Forrest. The Thames is undoubtedly a highway. This man was put to work, and was engaged, in my judgment, in doing work which was likely to cause injury to persons lawfully passing and re-passing along that highway, unless precautions were taken. Thereupon it is said, although that is so, still he was not the servant of the defendants, but he was an "independent contractor." Now, we have had of late years since I have been in this court a great deal to do with this question of independent contractor. At one time, in conjunction with Lindley, M.R., my brother Rigby and myself set to work and wrote a judgment, as best we could, upon this question of independent contractor, and the liability of the independent contractor, and we stated what in our judgment was the law relating thereto. That was the case of *Hardaker* v. *The Idle District Council*. It has been referred to by Barnes, J., in this case, and I am not going to refer to it any more at this moment. I see nothing to repent of in what any one of us said in that case. There have been other cases since then which I am not going to refer to, because Bruce, J., in a judgment in *Penny* v. *Wimbledon Urban District Council and Another*, [1898] 2 Q. B. 212, 46 W. R. Dig. 138, dealt with the question. That case came before this court on appeal in the next year, 47 W. R. 565, [1899] 2 Q. B. 72, and I then said, and I say it again, that I absolutely agree with the manner in which Bruce, J., put the law applicable to this question of independent contractor, when the defendant is sued for a wrong act. I will just read the passage from his judgment, because I cannot put the matter more tersely or more clearly. It is: "When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. *Pickard* v. *Smith* is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do." I subscribe to every word of that. I have done so, and do so again. That being, in my judgment, the law applicable to this question of Forrest being an independent contractor, that point falls practically within the decision in the case of *Penny* v. *Wimbledon Urban District Council*, and the reasons of that decision. Therefore this point does not avail the defendants in the present case. It is said that is all very well in matters arising on land, but it does not apply to matters arising on water, or matters arising, as in this case, with regard to a sunken barge in the River Thames. I will say for myself that I think that counsel for the appellants have made out this distinction, that in the case of a barge navigating, as here, up the River Thames, which goes to the bottom, it is in the power of the barge-owner, if he is so minded, to throw up the barge—abandon it or transfer it, and have nothing more to do with it. But then it would seem to me also that within the terms of the Thames Conservancy Act, which is a private Act, the public authority would have to come in and take up the barge, so as to prevent its being an obstruction to the navigation of the River Thames. It also seems to me to be within the case cited in the judgment of the Privy Council, delivered by Jeune, P. (*The Utopia case*). It is there laid down: "That although it is in the power of the owner of the barge"—as I say—"to throw up and abandon his sunken barge, and have nothing more to do with it, until he has done that he is under the ordinary liability of every other man." What does Jeune, P., say in his judgment delivered in the *Utopia case*? Counsel for the appellants said the prior cases to which we have had our attention called were all old cases, but they are summarized, and this is the result. Jeune, P., says ([1893] A. C., at p. 498): "The result of these authorities may be thus expressed: The owner of a ship sunk, whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owner an obligation in regard to the protection of other vessels from receiving injury from her." Very well; be it so. Where do you find a tittle of evidence, and what is more, proof, that the owners of this barge abandoned or properly transferred possession, management, and control of the wreck within the meaning of that judgment? Of course they did not. What they did was to employ Forrest to get this barge up, not for the purpose of abandoning control of her, but for the exactly opposite purpose of getting her above water again. This case seems to me to fall within the decision of the Privy Council. I have dealt with the independent contractor point, and for these reasons I am of opinion that the judgment of Barnes, J., should be affirmed.

RIGBY and COLLINS, L.JJ., concurred.

*Appeal dismissed.*

Solicitors, *J. A. & H. E. Farnfield; Stokes & Stokes.*

---

From Q. B. Div. (A. L. Smith, Collins, and Vaughan Williams, L.JJ.) — Dec. 13.

GRANT *v.* THE GOLD EXPLORATION AND DEVELOPMENT SYNDICATE (LIMITED). (*a.*)

*Vendor and purchaser—Contract—Agreement by vendor to pay commission to undisclosed purchaser's agent—Action on contract by vendor—Claim by purchaser to set off agent's commission.*

*The plaintiff was the owner of certain mineral rights in British Columbia, and he agreed with one Govan that*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*Govan should have the option of finding a purchaser for the property, and that he would pay him, if successful, 10 per cent. of the price obtained from the purchaser. Govan succeeded in arranging a sale of the property to the defendant syndicate, of which, unknown to the plaintiff at that time, he was a director, and for whom he acted as agent in the transaction. Before the contract was entered into, however, and before the commission had become payable, the plaintiff learned Govan's position with regard to the defendants.*

*Held, that, the plaintiff having completed the contract without disclosing to the syndicate the agreement to pay commission to their agent, any part of the commission still in the plaintiff's hands could be recovered by the defendants.*

*By a second agreement between the plaintiff and Govan, made before the commission became due, it was agreed, in consideration of an immediate payment, that Govan should accept a less commission than he was entitled to under the original agreement. The syndicate subsequently became aware of this second agreement, and they demanded and received from Govan, in satisfaction of all claims from him, the amount he had received from the plaintiff.*

*Held (reversing the decision of* Bigham, J.), *that the defendants had not lost their remedy by their conduct after they had discovered the real facts of the case. Neither were they bound by the terms of the second agreement between the plaintiff and Govan as to a reduction of the amount of commission; and therefore, notwithstanding that second agreement and their demand and receipt from Govan of the reduced amount of the commission paid him, they were entitled to recover the balance from the plaintiff.*

Appeal by the defendants from the judgment of Bigham, J., at trial of the action without a jury.

The action was brought to recover the balance of a promissory note dated the 26th of September, 1896, made by the defendants in respect of the sale of a gold mine to them by the plaintiff. The defence consisted of a counter claim for £500, being the alleged balance of a commission which the plaintiff had agreed to pay to one Govan, who was in fact a director of, and agent for, the defendants, although at the time the plaintiff did not know that he held that position. The only question for decision was whether the defendants were enabled to succeed on the counterclaim. The agreement between the plaintiff and Govan was that the latter should have an option of finding a purchaser for the property, and if successful he was to be paid as commission 10 per cent. of the price obtained. This director arranged a sale to the defendants, but before the contract was entered into or the commission had become payable the plaintiff became aware of Govan's position with regard to the defendants.

On the 8th of January, 1897, a contract was concluded between the plaintiff and the defendant syndicate whereby the plaintiff sold the mine to the syndicate at the price fixed by Govan. The company was floated and 115,000 shares were duly allotted to the plaintiff. Ten per cent. of the shares, amounting to 11,500 shares, were put into the name of a nominee at the request of the plaintiff, and were accepted by Govan as payment of that part of his commission. The syndicate then paid the plaintiff £10,000 in cash, leaving a balance due of £15,000. The plaintiff in March, 1897, saw Govan about it, who said he would try to get the syndicate to pay £5,000 in cash and the balance, £10,000, by a four-month's promissory note. Govan stipulated that if he was successful in procuring this settlement with the syndicate his own commission should be paid at once, without waiting for the promissory note to mature and be paid. Both the plaintiff and Govan regarded the cash commission as not payable until the plaintiff had in fact received his £25,000. The plaintiff agreed to this, on the terms that the cash commission should be reduced to £2,000, thus, in consideration of promising a present cash payment, getting the cash commission reduced by £500. The syndicate paid the plaintiff a further £5,000, and gave him the promissory note for £10,000, and the plaintiff paid Govan the £2,000. Half of the amount of the £10,000 promissory note was paid by the syndicate when the note was matured, and a new note for the remaining £5,000 with interest was given. It was this latter note that the plaintiff now sued on.

The facts as to the agreement to pay Govan commission subsequently came to the knowledge of the syndicate while this note was current, and by resolution of the board of directors the payment and transfer was accepted in full satisfaction of the claims of the defendants against Govan. Subsequently the directors decided that the defendants were entitled to the £500, the balance of the commission originally agreed upon between the plaintiff and Govan, and they claimed to deduct this amount from the balance of the purchase-money due to the plaintiff. On this action being brought to recover that balance the defendants paid the amount into court less £500, for which they also counterclaimed.

The learned judge decided that although the plaintiff, when he ascertained what Govan's true position was, should have insisted upon paying the commission to the defendants, and had no right to pay it to Govan, or to make arrangements by which the amount of the commission was reduced, yet that the defendants had lost their remedy by their conduct after they had discovered the real facts of the case. Knowing the facts they had elected to treat their rights as defined by the second agreement, getting thereby the benefit of an immediate instead of a deferred settlement of the commission. They could not now plead they were not bound by all the terms of the second agreement, one of which was that the commission should be reduced by £500. The defendants' counter-claim therefore failed, and the plaintiff was entitled to judgment on the claim and the counterclaim.

The defendants appealed.

*Rufus Isaacs, Q.C.*, and *T. W. Chitty*, for the defendants.—Where a vendor agrees to give a commission to the purchaser's agent unknown to the purchaser, the price of the property is presumably swollen by the amount of the commission, and here the £500 which was taken off the commission must be considered as money of the defendants in the plaintiff's hands. They have recovered from their agent what he took by way of secret commission, but that fact does not prevent their recovering from the plaintiff any amount paid to him in excess of what must be taken to be the real purchase-money of the property.

*Duke, Q.C.*, and *Kerly*, for the plaintiff.—The defendants have no right to recover the sum claimed either at law or in equity. This is not a case where a secret commission is paid to the purchaser's agent. Moral fraud or conspiracy in some form or other must be proved to exist before the purchaser has a cause of action: *Salford Corporation* v. *Lever*, 39 W. R. 85, 25 Q. B. D. 363, [1891] 1 Q. B. 168; *Lands Allotment Co.* v. *Broad*, [1895] 2 Manson 470. There is no evidence here that the commission was added to the purchase-money. A vendor may be content to take less than the full value of the property in order to secure a purchaser (*Whaley Bridge Calico Printing Co.*

v. *Green*, 28 W. R. 351, 5 Q. B. D. 109) so in the *Salford Corporation* v. *Lever* a fair price was arrived at and the commission added to it. The onus is on the defendants to show non-disclosure and they have not done so: *Cavendish Bentinck* v. *Fenn*, 36 W. R. 641, 12 App. Cas. 652.

*Rufus Isaacs, Q.C.*, in reply.—The decision of the House of Lords in *Cavendish Bentinck* v. *Fenn* is distinguished in *Archer's case*, 40 W. R. 212, [1892] 1 Ch. 322. It was clear that Govan was to act as agent for some principal and could not be in a position to take a commission.

*Cur. adv. vult.*

Dec. 13.—A. L. Smith, L.J., read the following judgment: The question in this case is, as to what is the position of a vendor of property who pays a secret commission to a person whom he knows to be the agent of the vendee, and the facts are as follows: By an agreement dated the 8th of January, 1897, the plaintiff sold a gold mine in British Columbia, of which he was then possessed, to the defendant syndicate, and he sues the syndicate upon a promissory note for £5,000 given to him by them in part payment of the purchase-money. As to the sum of £500 the defendants counterclaim, and assert that upon the facts which they subsequently discovered they are entitled to recover this sum from the plaintiff, and it is agreed by the learned counsel on each side that this case is to be decided upon the admission that the plaintiff has received this sum of £500 from the defendants. I now revert to the facts antecedent to the agreement of the 8th of January, 1897. In the month of August, 1896, the plaintiff, who, as before stated, was possessed of a gold mine in British Columbia, was desirous of selling it, and he there met a Mr. Govan. By an agreement in writing dated the 26th of September, 1896, and made between the plaintiff and Govan, the plaintiff gave an option on his mineral claims to Govan for a period of six months, and in this agreement it was stated that the option was granted to Govan to enable him to deal with the properties with the object of forming one or more limited liability companies on the London market, and Govan agreed to use his best endeavours with regard to the successful flotation of such company or companies on terms to be thereafter discussed and settled between the plaintiff and him, the plaintiff agreeing to hand Govan on any such successful flotation 10 per cent. on all the sums received in cash or shares accruing to the plaintiff. It will be seen that by this agreement the plaintiff agreed to pay to Govan one-tenth of what purchase-money he might be able to obtain from the company which through his instrumentality was to be brought into existence to become the purchasers of the plaintiff's mine, and I agree with Bigham, J., that, when a vendor sells property subject to the payment by him of a commission, the commission is added to the price asked by the vendor; in other words, the purchase-money by reason of the commission to be paid by the vendor is loaded with the amount of commission so to be paid. At the time when this agreement of the 26th of September, 1896, was entered into, the plaintiff did not know that Govan was agent and managing director, as, in fact, he was, of the defendant syndicate, though he did know that Govan was connected with the companies. The learned judge has found that at this time the plaintiff was acting with perfect honesty and good faith, but this by no means exhausts the case; for after the plaintiff came to this country, until which time the negotiations for sale were not completed, a new set of facts arose, which give rise to the defendants' counterclaim. In the month of December, 1896, the plaintiff came to England at the instance of Govan in relation to the sale of his gold mine. Upon his arrival he went to see Govan, who had a room in the office of the defendant syndicate in Ryder-street. The plaintiff was constantly there, and he admitted in cross-examination that before the contract of purchase and sale of his property was entered into between him and the defendants upon the 8th of January, 1897, he knew that Govan was a director of the defendant syndicate, and that he was, as such director, negotiating with him (the plaintiff) for the purchase of his property on behalf of the syndicate. The plaintiff made an effort in his evidence to get rid of this fatal admission, which was undoubtedly true, by suggesting he had sold the property to Govan before he knew of the above facts, but when pressed in cross-examination this suggestion was found to be without foundation, and in my judgment was clearly not the truth. The price fixed by the contract of the 8th of January, 1897, was £140,000, of which £25,000 was to be paid in cash at certain named times, and the balance by a transfer to the plaintiff or his nominees of 115,000 fully paid-up shares of £1 each in a company about to be promoted by the syndicate. It appears to me plain that the meaning of what took place between the plaintiff and Govan was that one-tenth of the ten-tenths of the purchase-money was to go to Govan as commission, and Govan was to get up a company to buy the plaintiff's mine, and that the price which was to be paid to the plaintiff for the purchase of his mine was to embrace and cover Govan's cash commission of £2,500. At the time when the defendant syndicate contracted to purchase the plaintiff's mine—namely, on the 8th of January, 1897—as a matter of fact the defendants had no knowledge of the arrangement made between their managing director, Govan, and the plaintiff as to the payment of this commission of £2,500 to him, nor did they discover it until the next year—namely, in March, 1898—under the circumstances hereafter mentioned. Upon the 17th of March, 1897, upon which date payment of £15,000, part of the purchase-money, had not become due, it was agreed between the plaintiff and Govan that, if Govan would get the defendant syndicate to pay to the plaintiff £5,000 in cash at once and £10,000 in promissory notes, he would give Govan £2,000 in cash down instead of £2,500 payable to Govan under the agreement of the 26th of September, 1896, and which had not then become payable, and for which Govan would then have had to wait. The plaintiff admitted that at the time he made the agreement of the 17th of March, 1897, for Govan to get him £5,000 in cash at once and £10,000 in promissory notes from the defendants, and for him to pay Govan £2,000 in cash, he (the plaintiff) knew that Govan was a director of the defendant syndicate and was acting for them. Govan succeeded in doing what was desired, and upon the 18th of March, 1897. £2,000 in cash, and upon the 25th of March, 1899, £3,000 in cash, making £5,000 in all, was paid to the plaintiff. The way in which the plaintiff then paid Govan his commission of £2,000 in cash down is very significant, and well worthy of attention, considering the arguments addressed to us by the plaintiff's counsel. The plaintiff under cross-examination admitted that he wrote out a cheque (this was on the 17th of March, 1897) for £1,000, and went with this cheque to a bank where the plaintiff had an account, accompanied by Govan, that Govan took with him a bag, and that the plaintiff asked the cashier to give him bank-notes in exchange for the cheque, which the cashier did, and that the plaintiff thereupon handed £1,000 in notes to Govan. Upon the 25th of March, 1897, the plaintiff drew another cheque for

£1,000 to complete the bargain between him and Govan, and the same thing was repeated as regards this cheque as with the former, and Govan was handed by the plaintiff this £1,000 also in notes. It was in this way that the plaintiff paid the £2,000 commission to Govan. It is also a fact of peculiar significance that, when the defendants had floated the new company, and 115,000 of its shares were allotted to the plaintiff in part payment of the purchase-money of his mine, 10 per cent. of those shares—*i.e.*, 11,500—were placed in the name of a Mr. Allingham at the request of the plaintiff, and this allotment was accepted by Govan as payment by the plaintiff to him of his (Govan's) commission, which was to consist of shares. The plaintiff, when challenged as to these transactions, was unable to give any intelligible reason either for the payment of the £2,000 in the notes to Govan, and not by cheque, or for the allotment of the shares in the name of Allingham. It has been well said that secrecy is a badge of fraud, and these transactions, in my opinion, constitute good evidence that the plaintiff knew well that Govan was receiving this commission from him without the knowledge or assent of the defendants. What then is the case proved. It is that a vendor is paying a secret commission to a person whom he knows to be the agent of the purchaser, in order to induce that agent to get the purchaser to pay the vendor a price for his property enhanced by the amount of the commission, of which fact the purchaser had no notice and the vendor knew that he had no notice. The evidence shows that the plaintiff subsequently quarrelled with Govan, and that the plaintiff through others gave information to the directors of the defendant syndicate of what had taken place as regards the agreements of the 26th of September, 1896, and the 17th of March, 1897, and the payment of commission to Govan. I do not understand that the plaintiff informed the directors of the way in which he had paid the commission to Govan. The directors of the syndicate then called upon Govan to explain what he had done, and to return the £2,000, which he had received from the plaintiff, and he thereupon paid to the syndicate the £2,000; and they also insisted that the £500 which formed part of the purchase-money and which the plaintiff had received should be returned to them by him, and they refused to meet the promissory note sued on so far as £500 was concerned, and set up the counterclaim in this action alleging that the 10 per cent. commission was a secret profit or bribe by the plaintiff to Govan, their agent, and that they had unknowingly paid to the plaintiff the amount of the contracted commission (£2,500) in the purchase-money of the mine.

Apart from the point upon which my brother Bigham decided against the defendants, it appears to me that the defendants are in the right in the position they took up, and indeed had it not been for this point, about which hereafter, the learned judge would have decided in the defendants' favour, for the whole tenor of his judgment shows that he would have done so. In my judgment the contract of purchase of the 8th of January, 1897, was a corrupt bargain, as was also the contract of the 17th of March, 1897, and the evidence shows that, when each of those contracts was entered into, the plaintiff well knew that the defendant syndicate had no knowledge of the commission contracted to be paid to Govan by the plaintiff, nor that the purchase-money they agreed to pay to the plaintiff was enhanced by the amount of that commission. It was said by the plaintiff's counsel that the case in the House of Lords of *Cavendish Bentinck* v. *Fenn* decided that where a person charges fraud, the onus is upon him to prove it, and to establish his charge in a case like the present he must establish that the person charged had not communicated the act complained of to the injured person, and unless he proves this, the charge is not made out, for it is possible that he may have made the communication, in which case there would be no fraud, and further he must prove that the person making the charge has, in fact, been injured by concealment. Assuming that in the present case this onus of proof is upon the defendants, though I am by no means certain that it is, I say that the defendants have satisfied this onus, and shown out of the plaintiff's own mouth that he knew that Govan had not disclosed to the defendants the fact that he was receiving commission from the plaintiff, and that they have also proved that they have been injured by the amount by which the purchase-money had been increased to pay the contracted commission. For the same reason I need not discuss the case before Romer, J., of the *Lands Allotment Co.* v. *Broad*. The *Salford case*, in this court, is a clear authority that where an agent who has been bribed to do so induces his principal to enter into a contract with a person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies—he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of entering into the contract, and it is immaterial whether the principal sues the agent or the third person first. This is the head-note of this case, and accurately describes what was decided therein. A great deal of argument was addressed to us whether an action for money had and received would lie at the suit of the defendants against the plaintiff in this case. Lord Esher in the above case said it signified not what it may be called, whether damages or money had and received, and Lindley, L.J., said: "It is obvious that in some forms of action the corporation have a right to recover the shilling (*i.e.*, the £2,500 in this case). Under the old practice, I think they could have recovered it by an action for money had and received, and probably they could have recovered it in more ways than one." It is not necessary upon the facts of this case to decide whether money had and received would lie, for I am of opinion that the £2,500 can be recovered from the plaintiff in an action for damages for deceit, though I am by no means prepared to hold that an action for money had and received would not lie. Apart from what I am now coming to and upon which Bigham, J., decided adversely to the defendants, I am of opinion that the defendant syndicate have a good counterclaim against the plaintiff to recover the sum of £500.

The point upon which Bigham, J., decided against the defendants was that in April, 1898, they settled with Govan after they had notice of the agreements of September, 1896, and the 17th of March, 1897, and that they therefore knew that Govan had agreed with the plaintiff for a reduced commission of £2,000, and the learned judge held that the defendants thus elected to adopt the agreement of March, 1897, and take from Govan the £2,000 which he had received under it from the plaintiff, for if there had been no such agreement Govan would not by then have received any commission at all. But how does this afford any answer by the plaintiff to the good cause of action which the defendants then had against him? The plaintiff was no party to this settlement with Govan, which was made solely between the defendants and Govan. The agreement with Govan, which is [illegible] resolution of the

23rd of March, 1898, was only a wiping out and settlement by agreement of the claims of the defendants against Govan, not against the plaintiff. The resolution was as follows: "It is resolved that the repayment of the £2,000 offered by Mr. Govan be accepted with his assurance that he received the money in the full belief that he was justified in accepting it and without any dishonourable intention and thereby unwittingly made a mistake." With all submission to my brother Bigham, I cannot see how this settlement with Govan gets rid of or affords any answer to the cause of action which the defendants had against the plaintiff, any more than the agreement which was set up in the *Salford case* by way of defence was held to afford an answer by the defendant Lever. For the reasons above I think judgment must be entered for the defendants upon their counterclaim, with costs of action here and below.

Collins, L.J.—I am of the same opinion. The result of the transactions between the plaintiff and Govan is that from the outset the plaintiff dealt and intended to deal with Govan as a person who was to stand in a fiduciary relation to the purchaser, whom he was not only to find but to bring into existence. Even, in my opinion, if the agreement of the 26th of September fell short of constituting the plaintiff himself a joint promoter of the company which was to be formed to buy his mining rights, it clearly debars him from contending that in agreeing to pay a commission to Govan he was dealing with a person who he did not suppose was about to be an agent for the intended purchaser. The basis of the agreement was that he should be such an agent, and should promote a company to take over the plaintiff's property on conditions prearranged between the plaintiff and Govan. In my opinion, if a vendor pays a commission to a buyer's agent in order to secure his help in bringing about the sale and does not inform the buyer of the fact, he cannot defend the transaction if impeached by the buyer, who has, in fact, had no notice, by proving that he believed that the agent had disclosed the circumstances to his principal: see *Panama Telegraph Co.* v. *India Rubber Telegraph Works Co.*, 23 W. R. 583, L. R. 10 Ch. App. 515; *Harrington* v. *Victoria Graving Dock Co.*, 26 W. R. 740, 3 Q. B. D. 549; and *Smith* v. *Sorby*, 3 Q. B. D. 552*n*. I do not think *Cavendish Bentinck* v. *Fenn*, is an authority for the plaintiff. In my judgment the plaintiff is not entitled to the sum of £500 which he claims. I think that it is money which he could be compelled to refund if he received it, or which he could be made to pay to the defendant syndicate if they chose to sue upon the agent's contract, or finally, as damages in an action of deceit; and that to none of these actions would the fact that the defendants have claimed and received the sum of £2,000 from Govan be an answer.

Vaughan Williams, L.J.—I agree. In my judgment the syndicate can recover the £500, and if it had not been paid could have recovered the whole £2,500 by action or counterclaim. The form of such action would be an action for damages, quantified, it is true, but still damages; but I do not decide that money had and received would lie, though I doubt it.

*Appeal allowed.*

Solicitors for the plaintiff, *Gush, Phillips, Walters, & Williams.*

Solicitors for the defendants, *Snell, Son, & Greenip.*

## High Court of Justice.

Chan. Div. } Buckley, J. } Feb. 5, 6, 7.

West Ham Central Charity Board v. The Company of Proprietors of the East London Waterworks and H. Base. (*a*.)

*Landlord and tenant—Waste—Long lease—Deposit of rubbish—Injury to reversion—Countervailing advantage—Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 25.

*To constitute waste on the part of a tenant there must be a substantial alteration of the thing demised, resulting in an injury to the inheritance; and such an alteration is not the less waste because it may result also in some countervailing advantage greater than the injury.*

*Therefore, where the land demised was low-lying land, and the lessee shot rubbish containing vegetable matter upon it, and thereby raised it above high-water level, but made it more expensive to build upon, it is no answer to an action for waste to say that it is an advantage for building, for the land to be thus raised. The land demised being building land, the fact that the existence of vegetable matter upon it might, under the Public Health Acts, prevent the lessors at the end of the term from building dwelling-houses upon it, or might put them to the proof that such vegetable matter was not then existing, is an injury to the inheritance making the shooting of the rubbish waste.*

*The fact that the shooting of the rubbish during the term would prevent the lessors at the end of the term from deriving the special profit to be made by the use of the land in this way, is an injury to the inheritance making the shooting of the rubbish waste.*

Action.

This was an action by lessors to restrain the defendants, their lessees, and a sub-lessee, from shooting rubbish upon the land demised. The land was low, marshy ground situate in the parish of West Ham near the River Lea, between two watercourses leading out of it, and was called Oxleas. It was about twelve acres in extent, its surface was below high-water level, and it was protected by banks about five feet high. It had been used as far as it could be used for grazing.

In September, 1830, the Churchwardens and Overseers of the Poor of West Ham let the land to the waterworks company for the term of ninety-nine years at the rent of £70 a year.

The lease recited that the waterworks company were desirous of constructing a reservoir upon the land, and had asked for a lease for the purpose; and among other things the lessees covenanted not to carry away from the land any soil or earth, and two years at least before the end of the term that they would fill up all holes made, and sow the land with grass seed, so that it might be restored to the lessors in the same condition as previous to the lease.

As events happened, the waterworks company did not want to make a reservoir there. It remained grass land until at any rate 1892. In 1894 the defendant Base applied for a lease of the land for the purpose of using it as a rubbish shoot, and in the result the waterworks company in April, 1896, let the land to him for the remainder of the term, less three days, at a rent of £105 a year. There was among other covenants one by the lessee not to do anything contrary to the provisions of the lease under which the lessors held. The learned judge held that

(*a*.) Reported by Neville Tebbutt, Esq., Barrister-at-Law.

his lessors did not either by the lease or otherwise authorize Base to shoot offensive materials on the land, but that they did authorize him to fill up and increase the level of the land. Base carried on the business of a housebreaker, and as such had a large amount of brick rubbish and material of that sort to dispose of. He also collected refuse from street sweepings known as "mud slop." These materials were put upon the land, and in addition ordinary dust-bin refuse from houses, sweepings up of markets, old tin cans, bottles, broken jars, clothes, ashes, dust, and paper, to the aggregate amount of some 150,000 or 160,000 cartloads, and the greater part of the land was thus raised some ten feet higher. Of the amount deposited some 16,000 loads was house refuse, 50 per cent. of which was ashes and inoffensive material, and the rest included a large amount of cabbage-stalks and leaves, and all sorts of vegetable refuse from house consumption. Base was paid from 8d. to 1s. 3d. a load for the house refuse deposited. Fires were kept upon the land and the paper and straw was burnt, but his lordship held that though some of the vegetable refuse had been burnt with the paper and straw, there had been no systematic burning of it, and that a large portion was covered up unconsumed. His lordship also held that it was not proved that this vegetable matter would have become innocuous or have disappeared by the end of the lease. The plaintiffs alleged that by these means the land had been permanently injured, and the value of their reversion greatly lessened; and they claimed an injunction restraining the defendants from bringing any rubbish, earth, or material on the land, or otherwise committing waste upon it, and damages.

A preliminary objection was taken that there was no such body known to the law as the "West Ham Central Charity Board," and consequently there were no plaintiffs in the action. It was alleged in the statement of claim that in 1870 a scheme had been ordered by the Charity Commissioners for the regulation by the vicar, churchwardens, and overseers of West Ham of the charity to which the land in question belonged, and that in such scheme the vicar, churchwardens, and overseers were called the "Central Charity Board." Counsel now stated that they were instructed to appear for the above persons individually, and undertook that if the objection of the defendants was well founded the pleadings should be amended, making their clients individually parties to the action.

*Astbury, Q.C.*, and *A. à B. Terrell*, for the plaintiffs.—The defendant Base has committed waste upon our land. He has altered its character and materially injured our reversion. We cannot build upon the land without digging down ten feet to get to solid ground. He has put offensive vegetable matter upon it, and if we desire to build dwelling-houses we shall be prevented by the local authorities under the Public Health Acts Amendment Act, 1890, s. 25. In any case it is untrue to say that the land has been made more valuable by what has been done, for we are prevented from making the extra profit by using it as a place to deposit material, which we might otherwise have made. We had a right to have the land returned to us at its original level: *Darcy* v. *Askwith*, Hobart 234; *Greene* v. *Cole*, 2 Wms. Saund., 644; *Simmons* v. *Norton*, 7 Bing. 640; *Queen's College, Oxford* v. *Hallett*, 14 East 489. We might have wanted to use it as a reservoir. The lease empowered the defendant waterworks company for that purpose to make certain alterations upon it, but for no other purpose. The defendant waterworks company authorized the defendant Base to use the land as he has done, and are properly parties. Besides, a lessee is responsible to his lessor for the acts of his sub-lessee: *London (Mayor of)* v. *Hedger*, 18 Ves. 355; *Attersoll* v. *Stevens*, 1 Taunt. 183; and the last note to *Greene* v. *Cole*.

*Cripps, Q.C.*, and *J. G. Woods*, for waterworks company.—Even assuming that waste has been committed, the lessees are not liable for the acts of the sub-lessees unless they have expressly permitted them or connived at them. Liability only attaches to the person in actual possession: Woodfall on Landlord and Tenant (16th ed.), p. 775; *Rich* v. *Basterfield*, 4 C. B. 783; *Harris* v. *James*, 45 L. J. Q. B. 545, 24 W. R. Dig. 164. In the old case of *Huntley* v. *Russell*, 13 Jur. 837, the lease in terms permitted the act complained of; in *London (Mayor of)* v. *Hedger* collusion was assumed on the demurrer. Lessees are not liable for the acts of underlessees merely because they do not prohibit the acts complained of. They are not bound to put themselves in such a position as to be able to stop any tort upon the land which the occupier likes to commit. If there has been waste here the damage has been trivial, for the measure of the damage is not the cost of restoring the land to its former condition, but the actual damage to the inheritance, which in this case is trivial, if any at all: *Whitham* v. *Kershaw*, 34 W. R. 340, 16 Q. B. D. 613.

*Birrell, Q.C.*, and *James Scarlett*, for the defendant Base.—In considering whether the nature of the land had been changed the court will consider the circumstances existing at the date of the act complained of, and not those existing at the date of the lease. The best and proper use of the land at present is for building factories, and for that purpose the acts of the defendant now complained of have improved instead of injuring the land. If waste has been committed at all, it is meliorating waste, in respect of which the court will not grant either an injunction or damages: see the judgments in *Doherty* v. *Allman*, 26 W. R. 513, at p. 515; 3 App. Cas. 709, at p. 722, and the observations of Jessel, M.R., in *Jones* v. *Chappell*, L. R. 20 Eq. 539, 24 W.R . Dig. 306; also *Doe* v. *Burlington (Earl of)*, 5 B. & Ad. 507, at p 517; *Harrow School* v. *Alderton*, 2 Bos. & P. 86; *Meux* v. *Cobley*, [1892] 2 Ch. 253, 40 W. R. Dig. 111.

BUCKLEY, J.—The best definition of waste that I have been able to find is that in *Darcy (Lord)* v. *Askwith*: "It is generally true that the lessee hath no power to change the nature of the thing demised, he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor decay the pale of park, for then it ceaseth to be a park, nor he may not destroy nor drive away the stock or breed of anything, because it disherits and takes away the perpetuity of succession, as villains, fish, deer, young spring of woods, the like; but he may better a thing in the same kind, as by digging a meadow to make a drain or sewer to carry away water." The test as there laid down seems to be whether the act which the lessor says is waste on the part of the lessee alters the nature of the thing demised. At one time it was supposed to be waste for a tenant to build a new house on the land: see Co. Litt. 53a, and *Queen's College, Oxford* v. *Hallett*. If that was the law, I think it is plainly not the law now: see remarks of Jessel, M.R., in *Jones* v. *Chappell*, I am content to take the law from the words of Denman, C.J., in *Doe* v. *Burlington (Earl of)*, 5 B & Ad. at p. 517: "Upon the whole there is no authority for saying that any act can be waste which is not injurious to the inheritance either first by diminishing the value of the estate; or secondly, by increasing the burden upon it; or thirdly, by impairing the evidence of title." If the permanent character of the property demised is

not substantially altered, as, for instance, by the conversion of pasture land into plough land, by breaking up ancient meadows or the like, I conceive that it is not now waste for the tenant to do things which are not forbidden by the covenants and conditions of his lease: see remarks of Eldon, L.C., in *Church* v. *Brown*, 15 Ves. 258, at p. 268. Now, did the defendant Base, by placing this heap of rubbish upon the land, make an alteration in the nature of the thing demised? The defendants admit that in order to build hereafter upon the land an act must be done which in the original condition of the land need not have been done, as ten feet of superimposed material must be dug through before the foundations can be laid. But they say that the extra expense thus caused would be more than compensated for by the additional value of the land when raised. That amounts to a contention that it is allowable to alter the nature of the thing demised to the injury of the inheritance if at the same time there is a countervailing advantage which compensates for the injury. I think not. I think that to alter building land so that in order to build on it it has to be dealt with in a different way than formerly, is waste within the rule. Then the case may be looked at from another point of view. The lessors may want to build cottages upon the land, and it is quite possible that with this material upon it they might be forbidden to do so. The local authorities can under the Public Health Acts Amendment Act, 1890, s. 25, forbid dwellings to be put upon land impregnated with fœcal, animal, or vegetable matter." Why are the reversioners to be exposed to this difficulty. Their situation has surely been altered. The defendants say that the vegetable matter will have disappeared by the end of the term. Suppose this is so, still the landowners might have to prove that such was the case to the satisfaction of the local authorities before they could build. They have thus to comply with a new condition. Is not that an alteration of the nature of the thing demised. I need hardly say that the owner ought not to be excluded from the opportunity of building cottages if he is so minded, even if the land is more valuable for factories. There is a third way of looking at the case. Assume the defendants are right in saying that the land cannot be beneficially used for building until it has been raised. Still, the reversioners at the end of the lease would, but for the defendant, have come into the enjoyment of a property from which they could, before building upon it, have obtained additional rent or profit by allowing it to be used for a rubbish shoot. They could have protected themselves by stringent conditions as to the quality of the material deposited, so as to have a perfectly good foundation for building upon it subsequently. Or they could have got an additional rent from a factory builder or from a contractor like the defendant Base for the use of it in that way. The benefit they would thus have derived during that period has been lost. Why should they not be entitled to have the land back at the end of the lease in 1929 as it was in 1830, with the opportunity of making use of it as they pleased? Having regard to the fact that in many agricultural districts there are mining industries which have large amounts of slag and other material to be got rid of, it seems strange that no authority can be found upon the question whether the deposit of such material on land is or is not legal waste. The defendants could not deny that if the land were raised 1,000 or 1,500 feet it would be an alteration amounting to waste, and the plaintiffs would not contend that raising the land a few inches by top dressing it, was waste. It must be largely a question of degree. I think there has been an alteration amounting to waste by what has been done irrespective of the question whether the material deposited is offensive or not, and that, therefore, the waterworks company, having authorized the defendant Base to put material upon the land, are equally responsible with him. I need not, therefore, consider the question which has been raised, whether waste comes under the same category as nuisance.

*Judgment for the plaintiffs.*

Solicitor for the plaintiffs, *A. A. Banes.*

Solicitors for the defendant company, *Bircham & Co.*

Solicitors for the defendant Base, *George Goodman.*

---

Q. B. Div.
(Darling and Channell, JJ.) Dec. 9.

DAVIES v. JENKINS.
HOWIE, *Claimant.* (a.)

*Bill of sale — Consideration — Occupation of grantor omitted—Specific description of farm stock—Statement of consideration—Accordance with form—Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-section* 2—*Bills of Sale Act,* 1882 (45 & 46 *Vict. c.* 43), *ss.* 4, 8, 9.

*The defendant, Sarah Jenkins, borrowed from the claimant prior to the 29th of April,* 1899, *at various times sums of money amounting to* £40. *On that date it was agreed that the claimant should advance her a further sum of* £50, *and that she should give a bill of sale on her farm stock to secure the sum of* £90; *and a bill of sale was thereupon executed and the* £50 *advanced. In the bill of sale the consideration was stated to be "the sum of* £90 *now due and owing," and the grantor, who farmed the farm herself, was merely described as "Sarah Jenkins, of Ynysgwas Farm, in the county of Glamorganshire, married woman." In the schedule the farm stock was described as "two horses, four cows."*

*An execution having been levied by the plaintiff upon the goods comprised in the bill of sale, the claimant claimed the goods, and the bailiff interpleaded. The county court judge held the bill of sale to be good, and gave judgment for the claimant. The plaintiff appealed.*

*Held (following* Carpenter v. Deen, 23 *Q. B. D.* 566, 38 *W. R. Dig.* 22), *that the words "two horses, four cows," were not such a specific description of the farm stock as to satisfy section* 4 *of the Bills of Sale Act,* 1882, *and therefore they must be excluded from the schedule.*

*Held, also* (sed dubitante), *that the bill of sale was void, on the ground that the consideration was not truly stated, since the bill omitting to acknowledge the receipt of the* £50 *then advanced was not in accordance with the form prescribed by the Act.*

*Held, also, that the point raised as to the sufficiency of the description of the grantor's occupation must be decided in favour of the validity of the document.*

Appeal from county court of Glamorganshire on an interpleader issue.

The plaintiff, a judgment creditor of one Sarah Jenkins, appealed from the decision of the county court judge of Glamorganshire, who had decided that a bill of sale held by the claimant Howie on the defendant's furniture, farm stock, and farming instruments was valid as against the plaintiff's judgment.

The defendant had, prior to the 29th of April, 1899, borrowed on various dates sums of money amounting in all to £40. On that date it was agreed that the claimant should advance the defendant a further sum of £50, and that she should give a bill of sale of her furniture, farm stock, and farming instruments to

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

secure the sum of £90, and a bill of sale was accordingly executed, and the £50 was advanced.

An execution having been put in by the plaintiff upon the goods comprised in the bill of sale, Howie claimed the goods, and the bailiff interpleaded.

The county court judge held the bill of sale to be good and the schedule to be sufficiently specific, and gave judgment for the claimant.

The plaintiff Davies appealed.

*Mallinson* (*Montague Lush* with him), for the appellant. — The bill of sale is void, for it is not in accordance with the form prescribed in the statute. It is bad, firstly, because the grantor is insufficiently described; secondly, the consideration is not truly stated; and thirdly, some of the chattels are not sufficiently specifically described to satisfy section 4 of the Bills of Sale Act, 1882. Mrs. Jenkins is described merely as "Sarah Jenkins, of Ynysgwas Farm, in the county of Glamorganshire, married woman," whereas she has been carrying on business for herself as a farmer for some years, her husband having gone to America—but it is not agreed that she is living "separate and apart" from her husband in the legal sense of that expression—and therefore she should have been described as the person farming Ynysgwas Farm—as a farmer—in order that creditors might be able to identify her. The consideration appears on the face of the bill to be "£90 then due and owing," whereas the evidence shows that as to £50 of that sum the statement was incorrect at the time the bill was executed—and the receipt of that advance is not acknowledged. Then the schedule (*inter alia*) includes "two horses and four cows" on the farm, and that description has been held insufficient in *Carpenter* v. *Deen*, 23 Q. B. D. 566, 38 W. R. Dig. 22.

*S. T. Evans*, for the respondent.—No definite line has yet been drawn by the court within which the "description" of the grantor or a chattel covered by a bill of sale must come, and I submit that where no reasonable doubt can arise as to identification the court will uphold the bill if otherwise valid. If this proposition be not true, then it is impossible to reconcile the various decisions that have been given on this point. As for the first objection, there is no substance in it. The grantor is described as "of" Ynysgwas Farm—that amounts to describing Mrs. Jenkins as the occupier of that farm—*i.e.*, as the farmer of it, and sufficiently describes her. If the consideration has not been "truly stated" the inaccuracy is merely technical, and not sufficient to invalidate the bill, for it is never suggested that the full £90 was not advanced to Mrs. Jenkins. Nor can it be said that the repayment of that sum is not now due and owing. As to the objection that the horses and cows should have been more specifically described, the onus rests on the plaintiff to show that the farm stock cannot be identified. If the description was merely "illusory" the bill of sale on this point might be held to be bad. *Witt* v. *Banner*, 36 W. R. 115, 20 Q. B. D. 114, is a good example of a general description that in fact is no description for identification of the goods covered by the bill of sale at all. On the other hand, in *Davidson* v. *Carlton Bank*, 41 W. R. 132, [1893] 1 Q. B. 82, the entry in the schedule of the item "1,800 volumes of books (in study) as per catalogue" was held to sufficiently describe the books assigned. [DARLING, J.—*Carpenter* v. *Deen* is an authority on this point against you that we must follow.] No evidence has been given that the horses and cows are not those assigned by the bill of sale. The plaintiff has failed to show that the description was not specific, for the county court judge found that there were only two horses and four cows on the farm, and in the absence of evidence of facts showing that the description was not specific it was sufficient: *Hickley* v. *Greenwood*, 38 W. R. 686, 25 Q. B. D. 277. [DARLING, J.—How does that finding help you? There might well be two horses and four cows on the farm when the stock was seized, none of which were there when the bill of sale was executed. Therefore the mere number of the stock does not identify the specific stock assigned by the bill of sale.] [CHANNELL, J.—I see in *Roberts* v. *Roberts*, 32 W. R. 605, 13 Q. B. D. 794, that "seven milking cows" was not held to be an insufficient description, but no question on that point appears to have been raised, and that case is really no authority on this point. Lindley, L.J., in his judgment (see p. 806), said he thought "twenty chairs, five tables" would be a good description, but that "household furniture and effects" was clearly insufficient, and it is a little difficult to say why "twenty-one milch cows" should be held insufficient in *Carpenter* v. *Deen*. The reason, I suppose, is that household furniture is not so often sold or exchanged as farm stock.]

*Mallinson* replied.

[DARLING, J.—If we hold this bill of sale is bad as to the horses and cows, do you want our decision on the other points raised against its validity. We understand the sale of the horses and cows will cover your judgment. *Mallinson.*—I ask for a decision on all the points raised, as it is doubtful if the sale of the horses and cows will cover the debt.]

DARLING, J.—I think this bill of sale cannot be upheld, for it is certainly bad as far as the specific description of the horses and cows, and they, at all events, must be struck out of the schedule of chattels purported to be assigned by the grantor. It is plain from the decision given in *Carpenter* v. *Deen* that it is not sufficient to merely describe farm stock as "twenty-one milch cows," and it was so held by the majority of the Court of Appeal. In the present case the description is even less specific than in *Carpenter* v. *Deen*. So, too, with regard to the two horses, that would follow *a fortiori*, for the court does not say that you may describe horses less definitely than cows, and Lopes, L.J., in *Carpenter* v. *Deen*, at p. 577, went farther and said that horses must be more specifically described than cows or sheep.

Therefore we think the bill of sale as to the farm stock is bad, and the horses and cows must be excluded from it.

Then as to the description of the grantor. She is described as "Sarah Jenkins, of Ynysgwas Farm, in the county of Glamorganshire, married woman," and we think that description sufficiently describes her occupation. It shows that the said Sarah Jenkins occupies the farm and is not merely living there as a maid servant or guest. She is the person who lives there in the sense that she is the occupier of the farm. On this point we decide in favour of the validity of the document.

I now have to decide whether the consideration was stated in accordance with the form required by the Act. It is clear that the form could not be absolutely followed for as to £40 the money had been advanced by instalments, the first as far back as 1897. I think this fact might properly have been set out. Then as to the £50 I think the form given by the statute should have been followed. On the whole I think the consideration was not truly expressed, for it was said to be for £90 now due and owing—whereas £40 of that sum was and £50 was not due and owing—that the bill purported to have been granted. As to the £50 in respect of which the bill was in fact given, that would not become due and

owing for six months, whereas the bill declared it was payable at once.

On the whole I think the bill is bad altogether, but certainly it is bad as to the horses and cows.

CHANNELL, J.—This is a case not without difficulty. I am bound as to the identification of the horses and cows to follow the decision of the majority of the Court of Appeal in *Carpenter* v. *Deen*, and I agree that the bill of sale is bad on that ground, and that this stock must be struck out of the schedule. But our so deciding that question does not necessarily make void the bill of sale, and indeed as to the occupation point I see no reason to disagree with the view already expressed by my brother, although I feel by no means confident that our decision would on this question be affirmed on appeal. As to the other point—namely, whether the consideration was correctly stated, I think that is a question open to considerable doubt. The statement certainly does not follow the form given, but then a true statement of the transaction would not be in strict accordance with the form, and the question to my mind is whether—it never being alleged here that the whole of the £90 was not *bonâ fide* advanced—the variation from the form under the circumstances amounts to a substantial misstatement—in other words, whether the consideration was not in fact substantially truly stated. For the reasons I have given I agree that the appeal should be allowed with costs, and that leave to appeal should be granted to the claimant on the two questions only on which we have expressed a doubt, if it should turn out that the amount realized by him by the sale of the horses and cows is insufficient to satisfy the claim. If on the other hand the debt is satisfied, then I understand the appeal will not be brought, and the matter will be ended by our judgment in this court.

Solicitor for the appellant, *Richard White*, for *Ivor Evans*, Swansea.

Solicitors for the respondent, *Helder, Roberts, & Walton*, for *R. P. Morgan & David*, Neath.

---

Prob. Div. & Adm. Div. Divorce. } Nov. 13.

GILES v. GILES. (a.)

*Divorce—Practice—Respondent of unsound mind not so found—No appearance—Notice to official solicitor.*

*Where the respondent, the husband in a suit for dissolution, was a person of unsound mind not so found by inquisition, and the suit was* in formâ pauperis, *the court, before making the decree, required notice of the proceedings to be formally given to the official solicitor.*

Hearing before the court itself of a petition *in formâ pauperis* by the wife for dissolution of the marriage on the ground of the cruelty and adultery of the husband.

The respondent, the husband, was a person of unsound mind, but not so found by inquisition. He had been confined in a county asylum from November, 1894, till he was in October, 1899, confined in another county asylum, where he was served with the petition, &c., in the presence of the medical superintendent and the head attendant. Information of the proceedings had been given to the official solicitor in order that he might act as guardian *ad litem*, but he had not taken any action. On the application in the registry for the formal certificate as to the proceedings and pleadings being in order, a note was made as to the state of the respondent's mind, that he was a pauper, and of the absence of any application to the court for the appointment of a guardian *ad litem*.

The court on hearing the evidence was satisfied that it proved cruelty and adultery on the respondent's part before November, 1894.

*Walsh*, for the petitioner.—No application was necessary to appoint a guardian *ad litem*; rule 196 of the Divorce Court Rules is not obligatory; here the petitioner is suing *in formâ pauperis*. This case has not been expressly provided for by the Legislature; see the judgment in the House of Lords in *Mordaunt* v. *Moncrieffe*, 23 W. R. 12, L. R. 2 H. L. Sc. & D. 374.

BARNES, J.—Under the Rules of the Supreme Court, ord. 13, r. 1, in ordinary actions at law it is provided that where no appearance has been entered on behalf of a defendant of unsound mind the plaintiff shall apply for an order that someone be appointed guardian of the defendant. No provision appears to have been made expressly in the divorce practice, and I think this court should adopt that practice. The official solicitor must be communicated with and the case can be mentioned again to me.

Solicitors, *Lovell, Son, & Pitfield*, for *J. Gordon Walsh*, Oxford.

---

Prob. Div. & Adm. Div. Probate. } Nov. 6.

*In the Goods of* JOHN GEORGE CAMPION. (a.)

*Probate — Will — Administration — Surviving executor absent from England—No intention to return or to continue to act—Application for grant* de bonis non *on behalf of assignee of reversionary interest.*

*Where a surviving executor, after proving the will and codicil, left England not intending to return or continue to act, the court, on motion, granted administration* de bonis non, *with the will and codicil annexed, to the nominee of the assignees of the residuary legatee.*

Motion for administration *de bonis non*, with will and codicil annexed, to Herbert Kidson, the nominee of the assignees of the residuary legatee.

The testator died on the 18th of March, 1890, leaving a will and codicil duly executed, and by which he constituted S. B. Eckett his residuary legatee.

The will and codicil were proved by both executors in October, 1890.

One executor died in 1891, and the same year the other executor left England not intending to return for a long time or to act any longer as executor.

Eckett assigned his interest to the Lancashire and Yorkshire Reversionary Interest Co. (Limited) in 1895 by deed, and subsequently in May, 1899, renounced any right to administration, and consented to a grant to the company. The company nominated their secretary, Herbert Kidson, to make the present application and take the grant.

The testator's estate consisted principally of reversionary interests under two wills which did not fall in till 1898, and the estate then amounted to about £15,000.

*Priestley*, in support of the application.

BARNES, J., granted the motion.

*Motion allowed.*

Solicitors, *W. J. & E. H. Tremellen*, for *Blair & Sedden*, Manchester.

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

## Court of Appeal.

From Chan. Div.
(Lindley, M.R., and Vaughan Williams and Romer, L.JJ.) Feb. 2.

SOUTH AFRICAN BREWERIES (LIMITED) v. KING. (a.)

*Contract—Conflict of laws—English law and law of South African Republic*—Locus solutionis.

*Where a contract is made in a foreign country between two Englishmen, and is intended to be performed primarily in that foreign country, this fact is in itself sufficient, in the absence of evidence to the contrary, to prove an intention on the part of the parties that the contract shall be governed by the law of the foreign country.*

*Decision of* Kekewich, J. (47 *W. R.* 681, [1899] 2 *Ch.* 173) *affirmed.*

Appeal from the decision of Kekewich, J. (reported 47 W. R. 681, [1899] 2 Ch. 173).

In this case the question for decision was whether a contract made in Johannesburg between a company registered in England and an Englishman resident in Johannesburg, and intended to be performed primarily in Johannesburg, was governed by the law of England or by the law of the South African Republic.

By an agreement in writing dated the 14th of October, 1892, and made between the Natal Breweries Syndicate (South-east Africa) (Limited) (a company registered in England mainly for the purpose of carrying on the business of brewers in the Transvaal and elsewhere in South Africa), of the one part, and the defendant, an English subject, of the other part, and executed in England, the defendant bound himself to serve the syndicate as brewer, or otherwise, in their business of brewers carried on at Johannesburg till the 6th of November, 1894, at a salary of £300 a year. The defendant further bound himself by the said agreement not to engage in any brewing business in South Africa for a period of five years from the determination of his engagement.

In November, 1892, the whole of the undertaking of the syndicate (including the benefit of the said agreement of the 14th of October, 1892) was transferred to the South African United Breweries (Limited), an English company having its registered office in London.

After the expiration on the 6th of November, 1894, of the agreement of the 14th of October, 1892, the defendant continued in the service of the company on terms generally similar to those of his former employment.

By an agreement in writing, dated the 11th of April, 1895, and made between the company or its successors, of the one part, and the defendant, of the other part, and executed at Johannesburg, the defendant bound himself to serve the company (subject to certain rights of dismissal on their part) for a term of five years from the 1st of October, 1894, "as brewer or otherwise in their business carried on at Johannesburg, and in the Colony of Natal, or elsewhere in South Africa," for a monthly salary of £54 3s. 4d. By clause 8 of this agreement the defendant bound himself not to engage in any brewing business in South Africa for the term of ten years from the time of the determination of his employment under the said agreement, except with the consent in writing of the board of directors of the company in London.

In May, 1895, the company was reconstructed, and the whole of its undertaking (including the benefit of the agreement of the 11th of April, 1895) was transferred to the plaintiff company (whose registered office was also in England).

By a memorandum indorsed upon the agreement of the 11th of April, 1895, and dated the 12th of July, 1895, the defendant formally agreed to serve the plaintiff company in the terms in all respects of the said agreement.

On the 3rd of September, 1895, the plaintiff company duly determined the employment of the defendant under the agreement of the 11th of April, 1895, and under the memorandum of the 12th of July, 1895. The defendant having subsequently proposed, in breach of clause 8 of the agreement of the 11th of April, 1895, to undertake the management of a brewery at Durban, in Natal, without the consent in writing of the board of directors of the plaintiff company in London, the plaintiff company issued a writ (the defendant being at the time in England) asking the court to restrain the defendant from the contemplated breach of his undertaking. The defendant pleaded that the agreement of the 11th of April, 1895, and the memorandum of the 12th of July, 1895, were executed in the South African Republic, and that all duties under them were intended to be performed primarily in that country. It also appeared from the evidence that the defendant was advised at the time of his signing the agreement of the 11th of April, 1895, that the stipulation in clause 8 was invalid by the law of the South African Republic, and that he was so informed by the agent of the plaintiff company.

Kekewich, J., though of opinion that on the true construction of the agreement of the 11th of April, 1895, the defendant might have been required to serve in any part of South Africa, though primarily intended to serve at Johannesburg, made a declaration to the effect that the said agreement was governed by the law of the South African Republic, and postponed the further hearing of the action in order that that law might be ascertained.

From this decision the plaintiff company now appealed.

*Warrington, Q.C.*, and *Younger, Q.C.*, for the appellants.—The agreement of the 11th of April, 1895, is governed by English law: *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202. (1) The agreement, it is true, was executed in Johannesburg, but it was in fact a continuation of the agreement of the 14th of October, 1892, which was executed in England. Substantially, therefore, the *locus contractus* was England. (2) The form of the agreement of the 11th of April, 1895, is English. (3) It cannot be supposed that the parties deliberately entered into a contract which they knew would be invalid. Hence it must be inferred that they never intended the agreement to be governed by Transvaal law. (4) There is no single exclusive *locus solutionis*. The defendant was liable to be called on to serve anywhere in South Africa. [ROMER, L.J., pointed out certain clauses in the agreement of the 11th of April, 1895, which indicated an intention that the defendant should serve primarily at Johannesburg.]

*Buckmaster*, for the respondent, was not called upon.

LINDLEY, M.R.—In my opinion the judgment of the court below is unquestionably right. Whatever be the law of the South African Republic, I am clear that the agreement of the 11th of April, 1895, is governed by it. It seems to me certain, having reference to the clauses in that agreement to which attention has been called by Romer, L.J., that it was intended that the agreement should be carried on

(a.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

Johannesburg; except so far, of course, as it might be necessary, owing to some pressing matter of business, temporarily to dispatch the defendant to some other country. The defendant contracted at Johannesburg to act as the company's representative at Johannesburg, and his contract is accordingly governed by the law of that country. The appeal must be dismissed with costs.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

*Appeal dismissed.*

Solicitors, *Loughborough, Gedge, Nisbet, & Drew; H. G. Campion & Co.*

---

Appeal.
(A. L. Smith, Rigby, and Collins, L.JJ.) Jan. 27.

MAUDE *v.* BROOK. (*a.*)

*Master and servant—Compensation for injury by accident—Building being "constructed" by means of a "scaffolding"—Workmen's Compensation Act,* 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7.

*The building of a house exceeding thirty feet in height was so far completed that the roof was on and the outside scaffolding was taken down, but the inside plastering work was not completed. To enable the plasterers, who were in the employment of the builder, to reach the ceilings and upper parts of the walls of the rooms, movable trestles, with boards placed across the top, were used for the plasterers to stand upon. While some of the plasterers were working on the trestles and boards, another plasterer was plastering the walls of the top landing, not standing upon trestles and boards, and, while so working, he fell over the stairs and was killed.*

*The county court judge found that the arrangement of trestles and boards was a "scaffolding" within the meaning of section* 7, *sub-section* 1, *of the Workmen's Compensation Act,* 1897, *and that, therefore, the building was, at the time of the accident, being constructed by means of a scaffolding.*

*Held, by* A. L. Smith *and* Rigby, L.JJ. (Collins, L.J., *dissenting*), *that there was evidence upon which the county court was entitled to find that the arrangement of trestles and boards was a "scaffolding" within the meaning of the section.*

Appeal from the award of the judge of the Leeds County Court in an arbitration under the Workmen's Compensation Act, 1897.

The respondent was the widow of a deceased workman who while in the employment of the appellant was killed by an accident arising out of and in the course of his employment.

The appellant was building two houses, and in November, 1898, the deceased man with other workmen was employed on the inside plastering work of the houses. On the 24th of November, 1898, the date of the accident, the outside scaffolding had been taken down, and the houses had been roofed in, but the inside plastering work had not been completed. The houses exceeded thirty feet in height. In order to enable the plasterers to reach the ceilings and upper parts of the walls of the interior of the houses, movable trestles with boards placed across the top were used. On the 24th of November, 1898, some of the plasterers were working on the trestles and boards, but the deceased man was standing on the landing of the top floor of one of the houses, not upon trestles and boards, plastering the walls, when he fell over the staircase where the banisters had not then been put up, and was killed.

The county court judge was of opinion that the plastering of the walls and ceilings of the unfinished house was part of its construction, and that the arrangement of trestles and boards, although inside the house, was a "scaffolding" within the Act. It formed a platform used by the workman engaged in the higher plastering to reach his work. Although the deceased man was not using the scaffolding himself and did not fall from it, he (the county court judge) was of opinion that the deceased man died from injury by accident arising out of and in the course of his employment in a building exceeding thirty feet in height which was being constructed by means of a scaffolding, and that his widow was entitled to compensation. He made an award in her favour for £296.

The employer appealed.

*Ruegg, Q.C.,* and *A. Powell,* for the appellant.—It is not sought to disturb the finding of the county court judge that the plastering work was construction. That is a question of fact in each case for the judge. The arrangement of trestles and boards is, however, not a "scaffolding" within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act, 1897. The word "scaffolding" is used in its ordinary and popular sense as a structure of poles and boards lashed together. Two trestles and a board placed across the top do not constitute a scaffolding. No one in ordinary language would call such an arrangement a scaffolding. The section refers to a scaffolding necessary for the particular building under construction—that is, a scaffolding of such a height and nature as to enable a building over thirty feet high to be constructed, repaired, or demolished. The building over thirty feet high is the dominating element. In *Hoddinott* v. *Newton, Chambers, & Co.,* 47 W. R. 499, [1899] 1 Q. B. 1018, Collins, L.J., said that "the scaffolding must, in my judgment, have some relation to the height of the building; the word 'scaffolding' must be interpreted by reference to the nature of the work for which the Legislature contemplated that it was to be used—that is to say, in the construction or repair of a building exceeding thirty feet in height by an undertaker who is defined to be the person undertaking the construction, repair, or demolition . . . It is the construction, repair, or demolition of a building, which would *primâ facie* suggest the building as a whole, and the operation to which scaffolding is contemplated as an essential would seem therefore to be *primâ facie* the work of constructing or repairing such a building as a whole." Further on he said that "the danger contemplated is that incidental to dealing with a building more than thirty feet high by means of a scaffolding adequate to such a building." The trestles and boards in the present case do not come within that description. They are no more a scaffolding than was the arrangement of a board with one end tied on to the rung of a ladder and the other end resting on the window-sill, in the case of *Wood* v. *Walsh & Sons,* 47 W. R. 504, [1899] 1 Q. B. 1009. The county court judge was therefore wrong.

*J. A. Compston,* for the respondent.—It is impossible to have an ordinary scaffolding in a room in a house. Trestles and boards are used instead. Being movable, they are more convenient, and a plasterer's scaffolding is well known in the trade. In Webster's Dictionary a trestle is defined to be a movable frame or support for anything, as scaffolding, consisting of three or four legs secured to a top piece, and forming a sort of stool or horse used

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

by carpenters, masons, and other workmen. These trestles and boards may well be called a scaffolding, and therefore there was evidence upon which the county court judge was entitled to find that they constituted a scaffolding within section 7, sub-section 1, of the Act.

He also referred to the definition of trestle in the Imperial Dictionary and the Century Dictionary.

*Ruegg, Q.C.*, replied.

A. L. SMITH, L.J.—In this case two points were taken before the county court judge. The first was whether the inside plastering work was part of the "construction" of the two houses. The houses were not completed, a great part of the inside plastering work still remaining to be done. The deceased man with others was engaged upon the plastering of the the ceilings and walls of the houses, and while standing on the floor of the top landing of one of the houses doing his work he fell over the stairs and was killed. In my opinion, it being well known what the nature of plastering work is, the county court judge was justified in holding that at the time of the accident the house was being "constructed" within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act, 1897. The second point is whether the house was being constructed by means of a "scaffolding" within the meaning section 7, sub-section 1. There is nothing in the Act requiring the scaffolding to be more than thirty feet high; the only requirement in that respect is that the building must exceed thirty feet in height. Certainly there is nothing to limit the accident to a fall off the scaffolding or to some accident occurring on the scaffolding. The question we have to decide is whether the county court judge was entitled to hold that the arrangement of trestles and boards, which were used for the plasterers to stand upon, when necessary, to reach their work, was a "scaffolding" within the meaning of the Act. We have already held in *Hoddinott* v. *Newton, Chambers, & Co.* that it is immaterial whether the scaffolding is inside or outside the building. Suppose a house was being built by means of trestles and boards placed outside, with a ladder to give the workmen access thereto in case of necessity, would not a county court judge be entitled to find that the house was being built by means of a scaffolding? To my mind there would in such a case be evidence to justify his so finding. We have always refused to lay down a definition of the term "scaffolding" as used in the section. We can only say whether in any particular case there is evidence that the arrangement or structure is a scaffolding within the meaning of the section. It seems to me that if this arrangement of trestles and boards were used outside the house for the purpose of its construction, there would be evidence to justify a county court judge in finding that it was a scaffolding. The fact that, instead of being outside it is inside the house, used for the purpose of completing the construction, cannot, in my opinion, warrant us in saying as a matter of law that the arrangement is not a scaffolding. It is said that the term "scaffolding" as used in the section means a scaffolding composed of poles, supports, and planks tied together. I cannot see anything in the Act requiring any such thing. In *Hoddinott* v. *Newton, Chambers, & Co.* I thought that there was evidence that a structure, inside a building, composed of scaffold boards resting on ledgers secured to the iron columns of the building was a "scaffolding" within the meaning of the Act. I cannot say that there is no evidence that the arrangement in the present case was a scaffolding. A number of possibly ridiculous results have been suggested in argument which may arise from our decision. That may be so or not, but during the year and a quarter in which I have been called upon to construe the Act I have come across some rather curious results arising from the language used in the Act. Our duty is to construe the Act. For these reasons I think that there was evidence that this house was being constructed by means of a scaffolding, and that therefore the appeal should be dismissed.

RIGBY, L.J.—I am of the same opinion. In construing the Act we are not, in my opinion, at liberty to confine the term "scaffolding" to that which is the most general form of scaffolding. A structure, whether it is a usual or an unusual arrangement, may be a scaffolding. Supposing that a building over thirty feet in height is being constructed, and on each side of the site there is a wall, of which the builder has the control. If, instead of going to the expense of putting up poles, the builder fixes planks across from one wall to the other, that may be a scaffolding within the meaning of the Act, although no poles are used. The Notice of Accidents Act, 1894, seems to show why the provision as to the height of the building and as to the scaffolding was inserted in the Workmen's Compensation Act, 1897. Certain employments mentioned in the schedule to the Act of 1894 are brought within that Act, and amongst them are the "construction or repair by means of a scaffolding of any building which exceeds thirty feet in height, or use or working of any such building in which more than twenty persons, not being domestic servants, are employed for wages." That seems to me to be quite an arbitrary enactment. I cannot say why that should be laid down as a condition of the necessity of giving notice of an accident, unless as a rough test of the importance of the work. I cannot say that the condition as to the construction being by means of a scaffolding is anything more than a rough test of the importance of the building. We have already held in *Hoddinott* v. *Newton, Chambers, & Co.* that it matters not whether the scaffolding is inside or outside the building, nor whether the accident happens by reason of the existence of the scaffolding or not. I apprehend that if a man were injured by a workman letting fall a load of bricks, the case would come within the Act, though the injured man was not on the scaffolding at all. I agree with my lord that the county court judge was justified in finding that the trestles and planks constituted a scaffolding within the meaning of the Act.

COLLINS, L.J.—I regret that I am unable to agree with my brethren. I could not agree with them without going back upon what I said in *Hoddinott* v. *Newton, Chambers, & Co.* Having carefully reconsidered the question, I adhere to what I said in that case, and it is not necessary to repeat it. The only safe rule is to give the word "scaffolding" its ordinary popular meaning. The word must be read with its context, and when so read the ordinary popular meaning is the only natural meaning to be given to it. I cannot think that the arrangement of two trestles in a room with a board laid across the top is a scaffolding within the meaning of the section. I do not think that any ordinary uninstructed person would call it a scaffolding. Certainly I do not think that such a person would call it a scaffolding by means of which a building was being constructed or repaired. The connection in which the word scaffolding occurs in the section points to something in the nature of a scaffolding consisting of poles and supports used for the construction or repair of a building. I do not deny that such a scaffolding may be inside as well as outside the house. To my mind it is not a question of pure fact. I think the court must accept the responsibility of giving some guidance upon the

point, without at the same time defining the exact legal meaning of the word scaffolding. In *Hoddinott* v. *Newton, Chambers & Co.* I attempted to state the direction which a judge should give to a jury, if there were a jury in such a case, as to whether a particular structure was or was not a scaffolding. I venture to claim that my view has the support of authority. In *Wood* v. *Walsh & Sons* there was a ladder used for the outside painting of a house, and on one of the rungs of the ladder was tied a board, the other end of which rested upon a window-sill. It was contended that that arrangement was a scaffolding within the Act. I may say that if the trestles and boards in the present case are a scaffolding, I cannot see why the arrangement of ladder and plank in that case was not a scaffolding. In that case A. L. Smith, L.J., said: "Is a ladder a 'scaffolding'? The question has only to be put in order to be answered, for no man in his senses who wanted his house repaired by means of a ladder would say that he wanted it done by means of a scaffolding; if he wanted scaffolding used he would say so. In my judgment this case does not come within the section at all. It has been contended that the attachment of a plank to a rung of the ladder made it a scaffolding; that however is a question of fact, and the arbitrator found that it did not, and I agree with him." In *Hoddinott* v. *Newton, Chambers, & Co.* there was an arrangement of scaffold boards resting on ledgers which were secured to the iron columns and supported in the middle by trestles. A. L. Smith, L.J., thought that there was evidence which entitled the county court judge to find that the structure was a scaffolding, though it was unnecessary to decide the point. I was of opinion that it was not a scaffolding, and I think that Romer, L.J., took my view, because he said that "in construing the language as to the height of the building, regard must be had to the words 'construction,' 'repair,' and 'scaffolding'; they should not be considered separately, but together, for they have a mutual bearing and effect upon each other." That was not a decision as to whether the arrangement in that case was a scaffolding, but the case is of importance upon this point as affording some guidance in the future. The result of holding the arrangement of trestles and boards in the present case to be a scaffolding would have some strange results which the Legislature could hardly have contemplated. It is admitted that the decision would cover the case of a workman employed on the building away from the scaffolding. The danger incurred in such a case would not arise from working on the scaffolding or from something falling off the scaffolding. It must follow that if the house was completed with the exception of the inside plastering, and if there was only one plasterer standing on a board placed on two trestles in a room finishing the plastering work, and another workman stumbled when coming upstairs and injured himself the case would come within the Act. Such a result could not have been contemplated. In my opinion the words "a scaffolding" means one system of scaffolding capable of being used for the construction or repair of the building as a whole.

A. L. SMITH, L.J.—I desire to say that in *Hoddinott* v. *Newton, Chambers, & Co.* I did not hold that the structure was a scaffolding within the meaning of the Act. I merely held that there was evidence which entitled the county court judge to find that the structure was a scaffolding. I said: "I cannot hold that there was no evidence to support the finding that it was a scaffolding." So also in *Wood* v. *Walsh & Sons* I merely refused to interfere with the finding of the county court judge.

*Appeal dismissed.*

Solicitors for the appellant, *W. Hurd & Son*, for *H. A. Child*, Leeds.

Solicitor for the respondent, *G. Trenam*, for *Milling & Dodgson*, Leeds.

---

Appeal.
(A. L. Smith, Rigby, and Collins, L.JJ.) Jan. 20.

HADDOCK v. HUMPHREYS. (a.)

*Master and servant—Employment—Accident—Factory—Wharf—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23.

*A workman was killed by an accident while he was engaged in removing some timber from a place where it was stored on the premises of the Mersey Docks and Harbour Board. By the side of the Canada Dock there was a large open space stretching back from the water for a distance of 150 yards, and on the further side of this space there was a road running parallel with the water. Beyond the road there was a row of offices, to which were attached timber yards. The offices and yards were leased to timber merchants. The timber in question was stored in one of these yards.*

*Held* (Rigby, L.J., *dissenting*), *that the place where the timber was stored was not a wharf so as to come, by virtue of section* 23 *of the Factory and Workshop Act*, 1895, *within the definition of "factory" contained in section* 7 *of the Workmen's Compensation Act*, 1897.

Appeal from an award of the judge of the Lancashire County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who had been killed by an accident in the course of his employment. The employers were a firm of carters.

The employers had undertaken with a firm of builders to fetch a log of timber from a place where it was stored on the premises of the Mersey Docks and Harbour Board. The log was one of a pile of logs which were stacked in tiers.

The workman was assisting in the removal of the log by the means of a crane worked by hand for the purpose of placing it on one of the employers' carts when he met with the accident, which resulted in his death.

The place where the logs were stored was a timber-yard, which was distant about 150 yards from the water of the Canada Dock, at Bootle. Alongside the water's edge was a large space called the timber quay, which stretched back from the water for a distance of nearly 150 yards, and beyond this, running parallel with the water's edge, was a roadway, which was used by the public during the daytime as a cart-road. On the further side of this roadway was a row of offices, to each of which was attached a yard. These offices and yards were leased by the Mersey Docks and Harbour Board to various timber merchants. One of these yards was the *locus in quo*. The area comprising the yards was enclosed by a wall and gates. On the further side of this area ran a highway called Regent's-road, and beyond this again there were similar offices and yards.

The question was whether the place where the timber was stored was a wharf, so as to come by virtue of section 23 of the Factory and Workshop Act,

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

1895, within the definition of "factory" contained in section 7 of the Workmen's Compensation Act, 1897.

The county court judge held that the *locus in quo* was not a wharf, and made an award in favour of the employers.

The applicant appealed.

*Blackwood Wright*, for the applicant.—The county court judge failed to distinguish between a "wharf" and a "quay," though section 23 of the Factory and Workshop Act, 1895, speaks of "every dock, wharf, quay, and warehouse," and a distinct meaning ought to be given to each of those words. A quay is a place for discharging cargo. A wharf is an uncovered place for storing cargo. This timber yard was a wharf; if it had been covered with a roof it would have been a warehouse. The word "wharf" in this section ought to be construed with some regard to its original meaning, and not as though this section were one relating merely to shipping matters.

*Joseph Walton, Q.C.*, and *Leslie Scott*, for the employers.—The word "wharf" in this section ought to be construed according to its ordinary and popular meaning—viz., as a place alongside water used for unloading. A quay is a species of wharf; otherwise there is no difference between wharf and quay. A wharf may be used as a store, but a place used as a store need not be a wharf.

A. L. SMITH, L.J.—The question is whether the *locus in quo* is a wharf or a timber yard. By the side of the Canada Dock, at Liverpool, there is a large open space stretching back from the water for a distance of 150 yards, and on the further side of this open space there is a road running parallel with the water. That this space of 150 yards may be a wharf or quay I do not doubt. And if the deceased man's employment at the time of the accident had been there, the case might have come within the Act. But the accident did not happen there. On the other side of the road there is a line of offices, and at the back of them there is a wall with gates. Behind the wall is a piece of land which is not built upon, and which is enclosed by the wall, and beyond that is a street. The enclosed piece of land is leased in plots by the Mersey Docks and Harbour Board to different timber merchants, to be used by them as timber yards, one of these plots being the *locus in quo*. Water-borne timber is carried across the quay or wharf, and then taken through a gate into one or other of the timber yards, and there stored. The question is whether one of these plots of the enclosed piece of land is a wharf or simply a timber yard. The county court judge said that it was a timber yard and not a wharf. In my opinion it is not a wharf within the Act. I think that the word "wharf" implies some connection with water, and does not include a yard which is cut off from a quay in the way in which this timber yard is cut off. If it did, then I do not see why it should not also include the yards on the other side of the street. I therefore think that the appeal must be dismissed.

RIGBY, L.J.—I cannot arrive at the same conclusion as my learned brethren. I think that the word "wharf" does not necessarily imply anything to do with water. It is derived from an Anglo-Saxon word, and there are similar words in cognate languages. I agree that, according to the dictionary meaning of the word, it does appear that "wharf" is not generally used except in some kind of connection with water, and here it is used under the same heading as "dock." But it seems to me that the proper meaning of the word is a place for the reception of goods, and not specially for the unloading of goods. The place where this timber was stored is a yard used for the reception of timber, and I think we have here all that is required to satisfy the meaning of the word "wharf."

COLLINS, L.J.—I think the county court judge was right. In my opinion, the only safe standard to adopt in giving an interpretation to the words used in section 23 of the Factory and Workshop Act, 1895, is to give to each of them its ordinary popular meaning. Any attempt to refine on their meanings seems to me likely to be fraught with difficulty. In a recent case we put its popular meaning on the word "dock" (*Hennessey* v. *McCabe*, *ante*, p. 231), and so here I think we ought to put its popular meaning on the word "wharf." In my opinion the *locus in quo* in the present case could not properly be described as a wharf at all. It is contiguous to a wharf where goods are continually in transit, but it is itself a place where an individual timber merchant is entitled to store timber. I do not doubt that if it had been roofed over it would have been a warehouse, but it is not a wharf. I think that in popular language a wharf is a place contiguous to water, over which goods are passed in the process of loading or unloading. In this case there is a large open space which is used for that purpose. It seems to me that before a place can properly be called a wharf it must be shown to be a place of such a sort that goods on it must necessarily be in transit; there must be some limit to the time during which goods are allowed to remain there. If contiguous to the wharf there is a place set apart for the private use of some person using the wharf, that place is not a wharf. The place in question in this case is kept by a particular person, who exercises exclusive rights over it, and it is not a wharf in the popular sense of the term.

*Appeal dismissed.*

Solicitor for the applicant, *W. H. Quilliam.*

Solicitor for the employers, *J. R. Watkins.*

---

From Prob. Div. & Adm. Div. (A. L. Smith, Rigby, and Collins, L.JJ.) — Jan. 11.

"THE CAWDOR." (*a*.)

*Admiralty—Practice—Ship—Action of restraint—Bail bond for safe return of vessel—Forfeiture—Discretion of court.*

*A bail bond given in an action of restraint was conditioned for the safe return of the vessel to the port of Liverpool. On the termination of the voyage the vessel did not return to Liverpool, but put into the port of Dundee, outside the jurisdiction of the English Admiralty Court, from whence she was sent under a charter-party on a fresh voyage.*

*On the application of the plaintiff*, Barnes, J., *made an order declaring the bond to be forfeited.*

*Held, that the order was right.*

Appeal from an order made by Barnes, J., on a motion in an action of restraint.

The plaintiff, W. E. A. Graham, was the owner of eleven sixty-fourth shares in the sailing ship *Cawdor*, which in August, 1898, was in the port of Newcastle-upon-Tyne and was about to be sent by her managing owners to the port of Hartlepool and thence on a voyage to Calcutta.

The indorsement on the writ in the action was as follows: "The plaintiff, as owner of eleven sixty-

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

fourth shares of the sailing ship or vessel *Cawdor*, of the port of Liverpool, being dissatisfied with the management of the said ship by his co-owners, claims that his co-owners shall give bail in the sum of £2,750, the value of his shares, for the safe return of the said ship to the port to which she belongs—namely, to the port of Liverpool."

On the 1st of September, 1898, the defendants put in a bail bond in the sum of £1,718 15s., that sum being the value of the plaintiff's shares after appraisement of the vessel by the marshal of the court. The bail bond was executed by two sureties, and was to the following effect: "Whereas an action of restraint has been commenced in the High Court of Justice on behalf of W. E. A. Graham against the owners of *The Cawdor* other than himself, now, therefore, we, the undersigned, hereby jointly and severally submit ourselves to the jurisdiction of the said court, and consent that if *The Cawdor* shall not safely return to the port of Liverpool, and the owners of *The Cawdor*, other than W. E. A. Graham, shall not in such case pay to the plaintiff the sum of £1,718 15s., execution may issue forth against us for a sum not exceeding £1,718 15s."

*The Cawdor* proceeded on her intended voyage, and on her return to the United Kingdom in August, 1899, she went into the port of Dundee, outside the jurisdiction of the English Admiralty Court, and, while she was there, she was chartered by her managing owners for a fresh voyage to New York, there to load for Melbourne and Sydney.

The plaintiff thereupon applied to the court that the bond given in the action might be pronounced to be forfeited, and that the amount of the bond might be paid into court if *The Cawdor* did not within a month return to Liverpool, or, alternatively, that, on delivery up of the bond to be cancelled, the plaintiff might be allowed to participate in the future working of the vessel.

Barnes, J., ordered that the bail bond be forfeited, and that the sum of £1,718 15s. be paid into court within ten days.

The defendants appealed, and it was contended on their behalf that the court would not order such a bail bond to be forfeited except in the event of the vessel being lost.

*Carver, Q.C.*, and *Aspinall, Q.C.*, for the defendants.

*Laing, Q.C.*, and *Balloch*, for the plaintiff.

The following cases were cited: *Lambert* v. *Aeretree*, 1 Ld. Raym. 223; *The Margaret*, 2 Hagg. Adm. 275; *The Regalia*, 51 L. T. Rep. 904; *The Vivienne*, 36 W. R. 110, 12 P. D. 185.

A. L. SMITH, L.J.—In my opinion the bail bond is a bond which has been given to the court to be enforced if the court thinks right. The effect of the bond is not that in no case can the sureties be called upon to pay the amount into court unless the ship be lost. I think the court has jurisdiction to consider whether in the circumstances of the case the enforcement of the bond would be right as between the parties. By the terms of the bond execution may issue against the sureties if the vessel shall not return to Liverpool. The bond then is given to the court for the safe return of the vessel to Liverpool, and it is to be enforced as and when the judge thinks fit. The vessel did not return to Liverpool, but to the port of Dundee, which is outside the jurisdiction of the English Admiralty Court, and from that port she was sent off on a new voyage to New York. The plaintiff thereupon applied that the bond might be forfeited, or that he might be allowed to participate in the future working of the vessel. The learned judge made an order in the terms of the first alternative. I think that he had jurisdiction to make the order, and that the order is right. I do not think that the cases which have been cited are any authority to the contrary. The argument in support of the appeal comes to this, that the majority-owners ought to be allowed to send the vessel on voyages all over the world until they think fit to bring her back, and in the meantime—that is, perhaps, for years—to prevent the plaintiff from participating in the working of the vessel. I cannot think that that is right. The appeal must be dismissed.

RIGBY and COLLINS, L.JJ., concurred.

*Appeal dismissed.*

Solicitor for the plaintiff, *Charles E. Harvey.*

Solicitors for the defendants, *Pritchard & Sons*, for *Hill, Dickinson, & Co.*, Liverpool.

---

From Q. B. Div.
(A. L. Smith, Collins, and Vaughan Williams, L.JJ.) Dec. 20.

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL. (a.)

*Inland revenue—Income tax—Deduction of tax from interest or annuities—Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-section* 3.

*The London County Council, when they paid the dividends due on Metropolitan Consolidated Stock, deducted a sum therefrom at the rate of 8d. in the pound in respect of income tax, in accordance with section* 24, *sub-section* 3, *of the Customs and Inland Revenue Act*, 1888. *The dividends were paid out of the Consolidated Loans Fund. The Consolidated Loans Fund was made up* (inter alia) *of rents received by the county council from their tenants, interest received by the county council from local authorities in respect of loans made by the county council, and money raised by rates. The Consolidated Loans Fund was applicable, first, to the payment of the said dividends, and then to the redemption of Consolidated Stock and the payment of various debts and liabilities. The county council claimed to be entitled to retain, as against the Crown, the amount deducted as income tax in respect of so much of the dividends as they stated to have been paid out of rents from tenants and interest from local authorities.*

*Held, first, that the county council were not entitled to retain any income tax in respect of so much of the dividends as they stated to have been paid out of rents; secondly, that they were entitled to retain the tax on so much only of the dividends as was equal to that rateable proportion of the interest received from local authorities which was applicable to the payment of the dividends.*

Appeal from a judgment of a Divisional Court (Day and Lawrance, JJ.) on the hearing of an information by the Attorney-General against the London County Council claiming an order for the payment of certain sums in respect of income tax under Schedule D: [1899] 2 Q. B. 226.

The question was to what extent the London County Council were entitled to retain the sums deducted by them as income tax, when they paid dividends to the holders of Metropolitan Stock.

By the Metropolitan Board of Works (Loans) Act, 1869, s. 4, it was enacted that the board might create capital stock to be called the Metropolitan Consolidated Stock.

By section 5 the sums required for the redemption of the Consolidated Stock and the dividends thereon

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

were to be charged indifferently on the whole of the land, rents, and property belonging to the board, and on all moneys which could be raised by rate.

Section 22 provided for the creation of a metropolitan consolidated rate.

Section 26 provided for the establishment of a Metropolitan Consolidated Loans Fund.

Section 27 provided that the board should carry to the Consolidated Loans Fund the moneys following: (1) All moneys, whether in the nature of capital or otherwise, arising from the sale, lease, or other disposition of lands, rents, and property belonging to the board; (4) such greater or less annual sum as the Treasury might from time to time approve as being in their opinion necessary in order to pay the dividends on and to redeem all the Consolidated Stock in sixty years from the date of the creation thereof.

By section 28 the board was to apply the consolidated Loans Fund according to such regulation as might be approved by the Treasury.

The defendant council succeeded the said board on the 1st of April, 1889.

Section 15 of the London Council (Money) Act, 1889, repealed section 28 of the Act of 1869, and provided for the Consolidated Loans Fund being applied in payment of the dividends on Consolidated Stock and then in purchasing and redeeming Consolidated Stock and in payment of certain other liabilities.

By various Acts of Parliament the Metropoitan Board and the defendant council were empowered to lend to divers local authorities sums of money, and by the said Acts it was directed that the interest paid and principal repaid by the local authorities in respect of such loans should be carried to the Consolidated Loans Fund.

The total sum paid by the defendant council by way of dividends and interest on loans made to the said board and the defendant council during the year the 1st of April, 1897, to the 31st of March, 1898, was £1,142,884 6s. 9d., the income tax on which at 8d. in the pound amounted to £38,096 2s. 10d.

The defendant council, in paying the said dividends, deducted and retained the income tax payable thereon under Schedule D.

The defendants had paid certain sums to her Majesty, but had left a balance of £19,963 9s. 3d. unpaid.

During the half-year the 1st of April, 1898, to the 30th of September, 1898, the defendant council paid by way of dividends and interest on loans made to the said board and the defendant council £587,058 3s. 8d., the income tax on which under Schedule D at 8d. in the pound amounted to £19,568 10s. 1d.

The defendants had paid to her Majesty certain sums, leaving a balance of £11,035 3s. 8d. unpaid.

In the information the Attorney-General charged that all the sums deducted as aforesaid were payable to and should be accounted for to her Majesty by the defendant council.

In argument, however, he gave up the claim in respect of a rateable proportion of so much money as was repayment to the county council of the interest on loans made to local authorities who had deducted income tax under Schedule D before paying the county council.

By section 11 of the information the Attorney-General alleged, by way of alternative, as follows: That the Consolidated Loans Fund has only one constituent portion which is chargeable to the income tax under Schedule D of the Income Tax Acts—viz., the said interest paid to the defendant council by local authorities on the loans made to them, and no other constituent so chargeable, and that such Consolidated Loans Fund is by law applicable, in the first place, to the payment of dividends on Consolidated Stock and loans to the defendant council, and then in purchasing and redeeming Consolidated Stock and the payment of the other matters enumerated in section 15 of the said Act of 1889; that a rateable proportion only, and no more, of the said interest payable by the said local authorities is applicable and applied to the payment of dividends on the said Consolidated Stock and loans to the defendant council; and that, therefore, no part of the dividends paid by the defendant council, excepting only an amount thereof equal to the said rateable proportion of the said interest, is payable out of profits or gains brought into charge to the income tax under Schedule D, and that the defendant council ought to deduct and to account to her Majesty for the whole of the income tax on the said dividends, excepting only the tax on the amount equal to the said rateable proportion of the said interest.

The defendants, in answer to interrogatories, stated that they had paid the sums mentioned in the information by way of dividends on Consolidated Stock partly out of rents and profits of land charged with income tax under Schedule A, partly out of interest on loans to local authorities, and other interest or annual payments charged with income tax under Schedule D, and partly out of sums raised by rate.

They contended that, in so far as the said dividends were paid out of rents and profits of land, or out of interest or other payments already charged with income tax either by way of deduction as and when they were received or otherwise, the said council were entitled to deduct and retain income tax on dividends paid out of such rents and profits, interest, and payments already charged. They claimed to be entitled to do this by virtue of the Income Tax Acts, 1842 and 1853, and the Customs and Inland Revenue Act, 1888. By section 24, sub-section 3, of the Customs and Inland Revenue Act, 1888, it is enacted as follows: "Upon payment of any interest of money or annuities charged with income tax under Schedule D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to her Majesty, and recoverable as such accordingly; and the provision contained in section 8 of 13 & 14 Vict. c. 97, now in force in relation to money in the hands of any person for legacy duty, shall apply to money deducted by any person in respect of income tax."

The Divisional Court gave judgment for the Crown, holding that, so far as the sum paid by the county council for interest consisted of rents received by them, they were not entitled to retain any of the deducted income tax, and that, so far as it consisted of interest paid to them by other authorities, they were bound to account to the Crown for the deducted income tax in accordance with section 11 of the information.

The defendants appealed.

*Sir Edward Clarke, Q.C., Bosanquet, Q.C.,* and *Ryde,* for the appellants.

*Sir R. E. Webster, A.G.,* and *Danckwerts,* for the Crown.

*Cur. adv. vult.*

Dec. 20.—A. L. SMITH, L.J., read the following

judgment: Two questions arise in this case—the one as to the true construction of section 24 (3) of the Customs and Inland Revenue Act, 1888; and the other, what, upon the facts proved when applied to this section, is the account to be rendered by the London County Council to the Crown. The London County Council has a stock, which is called Consolidated Stock, upon which they pay dividends to the stockholders amounting in round figures to the sum of 1,000,000 of money per annum. By section 24 (3) of the Act of 1888, it is provided that, before the London County Council pays this annual dividend to their stockholders, the council shall deduct the income tax payable thereon under Schedule D—*i.e.*, shall deduct one million of eightpences and unless excused (about which hereafter) the council is bound to render an account to the Crown of these eightpences, which it has thus deducted, and for this amount the council is made debtor to the Crown. For the payment of these dividends and for the payment of the other expenditure of the London County Council the council has a fund, called the Consolidated Loans Fund, which is supplemented by the many receipts of moneys which fall in to the London County Council. These receipts consist, amongst others, of rents, of interest upon loans, of profits made by borrowing and lending money, of profits made by purchasing and selling property, and of money raised by the levy of rates. These receipts are placed together in one fund, which forms the Consolidated Loans Fund. The rents which are received by the London County Council, and which are paid into this fund, amount in round figures to the sum of £100,000 per annum. The interest upon loans which are received by the London County Council, and which are paid into this fund, amounts in round figures to the sum of £500,000 per annum, and the total receipts paid into this fund, including the two sums above mentioned, amount to the sum of about £2,600,000 per annum. The first question is whether the rents of £100,000 per annum thus received by the London County Council, and which have had the income tax under Schedule A of the Income Tax Act deducted by the tenants before these rents were paid to the county council, fall within the provisions of section 24 of the Act of 1888; and this depends on the true construction of that section. By section 23 of the Act of 1888, under the heading "Income Tax," it is enacted that "There shall be collected and paid . . . in respect of all property, profits, and gains, the amounts therein prescribed chargeable under Schedules A, B, C, D, or E." Section 24, so far as it is material, is as follows: "Upon payment of any interest of money charged with income tax under Schedule D"—*i.e.*, upon payment of the annual dividends of £1,000,000 per annum accruing due upon the Consolidated Stock to the stockholders—"the person"—*i.e.*, the London County Council—"by whom such interest shall be paid, shall deduct thereout the rate of income tax in force at the time of such payment"—*i.e.*, income tax payable under Schedule D—"and shall forthwith render an account thereof to the Crown, and for the amount so deducted the person rendering the account shall be a debtor to the Crown." What is the meaning of this? It seems to me plain that where a person pays interest or a dividend which is liable to income tax under Schedule D, that income tax—*i.e.*, the income tax under Schedule D—is to be deducted by the person paying that interest or dividend, coupled with the obligation of rendering an account to the Crown of the amount so deducted, and for which amount the person deducting that tax becomes a debtor to the Crown. If there were no exception in this action, which there is, the London County Council in my judgment would have to render an account to the Crown of the million eightpences which it had deducted before it paid the million of dividend to its stockholders, which deduction would be the income tax payable under Schedule D and has nothing whatever to do with income tax under Schedule A. But there is an exception, and what is it? It is that the person to account to the Crown is not to deduct the income tax payable under Schedule D, and therefore is excused from rendering an account as to this to the Crown, if the dividend paid to the stockholders is paid out of "profits and gains" already "charged to such tax." What tax? Why, charged to the income tax under Schedule D. This is my reading of this section 24, and in my opinion this section, as I have said, has nothing whatever to do with income tax payable under Schedule A of the Income Tax Acts, whereas the county council argues that it has. It is said by the London County Council that the meaning of section 24 is that the Crown in no case is to get income tax twice over, and that it would do so if income tax upon the £100,000 of rents is not deducted from the account rendered to the Crown; for, say the county council, the tenants, before they pay their rents to the council, have already deducted the income tax under Schedule A, and paid it to the Crown; and, unless the London County Council is allowed to deduct this income tax from the account to be rendered, the Crown will get income tax twice over. As regards income tax under Schedule A this apparently would be so, but where is it enacted in section 24 that it is not to be so? As regards income tax payable under Schedule D it is so enacted; but I am clear that this section does not embrace income tax payable under Schedule A. It is said that we should read section 24 in such a way as to make it apply to income tax under Schedule A; but this I cannot do, for the two taxes—*i.e.*, the tax under Schedule A and the tax under Schedule D—are entirely distinct, excepting that they are both taxes upon income, as are the taxes under the Schedules B, C, and E. The tax under Schedule A is a tax upon the gross annual value of property. The tax under Schedule D is a tax upon "gains and profits," an entirely different tax from the tax under Schedule A. Whether the Legislature should have enacted otherwise is not for me to say. It suffices to say that it has not done so. The first point, therefore, taken by the London County Council—viz., that in the account it is to render to the Crown it may deduct the tax paid under Schedule A on the £100,000 of rents—in my opinion fails, and I pass on to the next question. I have already stated of what the Consolidated Loans Fund is composed. It is obvious that, though there is one component part upon which income tax under Schedule D has been deducted before it was received into the fund, to wit, the tax under Schedule D upon the £500,000 of interest received by the council upon loans made by it, on the others no such deductions have been made; for instance, upon the rents, the profits made by buying and selling property, and upon the rates levied by the council. If the London County Council is to escape rendering an account to the Crown of the million of eightpences which it has deducted from the stockholders, it is for it to prove that the million of money paid to the stockholders has been paid out of money which has already paid income tax under Schedule D. Do they prove this? In my opinion they do not; for it is impossible to say out of what moneys which constitute the Consolidated Loans Fund of £2,600,000 they do pay these dividends of £1,000,000 of money annually to their stockholders, whether partly out of the million of rents which have paid no income tax under Schedule D or partly out of profits made by

borrowing and lending money, or partly out of profits made by purchasing and selling property, or partly out of the rates, none of which have paid income tax under Schedule D. If it is to be presumed that no part of the money received from rates and paid into the loans fund, together with the other receipts, was used to pay the one million of dividends, as Williams, L.J., thinks should be presumed, though it is a mere presumption and in my opinion not proved, what then? The only effect will be that the loans fund, applicable to the payment of the dividends, will stand, not at £2,600,000, but at that sum less the amount received from rates, which will alter somewhat the rateable proportion mentioned in paragraph 11 of the information. But this is not the real point in the case, for what was really contended for by the learned counsel for the London County Council was that the interest of £500,000 paid to the London County Council was not the only sum in the loans fund which had already paid income tax under Schedule D, but that the £100,000 of rent had also paid this tax, so that it came within section 24 of the Act of 1888. This I have held not to be so. In my opinion upon the facts proved paragraph 11 of the information has been established by the Crown. As the £500,000 of interest received by the council will not pay the million of dividends to the stockholders, it is obvious to me that the dividends, in part at any rate, have been paid out of moneys which had not theretofore paid income tax under Schedule D. I have not to decide whether, if the Crown pushed this case to its extreme limit, the London County Council would have to render an account of the whole of the million eightpences it has deducted from its stockholders; for the Crown does not insist upon this, and asks only for an account less such a rateable proportion as the £500,000 of interest received bears to the whole fund. In my judgment the London County Council cannot ask for more, and it is wrong as to this as also upon the construction of section 24 (3) of the Act of 1888. I think, therefore, that this appeal should be dismissed with costs.

COLLINS, L.J., concurred.

VAUGHAN WILLIAMS, L.J., read the following judgment: I agree with the view taken by the other members of the court as to the construction of this very difficult section 24 (3) of 51 & 52 Vict. c. 8, and I think that "such tax" means income tax under Schedule D, and not income tax generally, and that that portion of the income tax which is a charge on rents under Schedule A is not included in the words "paid out of profits or gains," but is rather in the nature of a property tax, but the meaning of the section is by no means clear.

As to the question, what portion of the deduction made by the county council for income tax from dividends paid by the council on stock issued by them in respect of moneys borrowed by them the county council are entitled to retain without accounting to the Crown, by reason of such dividends being paid out of profits or gains brought into charge under Schedule D, my view is that the fact that the principal and interest on the stock is secured by a charge on the entire Consolidated Loans Fund does not prevent the county council in the application of that fund paying the dividends out of any specific portion of the fund out of which it lawfully may be paid. Assume that the fund is derived from four sources—say, (*a*) interest on moneys lent by the county council, (*b*) rents payable to the county council, (*c*) prices of lands sold by the county council, (*d*) moneys coming from the county rate—why should the fact that the principal and interest on the stock issued by the council is charged on a fund made up as above prevent the council in the application of the fund paying the dividends out of constituent item (*a*), in so far as that item is sufficient for the purpose?

It is said that the stockholders to enforce their charge could get a receiver appointed for the whole fund. I do not see that this makes any difference, provided the fund yielded sufficient to pay all the charges in due course. It seems to me, therefore, that it is open to us to consider whether there is any proof that the dividends were in fact paid out of rents or profits already brought into charge—that is to say, in the example taken, out of constituent item (*a*). Now in my judgment if there is any law, regulations, or fact which makes it the duty of the county council in the application of the fund to pay the dividends out of a specific constituent item going to make up that fund, the county council are bound so to apply the fund, unless so to do would be inconsistent with the paramount charge of the stockholders, and in the absence of evidence to the contrary all payments made by the council would be presumed to have been made in accordance with the duty arising on the law, regulation, or fact, as the case may be. This in my judgment would be sufficient proof of payment out of the particular constituent item.

Now, let us see whether we find any law, regulation, or fact governing the application of the Consolidated Loans Fund and making it the duty of the council to pay dividends out of constituent item (*a*) as far as it will go. In the first place we find that the borrowing of money by the county council is controlled and governed by the Metropolitan Board of Works Loans Act, 1869, and that by section 5 of that Act stock created for the purposes of the Act shall be charged indifferently on the whole of the lands, rents, and property belonging to the board, and that all moneys required for the payment of dividends on such stock and for the redemption of such stock—that is to say, the deficiency after taking into account the lands, rents, property, moneys and fund—shall be raised out of the Improvement Fund and Consolidated Rate. The Act goes on to say how the rate shall be raised, and says that every precept shall specify, first, the proportion of the amount named in the precept required for the purpose of paying (*inter alia*) the dividends on and the sums required for the redemption of Consolidated Stock under this Act. An instance of how this is done in practice appears at the end of Lord Welby's letter asking for the sanction of the Treasury for the amounts proposed to be raised by rate in 1897. I am clearly of opinion that we here find a duty binding on the county council not to apply in the payment of dividends that amount which is named in the precept as being required for redemption or the amounts therein mentioned as being required for specified capital payments.

Then we come to section 15 of the Act of 1889, which says that the Consolidated Loans Fund shall be first applied in the payment of dividends and in the redemption of stock, and then in the payment of certain specified debts charged on the fund.

There is nothing in this to make either the dividends or any of the specified payments payable out of one constituent item more than another; but the regulations in force in 1897—under section 15 of the Act of 1889—"with respect to the application" of the Consolidated Loans Fund provide that the account to be kept by the council of the Consolidated Loans Fund shall be divided into two parts, an income account and a capital account. [His lordship read the regulations.] It is plain from these regulations that the dividends must be paid out of the receipts of the income account—that is to say, out of interest received by the council

on loans and rents and other annual income. Besides the dividends there is payable out of these receipts interest and rents and other payments properly chargeable to income; but these are a very small matter. Redemption and other capital payments are to be paid out of the capital account—that is to say, moneys received by the council (except income) applicable to the payment or redemption of debt, including moneys received by realization of temporary investments of capital.

Now, applying these rules of payment, it seems to me that, although paragraph 11 is generally right in principle, it is wrong in so far as it treats the whole Consolidated Loans Fund as the factor to which the amount of the interest payable by the local authorities must bear a rateable proportion. The sum to which the interest payable by the local authorities must bear a rateable proportion is so much of the Consolidated Fund as is properly carried to the receipts of the income account. This may or may not be an important matter when the figures are examined; but it is important as showing that the Attorney-General was right in law in abandoning paragraph 9 of the information, which charged that none of the said dividends are by law payable out of profits or gains brought into charge to the income tax under Schedule D. The suggestion made in argument that the Crown in abandoning paragraph 9 abandoned the strict rights of the Crown seems to me, I am happy to say, quite unnecessary and untenable; for I do not think that anyone would have had the right to make such a concession in favour of the county council or any other subject.

*Appeal dismissed.*

Solicitor for the appellants, *Blaxland.*

Solicitor for the Crown, *Solicitor of Inland Revenue*

## High Court of Justice.

Chan. Div.
North, J. } Nov. 2, 3.

CONSOLIDATED EXPLORATION AND FINANCE CO. *v.* MUSGRAVE. (*a.*)

*Contract — Indemnifying a bail — Illegality — Shares transferred to bail—Innocent transferror.*

*It is just as much contrary to public policy for a third party to indemnify a bail as it is for the prisoner himself to do so.*

Wilson *v.* Strugnell, 7 *Q. B. D.* 548, 30 *W. R. Dig.* 50, *and* Herman *v.* Jeuchner, 33 *W. R.* 606, 15 *Q. B. D.* 561, *considered.*

Action.

The defendant had gone bail for one Jordan, who was charged with fraud in connection with the promotion of a company of T. E. Brinsmead & Sons. In the first instance the defendant had also undertaken to go bail for one Ainsworth, who was charged in connection with the same matter, and in consideration of doing so and in order to be indemnified against any claim which might arise the defendant had agreed with Ainsworth that there should be transferred into the defendant's name 1,500 shares in the London Woollen Co., the defendant undertaking to re-transfer the shares if no claim was made on him. These shares were the property of the plaintiff company, and they had been transferred into the defendant's name under an arrangement come to between Ainsworth and the plaintiff company, by which the plaintiff company should be indemnified against loss in connection with the proceedings pending with reference to the promotion of T. E. Brinsmead & Sons. The consideration for the transfer of the shares to the defendant was stated to be five shillings. Subsequently the defendant became bail for Jordan alone, but otherwise the arrangement held good. Jordan absconded, and the bail was estreated, the defendant being called upon to pay £1,500.

The plaintiff company claimed in this action that the defendant was trustee for the company of the 1,500 shares, and that the shares should be transferred to the company, on the ground that to indemnify a bail was illegal and contrary to public policy.

*Haldane, Q.C.*, and *Kenyon Parker*, for the plaintiff company.—The object of becoming bail is defeated if the bail receives an indemnity, as he is then no longer interested in the production of the prisoner at the proper time. It is indifferent to the bail whether the prisoner appears or not, for if he does not appear the bail suffers no detriment and the bail has no inducement to see that the prisoner does not abscond. The cases show that a prisoner himself cannot indemnify his bail (*Wilson* v. *Strugnell*, 7 Q. B. D. 548, 30 W. R. Dig. 50; *Herman* v. *Jeuchner*, 33 W. R. 606, 15 Q. B. D. 561), and the rule is based on considerations of public policy, and it makes no difference therefore if a third party indemnifies the bail.

*Macnaghten, Q.C.*, and *Cassell.*—The case of a third party indemnifying is different to that of a prisoner himself giving security to the bail; in the former case the person giving security is just as much interested as the bail in seeing that the prisoner surrenders in due course, and therefore considerations of public policy do not arise in that case as they do where the prisoner hands the security to the bail, and nobody is interested any more to see that the prisoner surrenders: *Jones* v. *Orchard*, 3 W. R. 554, 16 C. B. 614. Moreover, in *Cripps* v. *Hartnoll*, 11 W. R. 953, 4 B. & S. 414, the precise point that an indemnity by a third party is illegal might have been taken, but it was not. The text-books limit the rule carefully to the case of the prisoner indemnifying the bail: see Pollock on Contracts, p. 316 of 6th ed.; Leake on Contracts, p. 626 of 3rd ed.

*Stewart Smith*, for London Woollen Co.

*Kenyon Parker* in reply.

NORTH, J., after stating the facts, said: In my opinion this was an illegal bargain. It is said that the cases of *Wilson* v. *Strugnell* and *Herman* v. *Jeuchner* establish that the rule is that the prisoner alone is debarred from giving the bail security, but I think that the rule is wider than that. It is true that there is no authority to be found as to the case of a third person giving security, and that the text-books cited deal with the case of a prisoner giving the security, but they merely state the effect of the two cases of *Wilson* v. *Strugnell* and *Herman* v. *Jeuchner*. As was said by the Master of the Rolls in the later case, "When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced."

Now, what are the duties of a bail? In Peterdorff on Bail, quoted in *Cripps* v. *Hartnoll*, it is stated that "It is essential to the security of the bail that the principal should be compelled to appear at the time and place specified in the recognizance. To

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

enable the bail to effectuate this purpose, they are invested with the same unrestricted authority over the person of the defendant as we have seen is conferred upon them in civil cases. Indeed, in criminal proceedings the power possessed by the bail in obliging the accused to fulfil the terms of the recognizance should be even more unlimited, as by not rendering him they not only forfeit to the public the penalties imposed by law, but perhaps create, in crimes of a flagrant nature, an impossibility of the ends of justice being accomplished. Hence they may seize his person at any time (as on a Sunday) or at any place to carry him to a justice to find new sureties, or be committed in their discharge, and in surrendering the principal they may command the co-operation of the sheriff and any of his officers." Therefore it is seen that the person going bail has to exercise zeal so that he may prevent the accused from disappearing in the interval. Anything which interferes with that duty is illegal. Why should it make any difference that the indemnity is given by a third party and not by the prisoner? I can see none. In either case the public lose the security of the zeal which the bail is supposed to exercise. But then it is said that the third party is as a matter of fact as much interested in the prisoner surrendering as the bail, but the third party cannot do any of the things which the bail is entitled to do to prevent the evasion of the prisoner. That makes the giving of security by a third party to a bail illegal and contrary to public policy.

The learned judge made an order for re-transfer, holding on the facts that the plaintiff company were not participators in the illegality.

Solicitors, *Ralph Raphael; Ashurst Morris, Crisp, & Co.; Nash, Field, & Co.*

---

Chan. Div. }
Stirling, J. } Feb. 7, 13.

*In re* THOMAS.
EVANS *v.* GRIFFITHS. (*a.*)

*Solicitor—Costs—Taxation—Sale by auction in lots—One title—Different purchasers—"Transaction"—Scale charge—Solicitors' Remuneration Act,* 1881 (44 *&* 45 *Vict. c.* 44)—*Construction of General Order, rr.* 1, 7, 8.

*Where real estate is ordered to be sold and is sold by auction in separate lots to different purchasers for prices under* £100, *with one title common to all the lots, the solicitor engaged to carry out the sale is, under rule* 8 *of Schedule I.* (*Part I.*) *of the General Order under the Solicitors' Remuneration Act,* 1881, *entitled to the remuneration of a minimum fee of* £3 *for deducing title and perusing and completing the conveyance in respect of each sale of a lot, each such sale being a "transaction" within the meaning of the rule.*

This was a summons to vary the certificate of the taxing-master.

By an order made in the action on the 12th of November, 1898, liberty was given to the plaintiffs, who were trustees of the testator's will, to sell out of court the residuary real estate of the testator in the cause. Accordingly the plaintiffs put up the real estate for sale by auction on the 24th of January, 1899, in eleven lots. Lots 1 to 6 were sold to a purchaser, P. W., for £1,685 15s., the remaining lots were sold as follows: Lot 7 to T. W. for £28, lot 8 to J. L. (1) for £27, lot 9 to W. G. for £32, lots 10 and 11 to J. L. (2) for £24. The property was freehold, and was held under one title. A separate abstract was delivered to each of the five purchasers. The solicitor of the plaintiffs delivered his bill for deducing title to this property and perusing and completing the conveyances on the basis that the scale of charges established by Schedule I., Part I., to the General Order under the Solicitors' Remuneration Act and the rules annexed thereto were applicable. Rule 8 runs as follows: "Where the prescribed remuneration would, but for this provision, amount to less than £5, the prescribed remuneration shall be £5, except on transactions under £100, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor, or mortgagee is to be £3." In this case the bill delivered by the solicitor claimed under rule 8 a minimum fee of £3 in respect of each of the said last four sales. The master, holding that as the property was all held under one title, the solicitor was not entitled to do more than treat the whole matter as one transaction, first allowed only 30s. in respect of these four sales, and afterwards reduced the allowance to 15s.

*H. W. Loehnis*, for the plaintiffs.—Rule 8 is intended to regard the sale of each lot as a separate "transaction," each such transaction being the passing of an estate over to a purchaser: see *dicta* of Pollock, B., and Hawkins, J., in *In re Onward Building Society*, 41 W. R. 107, [1893] 1 Q. B. 16. *Cholditch* v. *Jones*, 44 W. R. 124, [1896] 1 Ch. 42; *In re Margetts*, 44 W. R. 462, [1896] 2 Ch. 263; *In re Lacey & Son*, 32 W. R. 233, 25 Ch. D. 301, also referred to.

*W. L. Richards*, for a beneficiary under the will.—The solicitor was engaged to do only one "transaction"—viz., a sale by auction ordered by the court within the meaning of the word "transaction," as used in rules 8 and 12 of the Solicitors' Remuneration Act. Where there is only one title, though the words of the rules are wide, a limited construction should be given to them. Regard should be had to the work done by the solicitor: *Welby* v. *Still*, [1895] 1 Ch. 524, 43 W. R. Dig. 176.

*Cur. adv. vult.*

STIRLING, J., after stating the facts, continued: By his bill the solicitor claimed under the 8th of the rules annexed to the schedule a minimum fee of £3 in respect of each of the sales to the four last-named purchasers. The taxing-master held that rule 8 did not apply, and allowed by his certificate 30s. in respect of these four sales; he afterwards amended his certificate and allowed only 15s. Now, rule 1 [which his lordship read] applies to all sales by auction in lots, whether the property is held under one title or not, except only where in the former case the same purchaser buys several lots and takes one conveyance and only one abstract is delivered. The exception applies to the sale of lots 10 and 11 to J. L. (2), but no further. Consequently the commission is chargeable on each lot sold to a different purchaser, and the master has so held. He has applied rule 7 [which his lordship here read] in allowing 15s. in respect of each of the four sales, but he refused to apply rule 8, which is that relied on by the solicitor, on the ground that the "transaction" to which the rule refers was in this case the sale of the whole property referred to in the order of 1898. It was contended on behalf of the solicitor that each of the five sales was a separate transaction within the meaning of rule 8. The question which I have to decide is one of construction of the rules, and little guidance is to be gained from the consideration that in a particular case or class of cases the remuneration provided may seem to be excessive: Chitty, J., in *In re Field*, 33 W. R. 553, 29 Ch. D. 608 (at p. 612), makes observa-

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

tions which apply with some force to rule 1 of the General Order. This rule applies to all sales by auction in lots, whether all the lots are held under the same title or whether each lot is held under a separate title. The labour of deducing title in the former case may often, perhaps most often, be less than in the latter; still, cases might occur where the remuneration at the minimum rate in respect of a large number of lots at a price under £50 would be inadequate. The scale of remuneration presumably has been fixed so as roughly to strike a just average in the different cases which may occur. Rule 8 speaks of "transactions under £100." "Transaction" there means the transaction of some piece of business. Whose business is it? The "£100" spoken of is obviously not a sum with which the solicitor is concerned, but one which concerns the person who employs him; the business, therefore, is the business of the client. Further, it must be a piece of business to which the rule is applicable, and the title of this schedule shows that the rule is applicable to sales, purchases, or mortgages. For the present purpose, therefore, the rule may be read as if the word "sales" were substituted for the equally compendious term "transaction." This is confirmed by a note annexed to the schedule and by the words of the rule itself, which speaks of "prescribed remuneration." What is the prescribed remuneration in the present case? It is that spoken of in rule 1 as commission for deducing title, &c., on a sale by auction, and is thereby made chargeable on each lot of the property sold. If rule 1 be read in connection with rule 8, modified in the way I have just mentioned, the natural meaning of the sales referred to in it is sales of the separate lots. The object of rule 8 appears to be to prevent injustice being done to a solicitor in cases where the sum in respect of which his remuneration is payable is small; and that is a matter just as necessary to be provided for in cases where rule 1 applies as where it does not. If, as the framer of the rules must have considered, it was right that solicitors should be remunerated for deducing title and perusing and completing conveyance on a sale by auction in lots by giving them commission chargeable on each lot separately, it seems reasonable that they should be protected against insufficient remuneration in cases where the price for each lot might be small. I therefore come to the conclusion that on the construction of the rule the contention of the solicitor is well founded. No one of the cases cited to me seems directly in point, but they seem to support the view which I have taken. The summons must be allowed.

Solicitors, *Greig, Meikle, & Briggs*, for *Evans & Thomas*, Llandyssul; *Fielder & Fielder*, for *W. Hughes Jones*, Aberystwyth.

---

Chan. Div.
Byrne, J. } Jan. 23.

*In re* GOSLING.
GOSLING *v.* SMITH. (*a.*)

*Charity—Will—Gift limited to old and worn-out clerks of firm—Amalgamation of firms.*

*A gift to form a fund for the purpose of pensioning off the "old and worn-out clerks" of a firm is a good charitable bequest, and the court will direct a scheme for its administration.*

Summons.

This was a summons to determine whether a gift in the second codicil to the will of Bennett Gosling, deceased, of certain Consolidated 3 per Cent. Annuities standing in the names of the testator and his brother, R. Gosling, in order to form a fund to be called the "superannuation fund" for the purpose of pensioning off the old and worn-out clerks of the firm of Goslings & Sharpe, was a good charitable gift; and secondly, whether if such gift were a good charitable gift, a scheme ought to be settled for the administration of the fund, or whether such fund ought to be applied *cy-près* for charitable purposes.

The facts of the case were as follow:

By a second codicil dated the 18th of October, 1849, to his will, which will was executed the 8th of March, 1844, Bennett Gosling, of the City of London, gave and bequeathed the sum of £1,890 6s. 4d. in Consolidated 3 per Cent. Annuities, standing at that time in his own and in his brother Robert Gosling's joint names, and representing the produce of various sums of money invested by himself at different times in the joint names of his said brother and himself; and testator directed that his executors should cause the same to be invested in trustees' names to be fixed upon by the partners in the firm of Goslings & Sharpe at the time of his death, and that the same should be invested in such trustees' names in some of the Parliamentary stocks or funds of Great Britain, in order to form a fund to be called the "superannuation fund" for the purpose of pensioning off the old and worn-out clerks of the firm of Goslings & Sharpe, and the testator trusted that the partners of the said firm would, in consideration of such bequest, set apart a further sum in order that a beginning might be made for forming such a fund. The testator died on the 12th of May, 1855, and the said will was duly proved on the 23rd of June, 1855. At the date of the hearing of the summons the fund had been increased by additional gifts and accumulations of dividends to £5,567 India 3 per Cent. Stock and a sum of cash. In March, 1896, the firm of Goslings & Sharpe was amalgamated with the firm of Barclay & Co. There was at the time surviving one clerk who had been a servant of the firm in the lifetime of Bennett Gosling. In consequence of the amalgamation, difficulties had arisen as to the proper distribution of the fund, which led to the present proceedings.

*Walters*, for the trustees.

*Howard Wright*, for the residuary legatee.—This is not a good charitable gift. There is no public element in the gift; and there is nothing in it which necessarily involves the relief of suffering: *In re Clark's Trusts*, 24 W. R. 233, 1 Ch. D. 497; *Carne* v. *Long*, 8 W. R. 570, 2 De G. F. & J. 275; *In re Buck*, 45 W. R. 106, [1896] 2 Ch. 727; *Cunnack* v. *Edwards*, 45 W. R. 99, [1896] 2 Ch. 679; *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] 1 A. C. 531, 40 W. R. Dig. 217.

*Rowden, Q.C.*, and *MacSwinney*, for the clerks in the firm at the date of amalgamation.—The gift is not charitable, as it is in no way of a public character, nor for the benefit of the public: *In re Foveaux*, 43 W. R. 661, [1895] 2 Ch. 501; *Attorney-General* v. *Haberdashers Co.*, 1 My. & K. 420.

*Methold* and *Hall Hall*, for the partners in the firm interested at the date of death and other parties.

*Mulligan, Q.C.*, and *Frank Russell*, for the clerk in the firm at the date of the testator's death.—At the date of the testator's death there were certain partners in the firm, and the partnership lasted for their lives and for the lives of the survivor. There could be no perpetuity here. The object was a gift to the clerks of this partnership: *Cunnack* v. *Edwards*.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

*Ingle Joyce*, for the Attorney-General.—It is not necessary to constitute a charity that it should be a gift for the public at large. This is either a charity, or it is a gift bad for perpetuity or as too vaguely expressed. [He referred to the preamble to the statute 43 Eliz. c. 4; *Morice* v. *Bishop of Durham*, 9 Ves. 399, 10 *ib.* 522.] As to the class of persons for whom gift was intended, the expression pensioning off shows that it can have no reference to rich clerks. The persons dispensing the gift must have regard to the circumstances of the recipient: *In re Wall, Pomeroy* v. *Willway*, 37 W. R. 779, 42 Ch. D. 510. It is a class of the public whom it is intended to relieve. If this fund was administered as a charity preference would be given to any deserving old clerk: *Attorney-General* v. *Duke of Northumberland*, 28 W. R. 586; 7 Ch. D. 745; *In re Slevin*, 39 W. R. 538, [1891] 2 Ch. 236.

*Rowden, Q.C.*, in reply.—To establish a charity it must be shown that there is poverty and there must be a geographical area which it affects: *Browne* v. *King*, 17 L. R. Ir. 448. [*Mulligan, Q.C.*, referred to *In re Tunno*, (1886) W. N., 154.]

*Ingle Joyce*, in reply on new cases.—There is no need for a geographical area in a charity.

He referred to *Farrer* v. *St. Catherine's College*, 21 W. R. 643, L. R. 16 Eq. 19; *Spiller* v. *Maude*, 32 Ch. D. 158*n*.

BYRNE, J. — Amongst other objects enumerated in the preamble to the statute of Elizabeth, are the "aged" and "impotent." Poor persons are especially mentioned there, and also the supportation, aid, and help of young tradesmen and handicraftsmen and persons decayed. There is some authority for saying that a gift to the aged of a parish generally without expressing that they are also the poor is not good: see *Attorney-General* v. *Haberdashers Co.* But in *Attorney-General* v. *Comber*, 2 Sim. & St. 93, it was held that a gift to widows and orphans of a parish was a good charitable gift. In *Thompson* v. *Corbey*, 8 W. R. 267; 27 Beav. 649, Lord Romilly followed the case of *Attorney-General* v. *Comber*, and also expressed a clear opinion that in the case of the gift of the interest of £600 to be divided between twenty aged widows and spinsters of the parish of Peterborough, the word aged would have been sufficient to create a good charitable bequest. [His lordship referred to *Powell* v. *The Attorney-General*, 3 Mer. 48, and the judgment of Kay, J., in *In re Wall*, and continued:] The aged are, as I have said, expressly mentioned in the statute, as also are the impotent. I think "worn out" and "aged" clerks come also within the description "impotent." I think, moreover, having regard to the phrase "pensioning off" and to the frame of the gift, that poor clerks of the firm and those unable to properly provide for themselves and their families are intended to be benefited. It was said in argument that the gift being in favour of clerks in a firm of which the testator was a member points rather to motives of benevolence than to motives of charity. I do not think that this view can be maintained and I may point out that even if the benefits were to be confined to clerks in the subsisting partnership immediately before the testator's death, that partnership would not by the terms of it come to an end until the death of another of the two partners with the testator.

I think it is clear that the benefits of the gift were intended to extend to persons who might not become clerks until after the death of the testator, and who might be absolutely unknown to him.

One other point was taken and strongly argued. It was said that inasmuch as there is no local area, such as a parish or a county referred to, as limiting the section of the public to be benefited, there is no public purpose such as is required to constitute a charity. No authority bearing out this proposition was cited; but a passage in the judgment of the late Chitty, L.J., in *In re Foveaux* was relied upon: see [1895] 2 Ch., at p. 504. But the Lord Justice does not say that the benefit of the public purpose, if limited, must be limited in point of local area. It says it may be so limited. The case of *Browne* v. *King* does not justify the case proposition sought to be established by it, and I think that there are many cases, including *Attorney-General* v. *The Duke of Northumberland* which are utterly inconsistent with it.

The fact that the section of the public is limited to persons born or residing in a particular parish, district, or county, or belonging to or connected with any special sect, denomination, guild, institution, firm, name, or family, does not of itself render that which would be otherwise charitable void for lack of a sufficient or satisfactory description or take it out of the category of charitable gifts. I therefore hold it to be a good charitable gift.

After some further discussion his lordship directed a scheme. The trustees were directed to bring in a scheme, and leave was given to the clerks to apply.

Solicitors, *Walters, Deverell, & Co.; Freshfields; Hare & Co.*

---

Chan. Div. Byrne, J. } Nov. 29.

*In re* RAYBOULD.
RAYBOULD *v.* TURNER. (*a.*)

*Administration—Trustee carrying on testator's business—Tort by trustee—Damages—Indemnity—Claim to indemnity out of estate by person recovering damages against the trustee.*

*Where a trustee is entitled to indemnity from his testator's estate in respect of damages for a tort committed by him in carrying on testator's business, the person entitled to such damages from the trustee may prove for them against the testator's estate direct.*

Summons.

This was a summons in an action for the administration of the estate of John Raybould, deceased, for the raising and payment to the applicants, out of the said estate and in priority to the creditors thereof, the sum of £1,092 in respect of damage suffered by the applicants by the working of minerals by a trustee of testator's will under a colliery belonging to testator's estate and ordered to be paid to them by a judgment of the Queen's Bench Division dated the 21st of December, 1898.

The facts of the case were as follow:

On the 8th of October, 1888, Roberts & Cooper purchased from Cornelius Chambers, John Fellows, and Thomas Billing, executors and trustees of the will of John Raybould, deceased, certain freehold ironworks and premises known as the Bromley Works, situate at Bromley Pensnett, in the county of Stafford, together with the machinery and plant then upon the premises, and as the same had previously been occupied and worked by Raybould, and together also with all the mines under the premises. Raybould's trustees, on the sale, retained a colliery known as Pechell's Colliery, which joins Roberts & Cooper's

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

said Bromley ironworks. At this time the Pechell's Colliery had not been worked for some years.

In 1892 Cornelius Chambers, who at that time was the sole surviving trustee of Raybould's will, recommenced to work Pechell's Colliery.

Owing to his works a considerable disturbance was caused which caused considerable structural and other damage at the applicants' ironworks.

The applicants accordingly brought an action for damages in the Queen's Bench Division against him, and judgment was given for them for such an amount as should be found due by a special referee, together with the costs of the action. The referee assessed the damages at £1,092.

Chambers obtained leave from Byrne, J., to defend this action on the ground that what he had done in working the colliery in question was for the good of the estate. Evidence was filed to show that the damages for the tort were not properly payable out of the testator's estate.

*Romer*, for the applicants.—The applicants are entitled to stand in the shoes of the trustee, and to be indemnified out of the trust estate. In *Benett* v. *Wyndham*, 4 De G. F. & J. 259, it was held that a trustee was entitled to an indemnity from the trust estate for damage recovered against him in an action for tort. In *Dowse* v. *Gorton*, 40 W. R. 17. [1891] A. C. 190, it was held that where executors had carried on a testator's business in accordance with the provisions of his will they were entitled to be indemnified out of testator's assets, including the assets which had come into existence subsequently to the testator's death. The principle of this case should be applied here for the benefit of the applicants as creditors of the testator's estate.

*Stewart Smith*, for the trustee.

*Rowden, Q.C.*, and *Martelli*, for the testator's estate.—The doctrine of subrogation has no application to tortious acts. [They referred to *In re Johnson, Shearman* v. *Robinson*, 29 W. R. 168, 15 Ch. D. 548; *Worrall* v. *Harford*, 8 Ves. 4.] If the trustee is not entitled to an indemnity, his creditor cannot have a better position.

BYRNE, J.—The first question here is whether there is authority for saying that where damage is the result of the tort of an executor or trustee he has the right to go against the estate of his testator for an indemnity. Now *Benett* v. *Wyndham* shows that if a trustee in the ordinary diligent management of his testator's estate commits a tort, if he has acted with care and diligence, he is entitled to be indemnified. I cannot see why a person who obtains judgment against the trustee in respect thereof cannot in such a case seek the indemnity direct out of the estate of the testator. Here all parties interested are present, and assuming this to be a case in which the trustee could himself recover an indemnity there is no reason why the applicant should not recover here. As to this point I am not satisfied that the injury was occasioned by tort otherwise than in a proper manner of working.

I therefore hold that the trustee is entitled to be indemnified out of the estate of the testator against the damages and costs ordered to be paid by him to the applicants, and that the applicants are entitled to stand in his place for the purpose of obtaining such indemnity.

Solicitors, *Robbins, Billing, & Co.*, for *W. Waldron*, Brierly Hill; *Walker & Row; R. H. Bentley*, for *S. Ward*, Dudley.

---

Prob. Div. & Adm. Div. } June 26;
Divorce. } July 3, 14, 1899.

DICK v. DICK. (a.)

*Divorce—Previous suit for restitution of conjugal rights—Decree in restitution suit—Husband temporarily resident out of the jurisdiction—Service of decree—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68).

*Where the respondent in a suit for restitution of conjugal rights was domiciled in this country, but temporarily resident in Ireland, was served in Ireland, and the court considered he was in a position to be able to comply with it, the court held that the service was good.*

Hearing of the wife's petition for dissolution of the marriage on the ground of the husband's adultery and failure to comply with a decree for restitution of conjugal rights. The husband was domiciled here, and lived and had cohabited here with his wife, in London, except occasional visits to Ireland. He had no occupation. The wife commenced a suit for restitution of conjugal rights, and service of the citation and petition was made in London. On the 6th of March, 1899, a decree in that suit was made ordering the husband to return to his wife and render her conjugal rights within fourteen days of service. A sealed copy of this order was served upon the husband in Dublin. He did not comply with it, and the wife then commenced the present suit; and the citation and petition in the present suit, with a copy of the order in the restitution suit, were served upon the husband in England. The husband entered no appearance, and the suit was undefended. The above facts and the adultery were proved.

June 26 and July 3.—*Pritchard*, for the petition, referred to the service in Ireland of the decree in the restitution suit, and referred to the following cases: *Pearson* v. *Pearson*, 33 L. J. P. & M. 156; *Yelverton* v. *Yelverton*, 8 W. R. 134, 1 Sw. & Tr. 574; *Firebrace* v. *Firebrace*, 26 W. R. 617, 4 P. D. 63; *Chichester* v. *Chichester*, 34 W. R. 65, 10 P. D. 186; *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517, and on the point of desertion he cited the Matrimonial Causes Act, 1884, ss. 5, 6.

*Cur. adv. vult.*

July 14.—BARNES, J.—This was a suit by the wife for dissolution of the marriage on the ground of the husband's adultery and on the ground of desertion on his part in neglecting to comply with an order in a suit for restitution of conjugal rights. The adultery was proved, and also the proceedings in the suit for conjugal rights, and also the service of the order made in that suit on the 6th of March, 1899, requiring restitution of conjugal rights. But the petitioner's counsel very properly called my attention to the fact that the order for restitution of conjugal rights within fourteen days from service of the order was served on the husband at the Gresham Hotel, Dublin, Ireland. He also referred me to cases on the point whether service out of the jurisdiction of such decree was good service or not. The dates—the restitution suit was commenced on the 12th of November, 1898, and the citation and petition were served on the 15th of November at Bedford-row, London. The decree was made the 6th of March, 1899. The citation and the petition in the present suit were filed on the 21st of April, 1899, more than fourteen days after service of a sealed copy of the order in the restitution suit, which was on the 14th of March. The citation and petition in the present action were served on the husband the 21st of

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

April, 1899, at Chester, and a further copy of the order for restitution of conjugal rights was also served then. These dates showed that there might be a point as to whether the service of the order in Dublin was good service. The cases cited, with one exception, deal with the question whether a person not domiciled within the jurisdiction had been rightly served out of it in such a suit, and do not appear to me to have any bearing on this case, because in this case there is no doubt that the husband was domiciled here, and he appears to have been only temporarily resident in Ireland when he was served. The case which I referred to as an exception is *Pearson* v. *Pearson*, where it was directed that a decree for restitution of conjugal rights should be served upon the husband, who was then in Shanghai, on his return to England. But that case does not really affect the question in the present case. The Matrimonial Causes Act, 1884, which completely altered the law as to the restitution of conjugal rights, renders it unnecessary to consider the position parties were in prior to that Act, nor is it necessary to consider what would be the position of parties if service were made on the husband when he was not in a position to be able to comply with the order. It was as easy to comply with this order from Dublin as from Chester. The result of the cases, and having regard to the Act of 1884 and the husband being domiciled in this country, is, in my opinion, that the service in Ireland of the order is a good service. I am of opinion, therefore, that the wife is entitled to a decree *nisi* in this suit for dissolution of the marriage, with costs against the co-respondent, and an order for custody of the children.

*Decree nisi.*

Solicitors, *Winter, Bothamley, & Co.*

---

Q. B. Div.
(Darling and Channell, JJ.) Dec. 15.

GARNETT (*Appellant*) v. COMMISSIONERS OF INLAND REVENUE (*Respondents*). (*a.*)

*Inland revenue—Stamp duty—Partnership dissolution—Record of transfer of property—"Conveyance on sale"—"Release or renunciation"—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *Schedule I.*

*J. F. and his brother, J. W., carried on business in partnership. J. F., in pursuance of the power for that purpose contained in the articles of partnership, gave J. W. notice to determine it, and J. W. gave J. F. notice of taking over his share in the partnership upon the terms prescribed by the articles. Two instruments were executed to give effect to the dissolution of the partnership—the first a conveyance, whereby the share and interest of J. F. in the real estate of the partnership was released and transferred to J. W. This deed was duly stamped with an* ad valorem *duty. The other instrument, of even date—after reciting that accounts of the partnership had been made up, and that the amount standing to the credit of J. F. was £41,752 4s. 7d., and that, by the above-mentioned deed of even date, the real estate had been conveyed to J. W., and that the chattel property of the partnership was then in the exclusive possession of J. W., and that the said J. W. had given his promissory note bearing even date therewith for the above said sum—witnessed that J. F. and J. W. declared that the partnership between them should be considered as determined, and J. F. declared that he accepted the said promissory note in full satisfaction of all claims against J. W. in respect of his share and interest in the said partnership and the assets and properties thereof.*

*The commissioners claimed that this last-mentioned instrument was chargeable with an* ad valorem *conveyance duty.*

*Held, that the instrument was chargeable in accordance with the assessment of the commissioners.*

Case stated by the Commissioners of Inland Revenue pursuant to the 13th section of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

1. On the 4th day of October, 1898, an instrument, of which a copy is annexed to and forms part of this case, was presented on behalf of John William Garnett (hereinafter referred to as the appellant) to the Commissioners of Inland Revenue under the provisions of the 12th section of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

2. The instrument is dated the 13th day of September, 1898, and is made between Joshua Francis Garnett of the one part and the appellant of the other part. When presented to the commissioners it was unstamped.

3. The said Joshua Francis Garnett and the appellant (his brother) have for some years past carried on business in partnership as cloth manufacturers under the style of "Greenwood, Garnett, & Sons" at Valley Mills, Apperly Bridge, Yorkshire, and at Greenside Mills, near to the said Valley Mills, having also a warehouse in King-street, Leeds, and by articles of partnership dated the 28th of February, 1893, it was agreed (*inter alia*) as follows: Clause 2. That the partnership should be deemed to have commenced on the 1st of October, 1890, and should continue until the expiration of six calendar months after notice to determine the same should have been delivered in writing by or under the authority of one partner to the other of them or sent by post as therein mentioned.

4. The articles of partnership contained further provisions as follows:

(3) The net capital of the firm on the first day of October, 1890, shall be taken at the sum of £ (being a sum therein mentioned), in which the parties hereto are interested in the following sums—namely, the said Joshua Francis Garnett in the sum of £ (being a sum therein mentioned) and the said John William Garnett in the sum of £ (being a sum therein mentioned). The capital of each partner shall bear interest after the rate of 2½ per cent., and such interest shall be payable yearly before any division of profits—such capital shall not be withdrawn without the consent of both partners, nor except as hereinafter mentioned shall any further capital be brought into the firm by either party without the consent of the other. The said John William Garnett has also invested with the partnership the sum of £ (being a sum therein mentioned), and the same is therefore a debt due to him from the said firm, and shall bear interest after the rate of 5 per cent. payable yearly before any division of profits or payment of interest to the partners in respect of their capital as aforesaid. Such interest on the said sum of £ therein mentioned as shall from time to time remain withdrawn by the said John William Garnett shall be added to his capital and bear interest at 2½ per centum per annum.

(8) Stock shall be taken yearly up to the first day of October, and as soon as convenient thereafter in each year the partners shall meet at the partnership premises in Leeds for the purpose of balancing up the books and making a general statement of the assets

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

and liabilities of the firm, and the clear profit or loss of each year as shown by such statement shall be taken or borne by the partners in the following proportions—namely (being certain proportions therein mentioned). Each partner shall be entitled to withdraw during the present or any future year 50 per cent. of the profits made in the first or any succeeding year, provided always that no profits shall be withdrawn until after the expiration of one year from the close of the partnership year during which they shall have been earned. Subject to such power of withdrawal, the share of each partner in the profit of any year beyond subsist shall not be withdrawn, but shall remain as capital in the firm until the termination of the partnership, and bear interest after the rate of 2½ per centum per annum, payable by yearly instalments.

(9) A book shall be provided wherein the capital account of the firm and of each partner shall be kept, and the same shall be made up yearly immediately after the preparation of the statement referred to in the last preceding clause, and the capital account so kept shall be signed by and be binding on the partners, except in the case of any manifest error discovered prior to the next occasion of making up such capital accounts.

(10) In case of any partner committing an act of bankruptcy, or suffering his share in the partnership estate and effects to be attached or taken in execution or allowing himself to be arrested for any private debt it shall be lawful for the other of them at any time within one calendar month after the same shall have come to his knowledge to give his co-partner notice in writing announcing a dissolution of the partnership, and such notice may be given either by delivering the same to the partner in default under this clause, or sending the same to or for him by post in manner specified in clause 2 hereof, and thereupon the partnership shall determine. And the partner giving such notice shall be at liberty to insert a notice of such dissolution in the *London Gazette*, and otherwise advertise the same, and to subscribe as attorney the name of the defaulting partner to any public notice of dissolution as well as his own.

(11) In case of the partnership being dissolved by reason of the death of either partner, or by notice pursuant to clause 10 hereof, the share of such deceased or outgoing partner shall be taken over by the other of them, and the value of such share shall be considered to be the amount standing to the credit of such deceased or outgoing partner in the partnership capital book, with interest thereon from the date of the last preceding balancing, and without any addition for goodwill or any deduction for subsist received up to his ceasing to be a partner, and the value of such share so ascertained shall be paid to the representatives of the deceased partner or to the outgoing partner by equal half-yearly instalments extending over seven years, and be secured by the promissory note of the partner taking over such share, and bear interest after the rate of 3½ per centum per annum, payable half-yearly as aforesaid.

(12) And in case the partnership shall determine by notice given by one partner to the other of them in pursuance of clause 2 hereof, the partner to whom notice shall be so given shall have the option of taking over the share of the partner giving such notice on terms similar in all respects to those prescribed in the last preceding clause, but such option shall not be exercisable unless notice be given to the partner seeking so to retire by the other partner of the intention of the latter to take over the same one calendar month at least before the expiration of the partnership.

5. On the 18th of February, 1898, the said Joshua Francis Garnett, in pursuance of the power for that purpose contained in clause 2 of the articles of partnership, gave to the appellant notice in writing to determine the partnership, and on the 11th of July, 1898, the appellant, pursuant to clause 12 of the said articles, gave notice to the said Joshua Francis Garnett to exercise the option thereby given of taking over his share in the partnership upon the terms prescribed by the said articles.

6. Two instruments were executed to give effect to the dissolution of the partnership—namely, the instrument in reference to which this case is stated, and an instrument of conveyance of even date whereby the share and interest of the said Joshua Francis Garnett in the real estate of the partnership was released and transferred to the appellant.

7. The latter conveyance which was executed before the instrument in reference to which this case is stated, contained recitals showing: (1) That the real estate of the partnership was legally vested in the appellant and the said Joshua Francis Garnett as joint tenants in fee; (2) that the appellant had come to a settlement with the said Joshua Francis Garnett in respect of his share and interest in the partnership business and the assets and effects thereof, and it had been agreed that he should pay to the said Joshua Francis Garnett the sum of £41,752 4s. 7d. in full satisfaction of such share and interest; and (3) that for the purposes of the Stamp Acts the sum of £8,708 6s. 8d., part of the said sum of £41,752 4s. 7d., had been apportioned as the estimated value of the share of the said Joshua Francis Garnett in the said real estate; and it was thereby witnessed that the undivided moiety and all other the part, share, and interest of the said Joshua Francis Garnett in the real estate of the partnership was granted and released by him to the appellant absolutely. The conveyance is stamped with *ad valorem* conveyance duty on the said sum of £8,708 6s. 8d. (which was the amount fairly attributable to the share of real estate) and with the adjudication stamp, and no question arises on this case in reference thereto.

8. The instrument in reference to which this case is stated contains recitals showing (*inter alia*): (1) That accounts of the partnership were made up to the 1st of October, 1897, and the amount standing to the credit of the said Joshua Francis Garnett on that day (being the last preceding balance) was £41,752 4s. 7d.; (2) that by an indenture of even date, being the conveyance mentioned in the foregoing paragraph, the real estate had been conveyed to the appellant; (3) that the chattel property of the partnership was then in the exclusive possession of the appellant; and (4) that the appellant had, in pursuance of the articles of partnership and of the agreement thereinbefore recited, given to the said Joshua Francis Garnett his promissory note bearing even date therewith for the said sum of £41,752 4s. 7d. and interest; and it was thereby witnessed that the said Joshua Francis Garnett and the appellant declared that the partnership between them should be considered as determined, and stand dissolved as from the 1st of October, 1897, and the said Joshua Francis Garnett thereby acknowledged and declared that the delivery of the said promissory note for £41,752 4s. 7d. and interest was accepted by him as in full satisfaction of all claims and demands against the appellant or otherwise in respect of the share and interest of the said Joshua Francis Garnett in the business of the partnership and the assets and properties thereof, and the said Joshua Francis Garnett (*inter alia*) covenanted that he would not during the remainder of his life carry on under the style or firm of Greenwood, Garnett, & Sons the business of a cloth manufacturer

or cloth merchant, nor personally or by letter, or by means of agents or travellers, solicit the custom of those who are or have been the customers of the said firm of Greenwood, Garnett, & Sons.

9. The commissioners were of opinion that the last-mentioned instrument was either a conveyance on sale within the meaning of that expression in section 54 of the Stamp Act, 1891, or was a release or renunciation upon a sale of property or of a right or interest in property, and was in either case chargeable with *ad valorem* conveyance duty, and they refer to the first schedule to the said Act under the heads "Conveyance or Transfer on Sale" and "Release or Renunciation of any Property or of any Right or Interest in any Property."

10. The commissioners accordingly assessed the duty at £165 5s., being *ad valorem* conveyance duty at the rate of 5s. for every £50 of the sum of £33,043 17s. 11d., being the balance of the sum of £41,752 4s. 7d., the amount payable to the said Joshua Francis Garnett by the appellant for the share and interest of the said Joshua Francis Garnett in the partnership and the assets and effects thereof after deduction of the sum of £8,708 6s. 8d. apportioned to the share and interest in the real estate conveyed, upon which stamp duty had been paid as stated in paragraph 6 hereof.

11. The appellant being dissatisfied with the assessment has, in pursuance of the 13th section of the Stamp Act, 1891, required the commissioners to state and sign a case setting forth the questions on which their opinion was required and the assessment made by them, and the commissioners do hereby state and sign this case accordingly.

12. The questions for the opinion of the court are: (1) Whether the instrument is chargeable with the duty of £165 5s. in accordance with the assessment of the commissioners. (2) If not, with what duty the instrument is chargeable.

*Vaughan Hawkins*, for the appellant.—The Crown claims that the second deed is also liable to pay an *ad valorem* duty on all the assets of the partnership other than the land. This deed is not chargeable with such duty. It is not, and does not purport to be, a conveyance, release, or renunciation of any property or estate or interest in property upon the sale thereof. Section 54 of the Stamp Act, 1891, defines the meaning of "conveyance on sale." This section is taken from section 70 of the Stamp Act, 1870. A conveyance within section 54 must be an instrument which purports to convey or by which some interest, legal or equitable, is actually transferred. In the case of *Commissioners of Inland Revenue* v. *Angus*, 38 W. R. 3, 23 Q. B. D. 579, it was held that an agreement to sell a business and the goodwill thereof, on certain conditions precedent being fulfilled, is not chargeable as a "conveyance or transfer on sale" under section 70 of the Act of 1870. Lord Halsbury, C., at p. 588, says: "In order that section 70 may apply the property must be actually transferred by the instrument itself, not merely by virtue of an equitable doctrine." Further, at the time this deed was executed no legal or equitable interest in the assets remained in the vendor, except the legal joint ownership, of which the vendor was a bare trustee for the purchaser, and which legal right was not meant to be transferred. Before the execution of the deed all the equitable and beneficial interests had already passed from the vendor to the purchaser. Immediately the purchase-money is paid interest in the property passes, even though no deed is executed: *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. Cas. 672; *Wall* v. *Bright*, 1 Jac. & W. 494. Further, a release or renunciation is not chargeable with an *ad valorem* duty, unless it be shown to be a conveyance: *Great Northern Railway Co.* v. *Commissioners of Inland Revenue*, *ante*, p. 170, 43 SOLICITORS' JOURNAL 691, [1899] 2 Q. B. 652. An instrument which is a record of a transaction is not liable to an *ad valorem* duty unless it is a record of a transfer which is a conveyance itself: *Horsfall* v. *Hey*, 2 Exch. 778.

*Sir R. Webster, A.G.* (*Danckwerts* with him), for the respondents.—Articles 2 and 12 of the partnership deed of the 28th of February, 1893, constitute an agreement for the sale of the retiring partner's interest in the partnership assets at the dissolution of the partnership to the continuing partner at the latter's option. There was here a sale by Joshua Francis Garnett of his interest in the partnership assets at the time of the dissolution of the partnership, to John William Garnett for the stipulated price—viz., £41,752 4s. 7d. The instrument in question was made or executed upon the said sale and by reason and on the occasion thereof. The effect of the said instrument is to conclusively bar the interest in the said partnership assets (other than the real estate previously conveyed) of Joshua Francis Garnett and to vest the same in John William Garnett within section 54 of the Stamp Act, 1891, and the said instrument is a conveyance on a sale. The said instrument constitutes and was intended to be a record of the sale and of the vesting in John William Garnett of the said Joshua Francis Garnett's interest in the said assets (other than the real estate previously conveyed). The said instrument constitutes a release or renunciation of Joshua Francis Garnett's right or interest in the said partnership assets (other than the real estate previously conveyed). The commissioners' decision is right and correct.

Counsel cited the following cases: *Potter* v. *Commissioners of Inland Revenue*, 2 W. R. 561, 10 Exch. 147; *Christie* v. *Commissioners of Inland Revenue*, 15 W. R. 258, L. R. 2 Ex. 46; *Phillips* v. *Commissioners of Inland Revenue*, L. R. 2 Ex. 399, 15 W. R. C. L. Dig. 113.

*Vaughan Hawkins* replied.

DARLING, J.—This case raises a question of considerable importance and difficulty. The facts are these: Two partners having by the partnership agreement stipulated as to the way in which the partnership should be terminated, resolved to put an end to the partnership, and all that we have before us to show how they did it is a deed—a deed which dealt not with the real property of the partnership but with the other things. It is said that the deed requires a stamp as having to pay *ad valorem* duty by virtue of section 54 of the Stamp Act, 1891, and that section is as follows: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument and every decree or order of any court or of any commissioners whereby any property or any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

Now it is said that this is a conveyance or a release—(because "release" is referred to in the schedule) "release or renunciation of any property or of any right or interest in any property—upon a sale." Well, if this is a release of any interest in any property upon a sale of that property by which that interest is transferred to or vested in the purchaser, then this document must pay the *ad valorem* duty. It is said by Mr. Vaughan Hawkins that this releases nothing, conveys nothing, that the whole thing had been done before, that the property had passed, that the partnership had been dissolved; but that this deed

was something for the mutual satisfaction of these people, merely recording something which had been done before. If it did merely record something which had been done before—no matter how long before, but which really was a thing which was passed, I think Mr. Vaughan Hawkins would be right. But what evidence have we that it was so? To a large extent I think this case depends upon a question of fact. The only evidence that we have got is contained in the deed itself, in the recitals, and in the operative parts of the deed; the only evidence as to what had been done appears in the deed, where, for example, it is recited: "And whereas the machinery, implements, plant, utensils, materials, stock of cloth, and so on" in the nature of personal chattels "have been taken over or otherwise retained by and are now in the exclusive possession of the said John William Garnett in pursuance of the said articles of partnership."

For my own part I think it is perfectly good law as stated by the present Master of the Rolls in his text-book: "If a retiring partner instead of assigning his interest takes the amount due to him from the firm and gives a receipt for the money and acknowledges that he has no more claims on his co-partners, they will practically obtain all they want." Well, that might be done without any deed at all; and it is perfectly possible that it might be so done, and that a deed might afterwards be drawn up which would not in any way do it, but would merely record it, and in that way such a deed as that might not require an *ad valorem* stamp; but I have really to look at what was done here, and the conclusion I should come to, looking at the deed, which is the only record of what took place, is this: That when the deed was made, this arrangement for dissolution and the handing of the property to these people in the proportions agreed, took place; that the deed really was that which effectuated the dissolution of the partnership, and the distribution of the partnership effects as the deed recited, but that it was done by the deed and not by something else. I come to the conclusion, therefore, that there did pass upon the making of that deed an interest in the property upon the sale of that property, that it was transferred, that it was transferred then, that something passed then which had not passed before, that there was a release of something which had not been released before. I quite agree with Mr. Vaughan Hawkins it is possible that all this might have been done without a deed. If it had been done without the deed, and if by any means that transaction could have been questioned—of course it could not have been questioned in the shape of the revenue stamp being wanted, because it is upon the instrument, and not upon the transaction that the stamp duty is imposed—but if in any way it could have been questioned, then I should have said I quite agree that all that was done was done without a deed, all that was sold was sold without a deed, every interest that passed passed without a deed. But when I have the deed and no evidence of anything happening except as the deed recites, then, in this case at all events, I come to the conclusion that what was done was not done in the way Mr. Vaughan Hawkins contends that it was, but that it really was done by the instrument which the parties went to the trouble to prepare, that it was done by the deed, and, therefore, that the deed requires an *ad valorem* stamp.

CHANNELL, J.—I think there are very nice questions raised in this case. When I say "raised" have been discussed, I am not quite sure whether they are raised or not. I think also that the deed requires an *ad valorem* stamp; and I should put it in this way: To begin with, undoubtedly there has been a sale in this case; it has been agreed on all hands that there has been a sale at some time, either completed before this deed was executed or not, but that there has been a sale of the partner's share in the partnership assets. Then this is certainly a "release," and I think it is a "release upon a sale" within the meaning of the schedule to this Stamp Act. Mr. Vaughan Hawkins has argued that it is only so if it is a release which passes property. Now, he may or he may not be right in that—I am not quite sure—but I will deal with it upon the footing that he is right in that, and that it is only such releases upon sales as do pass property which are liable to the *ad valorem* stamp. But how does this release stand? It seems to me to be entirely analagous to, if it is not covered by, the case of *Horsfall* v. *Hey* in the Exchequer Report, which has been quoted. The head-note of that case is: "Memorandum that T. has sold to G. all the goods, stock-in-trade, and fixtures" (fixtures was the important part there, because the stamp would not have been wanted so far as the goods were concerned). "Held to require an *ad valorem* stamp as a conveyance"; and it goes on "Any instrument which operates as a record of the transfer of property is a conveyance within the Stamp Act."

Now, if that head-note is right the thing is quite concluded. That tells us that this is a conveyance, because beyond all possible question it not only is a record of the transfer of property, but all these elaborate recitals were put in purposely for the purpose of recording the transaction and preventing any further disputes between the parties in reference to it; therefore if that head-note were right the case would not be arguable; but it is suggested (and there is something to be said for the suggestion) that it goes beyond the actual decision. The actual decision involves several propositions. First of all it says that it makes no difference that the words used are in the past tense. Now I do not see myself any difference between making a memorandum that T. has sold to G. and making a rather more formal document which says that "whereas certain things have been done,"—which is what this document does—and this document merely in its recitals uses the past tense just as it was used in the case of *Horsfall* v. *Hey*. Then the decision in that case apparently is that *eo instante* with this document—"Memorandum that T. has sold to G. all the goods," that at that instant the goods would pass. That was in 1848. Well now, there was in that case no evidence produced of any prior transaction. I suppose they could have called evidence—it was not in the old days when you could not have called all the witnesses who knew anything about the transaction; at that date they could have proved, I suppose, whether there had been a prior transaction, a sale, or not. But the proposition, as I understand it, put by Parke, B., is, that if it had not been they might have passed before or they might not—if they had not passed before they had passed then. That is exactly the operation of this document. They either had passed before, or if they had not so passed the share or interest in the partnership is absolutely gone the moment that the deed is executed. That much, I think, is quite clear. Now, *Horsfall* v. *Hey* seems to say that the words in the past tense will operate as a conveyance just the same as if they had been in the present tense. Rolfe, B., takes a rather technical point that in a deed everybody always does say: "In testimony whereof the parties hereunto have set their hands and seals." That seems rather technical but it may be important. Therefore this document would have passed this share provided it had not been passed before. Now it states that it had been passed, and the point is that it had passed eventually by payment and that the promissory note was equivalent to payment. But the

promissory note is given identically with this document and the whole thing appears to me to be absolutely one transaction. If this argument is good it seems to me that by paying your money first and executing your deed afterwards you could always get out of the *ad valorem* stamp. That cannot possibly be so. It seems to me that the question whether this is to be stamped as a conveyance is very much the same as the question which has arisen over and over again about that rather awkward definition in the Bills of Sale Act about a receipt being a conveyance; and the question is whether it is one transaction. If there is a clearly independent transaction, and it is not all part of one transaction, then the thing would stand upon a different footing. It seems to me that if the parties dissolved their partnership in 1896, and transferred all assets and wound up the whole thing, and then in the year 1897 it occurred to them that it would be rather better to have a release and a mutual document to set it all right, and in the year 1897 they had executed a document which said: Whereas the whole of the affairs in this partnership were wound up in the year 1896, and everything was settled between the parties—and so on; and whereas one of them has requested to have a release or to have a particular covenant—or something of the kind—put in (there are some particular covenants in this case), that then they executed a deed which was a separate transaction, and appeared by the deed to be so; that deed would not be liable to be stamped with an *ad valorem* stamp; but where according to the appearance of the deed it is a deed which practically effects a transaction, just as the memorandum in *Horsfall* v. *Hey* effected the transaction, then it is certainly a "release upon a sale" within the meaning of the Stamp Act; and on the whole I think there is not very much doubt about the matter, although it is perhaps a little difficult to give the very best possible reasons for the decision which I think must be right.

*Judgment for the Crown.*

Solicitors for the appellant, *Bell, Brodrick, & Gray*, for *Tweedale & Clark*, Leeds.

Solicitor for the respondents, *The Solicitor for Inland Revenue.*

---

## Court of Appeal.

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — Feb. 27.

### GREENWELL AND ANOTHER v. HOWELL AND ANOTHER. (a.)

*Local government—Practice—Costs as between solicitor and client—Public right of way—Action of trespass—Person acting under direction of local authority—Public Authorities Protection Act,* 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*)—*Local Government Act,* 1894 (56 & 57 *Vict. c.* 73), *s.* 26.

*A public right of way having been obstructed by the owner of the land through which it ran, the county council passed a resolution, under section* 26 *of the Local Government Act,* 1894, *that the powers and duties of the district council, who had failed to take proceedings to protect the right of way, should be transferred to them. The county council then, under an arrangement with the owner of the land, directed the defendants, two of their officials, to drive along the way so as to enable the question of the public right to be raised. The landowner brought an action of trespass against the defendants, in which the latter obtained judgment.*

*Held, that the defendants in committing the alleged trespass by the direction of the county council were acting in pursuance of the public duty of protecting public rights of way imposed upon the local authority by section* 26 *of the Local Government Act,* 1894, *and were therefore entitled to their costs as between solicitor and client under section* 1 *of the Public Authorities Protection Act,* 1893.

Appeal from the decision of Bruce, J., ordering the plaintiffs to pay the defendants' costs of the action, to be taxed as between solicitor and client.

The plaintiffs were the owners and occupiers of certain land in the parish of Godstone, through which a road ran. There was a dispute as to whether this road was a public highway or not, and the plaintiffs put obstructions across it. The district council having refused or failed to take proceedings in respect thereof upon the representation of the parish council, under section 26, sub-section 4, of the Local Government Act, 1894, that the public right of way in question had been unlawfully obstructed, the county council, upon the petition of the parish council, resolved that the powers and duties of the district council under the section, in relation to the road in question, should be transferred to them. Thereupon a correspondence ensued between the plaintiffs' solicitors and the clerk of the county council, and in the result the former wrote to the latter that as the county council had resolved that the powers and duties of the district council in relation to the road in question should be transferred to them, and as the Highways and Bridges Committee had been authorized to institute legal proceedings to obtain the removal of the obstructions, the plaintiffs had no desire to place themselves in opposition to the properly constituted highway authority, and they had accordingly removed the obstructions complained of, without in any way admitting that the road was a public way, and that they would prosecute anyone trespassing on the road. The letter also stated that in order that the question of right of way might be tried before a competent tribunal, the plaintiffs were prepared to bring an action of trespass in the Queen's Bench Division against any person so trespassing, and they suggested that the question whether it was a public right of way or not might be conveniently raised by the county council authorizing their surveyor, or some other person on their behalf, to commit a nominal trespass. Thereupon the two defendants, who were respectively the county surveyor and the deputy clerk of the county council, acting under the directions of the county council, drove along the road in question. The plaintiffs then brought this action of trespass. The defendants pleaded that the road was a public highway, and that in using the road they were not guilty of trespass.

At the trial Bruce, J., found that the road was a public highway, and gave judgment for the defendants with costs. The defendants thereupon applied for an order that the defendants' costs should be taxed as between solicitor and client under section 1 of the Public Authorities Protection Act, 1893. The learned judge, in giving judgment upon this point, said that it was the duty of the county council, in the circumstances, to appoint persons to drive along the road for the purpose of testing this right, and the defendants were the persons who were directed or ordered by the county council to test the right. They drove along the road as the servants of the county council, their

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

act was the act of the county council, and therefore, in his opinion, it was an act done by the defendants in pursuance of a public duty, because in doing what they did they were acting in pursuance of the authority of the county council. He accordingly made an order that the defendants' costs should be taxed as between solicitor and client. The plaintiffs appealed from the order so made.

*Neville, Q.C.*, and *McSwinney*, for the plaintiffs.—This case does not come within section 1 of the Public Authorities Protection Act, 1893. The action is not brought against the county council, but against two individuals who committed what was alleged to be an act of trespass. The preamble to the Act states that it is an Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties. The defendants were not acting in the execution of statutory or other public duties. They were only acting in the course of their private duty towards their employers. They were merely private individuals insisting upon a public right of way, just as any other private individual could have done. It is the duty of the district council or of the county council to protect public rights of way; it is not the duty of the defendants. The court can only look at the constitution of the action. The county council, not being parties to the action, cannot in any event be made liable for costs. They might have directed two men of straw to commit the trespass, in which case the plaintiffs, even if successful, could not have got costs, and yet it is said that, being unsuccessful, they must pay costs as between solicitor and client. This is strong to show that the local authority must be the defendants to bring the case within the protection of the statute. Even if the county council need not be defendants on the record, still it must appear upon the face of the record that the defendants were acting under their directions. This ought to have been pleaded, but it was not. Upon the face of the record the defendants were merely private individuals sued for a trespass. The order of the learned judge was therefore wrong.

*Jelf, Q.C.*, and *George Humphreys*, for the defendants.—It is admitted by the plaintiffs that if the county council had been made defendants the Act would apply. The defendants were acting under the orders of the county council in committing the trespass, and the plaintiffs might have sued the county council. They did not do so as they knew that the defendants were substantial men acting for the county council. Section 26 of the Local Government Act, 1894, imposed the duty of protecting public rights of way and preventing the obstruction thereof upon the district council, and in certain circumstances on the County Council. The obstruction need not be a physical one, the threat to prosecute anyone using the road being an obstruction. Inasmuch as it would be practically impossible for the whole council to commit an act of trespass in order to enable the question to be raised, they directed the defendants, who were two of their officials, to do so. The defendants, therefore, were acting on behalf of the county council in pursuance of a public duty under section 26 of the Act of 1894. Section 1 of the Public Authorities Protection Act, 1893, accordingly applies, that section not being limited to an action against a public body, but extending to an action against "any person." That Act was passed to "generalize" and amend certain statutory provisions for the protection of persons acting in the execution of statutory duties. It repealed certain sections of former statutes, but it was not intended in any way to cut down the protection given by those statutes. Many of those statutes—*e.g.*, section 106 of the Metropolis Management Act, 1862, and section 264 of the Public Health Act, 1875, gave protection not only to the local authority, but also to any officer of the local authority or any person acting in his aid. The learned judge was therefore right.

They referred to *Chambers* v. *Reid*, 14 W. R. 370, 13 L. T. Rep. 703.

*Neville, Q.C.*, replied.

A. L. SMITH, L.J.—This an appeal from an order of Bruce, J., after the trial of an action without a jury. The plaintiffs were the owners of certain land, across which it was alleged that there was a public right of way. A dispute arose upon this question, and the plaintiffs at first obstructed the way and afterwards removed the obstructions, but threatened to prosecute anyone found trespassing thereon. An arrangement was then arrived at between the plaintiffs and the County Council that in order to raise the question whether a public right of way existed the county council should send someone to commit a nominal act of trespass, and the plaintiffs would then bring an action of trespass. Accordingly, by the direction of the county council, the defendants, who were two officials of the council, drove over the way in question. It was known to the plaintiffs that the defendants were acting under the directions of the county council, though I do not say that that is a material element in the case. The present action was then brought, and the learned judge found that a public right of way existed, and gave judgment for the defendants. The defendants thereupon contended that they were entitled to costs as between solicitor and client under section 1 of the Public Authorities Protection Act, 1893. The question we have to decide is whether this case comes within that Act. Section 1 provides, so far as material, that where, after the commencement of the Act, any action is commenced against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, certain results are to follow. Pausing there, the section does not say that the action must be against a public body, but against "any person." The section then goes on to provide that in such a case the following provisions shall have effect: "(*a*) The action shall not lie unless it is commenced within six months next after the act complained of." It seems to me that if the plaintiffs had brought this action more than six months after the act of trespass complained of, that clause would have afforded a defence, though of course such a defence would have had to be pleaded. Then by clause (*b*) "wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client." The question we have to determine is whether the defendants here committed this act of trespass in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority. It is clear that they were acting under the directions of the county council for the purpose of enabling this action of trespass to be brought to determine the question whether or not a public right of way exists. Therefore the question is whether what the defendants did under the directions of the county council was an act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority. That brings me to section 26 of the Local Government Act, 1894. Sub-section 1 of that section makes it the duty of every district council to protect all public

rights of way, and to prevent as far as possible the stopping or obstruction of any such right of way, whether within their district or in an adjoining district in the county or counties in which the district is situate, where the stoppage or obstruction thereof would, in their opinion, be prejudicial to the interests of their district. By sub-section 3, a district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings, and generally take such steps as they deem expedient. By sub-section 4, where a parish council have represented to the district council that any such public right of way has been unlawfully stopped or obstructed, it shall be the duty of the district council, unless satisfied that the allegations of the representation are incorrect, to take proper proceedings accordingly; and if the district council refuse or fail to take any proceedings thereon, the parish council may petition the county council, and if that council so resolve, the powers and duties of the district council under the section shall be transferred to the county council. The plain meaning of that section is that if a person obstructs a highway, whether by means of a physical obstruction or by a threat of legal proceedings, it is the duty of the district council to take proper proceedings, and, if they refuse or fail to do so, the county council may resolve that the powers and duties of the district council in regard thereto shall be transferred to themselves, and, if the county council do so, it is then their duty to take proper proceedings. That being so, it was the duty of the county council, in the circumstances, to take proper proceedings in regard to this alleged public right of way, and the act of the defendants, being done under the directions of the county council for the purpose of protecting the right of way, was an act done in pursuance of a public duty within the meaning of section 1 of the Public Authorities Protection Act, 1893. I therefore agree with the judgment of Bruce, J. It is said that it was not pleaded that the defendants were acting under the directions of the county council. To my mind, it was not necessary, nor would it have been good pleading, to have pleaded that fact, because it was not a defence to the cause of action. It would have been like a plea to damages, which has always been held to be improper. The appeal must therefore be dismissed.

COLLINS, L.J.—I am of the same opinion. At first I did not realize that section 1 of the Public Authorities Protection Act, 1893, extended its protection not only to the public body, who are the principals, but also to the individuals who carry out the mandate of the public body. That being so, the only question is whether the defendants here, in committing the act of trespass complained of, acted in pursuance of a public duty under the Local Government Act, 1894. It seems to me to be clear upon the facts that they did. I do not think that the case can be better put than it is in the judgment of Bruce, J., with which I entirely agree.

ROMER, L.J., concurred.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Norton, Rose, Norton, & Co.*

Solicitors for the defendants, *Wyatt & Co.*

---

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) — Feb. 24.

CASS v. BUTLER. (a.)

*Master and servant—Compensation for injuries by accident—"Undertakers"—Sub-contractor—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

*A sub-contractor is not an "undertaker" within the meaning of section 7 of the Workmen's Compensation Act*, 1897.

Appeal from the award of the county court judge of Leeds under the Workmen's Compensation Act, 1897.

The respondent on the appeal was the widow of a deceased workman, Henry Cass, who, at the time of the accident causing his death, was in the employment of the appellant, who carried on business as a painter. The respondent claimed compensation under the Act on behalf of herself and other dependants.

A builder named Gould had entered into a contract with the Corporation of Leeds to build an electrical station for them. Gould then made a sub-contract with the appellant, whereby the latter undertook to do the painting work of the whole of the building. Cass was employed by the appellant on the painting work, and while he was standing on a scaffolding, which belonged to Gould and was used in the construction of the building, engaged in painting the iron girders of the roof, a plank broke and he fell and was killed. At the time of the accident the building was over thirty feet in height, and was being constructed by means of a scaffolding. It was admitted that the building was being painted for the first time.

The county court judge held that the appellant was an "undertaker" within the meaning of the Act, and that the painting of the new building was "construction." He accordingly made an award in favour of the respondent for £235 6s.

*Ruegg, Q.C.*, and *A. Powell*, for the appellant.—The appellant does not come within the definition of "undertakers" in section 7, sub-section 2, of the Workmen's Compensation Act, 1897. A sub-contractor is not an "undertaker." By section 7, sub-section 2, undertakers are defined as meaning, in the case of a building, "the persons undertaking the construction, repair, or demolition." The contractor Gould was the person who undertook the construction of this building. It is not like the case of two or more independent contractors for different parts of one building, as in *Mason* v. *A. R. Dean* (*Limited*), 16 Times L. R. 212, where each contractor may be an "undertaker." Section 4 is strong to show that a sub-contractor is not an undertaker, because the term "undertaker" is there used in contradistinction to sub-contractor. That section makes a contractor liable though he may have made a sub-contract for the execution of the work or any part thereof. Secondly, painting is not "construction." In *Wood* v. *Walsh & Sons*, 47 W. R. 504, [1899] 1 Q. B. 1009, painting the outside of an old house was held not to be "repair." There can be no distinction between that case and the present.

*Temple Franks*, for the respondent.—There is nothing in the Act to show that a sub-contractor may not be an "undertaker." *Mason* v. *A. R. Dean* (*Limited*) decided that anyone undertaking a sub-

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

stantial part of the construction is an undertaker, and that there can be several undertakers in the construction of one building. That being so, there is no reason why a sub-contractor cannot in law be an undertaker, and the county court judge has found that the appellant here was an undertaker. That is a finding of fact from which no appeal lies. Section 4 is not against this view. That section merely gives a remedy against the contractor in addition to that against the sub-contractor, who may be a man of straw. It does not say that a sub-contractor cannot be an undertaker. If the court is against the respondent upon this point, the question whether painting is "construction" does not arise.

A. L. SMITH, L.J.—In my opinion the learned county court judge was wrong. I take the facts to be these: A builder and contractor named Gould had entered into a contract to build an electrical station. Gould then made a sub-contract with the appellant, who carried on business as a painter, by which the latter was to do the painting work of the building. The appellant employed the deceased man, Cass, on the painting work, and Cass, while engaged in painting the girders of the roof, was killed by an accident. I do not think it necessary to determine whether painting this new buiding for the first time is "construction." The other point that has been raised is that the appellant is not an "undertaker"; that Gould is the undertaker, and is liable, if anyone is, and that the appellant is not liable. In other words, it is said that a sub-contractor for doing part of the construction of the building is not an "undertaker" within the meaning of the Act. It is said, on the other side, that both Gould and the appellant are "undertakers," and that the respondent had the option of suing either the one or the other, or both. I do not think that this latter view is the meaning of the Act. The term "undertakers" is defined by section 7, sub-section 2, as meaning, in the case of a building, the persons undertaking the construction, repair, or demolition. In my opinion Gould is the person who undertook the construction of this building. In *Mason* v. *A. R. Dean* (*Limited*) a builder had contracted with a building owner to construct a theatre, and by the contract the building owner had power to let off a specified part of the work to another contractor. The building owner did, under the power reserved to him by the original contract, enter into a contract with another contractor for this latter to do part of the work of construction, and we held that this latter contractor, who was not a sub-contractor, but who had contracted direct with the building owner to do part of the construction, was an "undertaker" within the meaning of the Act. The present is a very different case from that. That is my view of the meaning of the term "undertakers" in section 7. That view is fortified by section 4, which makes it still more clear that a sub-contractor is not an undertaker within the Act. The appeal must therefore be allowed.

COLLINS and ROMER, L.JJ., concurred.

*Appeal allowed.*

Solicitors for the appellant, *W. Hurd & Son*, for *H. A. Child*, Leeds.

Solicitors for the respondent, *Hamlin, Grammer, & Hamlin*, for *C. Dunn*, Leeds.

---

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 16.

*In re* TRENCH TUBELESS TYRE CO. (LIMITED). BETHELL v. TRENCH TUBELESS TYRE CO. (LIMITED). (*a*.)

*Company—Winding up—Liquidator—Notice of proposed appointment of particular person—Subsequent appointment, without previous notice, of another person—Validity.*

*It is competent for a company, after passing a resolution for voluntary winding up, to proceed forthwith, without previous notice of intention, to the election of a liquidator; and this general power will not be abrogated even in cases in which notice has been given of intention to elect a particular person as liquidator, and such person is not elected.*

*Decision of* Kekewich, J., ante *p.* 200 *reversed.*

This was an appeal from a decision of Kekewich, J., on the 15th of December, 1899 (*ante* p. 200), refusing, on a motion by the defendant company in an ordinary debenture-holder's action, to order that the receiver already appointed in the action on the 1st of December, 1899, should hand over to Mr. Marreco, the alleged liquidator of the company, certain books and documents belonging to the company and not comprised in the debenture-holder's security.

It appeared from the affidavit of the receiver in the debenture-holder's action, read before Kekewich, J., on the 15th of December, 1899, that he was perfectly willing to hand over the books and documents in question as the court might direct, but that in the meanwhile he was informed by his solicitors that they had grave doubts as to whether Mr. Marreco had been properly appointed liquidator of the company.

It appeared from an affidavit of the secretary of the defendant company that at an extraordinary general meeting held on the 1st of November, 1899, the defendant company had duly passed the two following resolutions: (1) That the company be wound up voluntarily; (2) that Mr. W. Walker be appointed liquidator.

On the 6th of November notices were sent out convening an extraordinary general meeting for the 16th of November, for the purpose of confirming the above two resolutions.

On the meeting being held on the 16th of November, the first of the above two resolutions was confirmed; but the appointment of Mr. Walker was not confirmed, and Mr. Marreco was appointed in his place.

On these facts Kekewich, J., found that the appointment of Mr. Marreco as liquidator was invalid; and refused to order the receiver in the debenture-holder's action to hand over to him the books and documents in question.

From this decision the defendant company now appealed.

*Ward Coldridge*, for the appellant company.—We have two grounds for this motion. (1) The liquidator is properly appointed. Liquidators may be appointed, without previous notice, at the general meeting at which a resolution for voluntarily winding up is passed: *Oakes* v. *Turquand*, 15 W. R. 1201, L. R. 2 H. L. 325, per Lord Chelmsford, at p. 355; *In re Welsh Flannel and Tweed Co.*, 23 W. R. 558, L. R. 20 Eq. 360. Here, it is true, notice was given to appoint a particular liquidator; but that resolution having been lost, it may be treated as though no notice had

(*a*.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

ever been given of it, and an effective resolution to wind up having been passed, the company was thereupon free forthwith to elect whatever liquidator it chose: *In re Indian Zoedone Co.*, 32 W. R. 481, 26 Ch. D. 70. It took advantage of this freedom, and elected Mr. Marreco. (2) Even suppose that the election of Mr. Marreco is invalid. Yet he is still the duly authorized nominee of the company for the purpose of receiving these documents.

*Warrington, Q.C.*, and *Martelli*, for the receiver, the respondent.—This is not the case of a company being wound up simply, and of its then proceeding to appoint a liquidator without previous notice. Here a meeting was expressly called to confirm the appointment of a particular gentleman, and to substitute another in his place at the last moment is practically to amend the previous resolution. That, however, cannot be done.

LINDLEY, M.R.—For a time, I admit, I thought that the notice convening the meeting for the 16th of November was possibly calculated to mislead. But when I look more closely into the law applicable to the matter, and especially when I bear in mind that it is now well settled that it is competent for a company, as soon as a winding-up resolution is passed, to proceed forthwith, without previous notice, to the appointment of a liquidator, the case assumes a different aspect. In this case I do not myself believe that those who supported Mr. Walker were in fact misled, or were subject to any surprise. If anyone thought that the only thing that could be done at this meeting was either to confirm or reject Mr. Walker's appointment, then I think he made a mistake in point of law. It appears to me that there are two answers to the contention of the respondent: (1) That this second resolution was not an amendment of the former one, which was duly put to the meeting and duly rejected; (2) that if the court gave effect to the objection now raised, it would mean enabling directors to palm off their nominee upon the company, unless the meeting should be postponed and a fresh notice sent out. I think that that ought not to be allowed. I think that the appointment of Mr. Marreco is good; but even if it were not, I should incline to believe that he was still entitled to the receipt of these books and documents as the nominee for that purpose of the company. I prefer, however, to base my decision on the ground first indicated.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

Solicitors, *Phillips & Boyle; Francis & Johnson.*

---

From Chan. Div.
(Lindley, M.R., and Vaughan Williams and Romer, L.JJ.) — Jan. 23, 30.

*In re* WREXHAM, MOLD, AND CONNAH'S QUAY RAILWAY CO. (*a.*)

*Railway company — Receiver and manager — Cost of litigation—"Other outgoings"—Jurisdiction of court —Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4—*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

*Since the passing of the Judicature Act*, 1890, *there can be no doubt that the court has power to order the payment of costs of proceedings under a special Act, though the special Act contains no provision for this purpose.*

*A railway company incurred costs in defending an action brought by a contractor for a large sum. During the course of the proceedings a receiver and manager of the company was appointed, on the petition of a judgment creditor, and inquiries as to creditors were directed by the receivership order. Leave was given to the company to continue to attend the proceedings commenced by the contractor.*

*Held, that the costs incurred in resisting the contractor's claim were not "other outgoings" within the meaning of section* 4 *of the Railway Companies Act*, 1867, *but that all such costs incurred since the receivership order ought to be treated as incurred in pursuance of the inquiries directed by that order, and ought to be paid in priority to any future payments to any creditors of the company who had benefited by the opposition to such claim.*

This was an appeal against a decision of Byrne, J., which raised the question whether costs incurred by a railway company in defending an action were "other proper outgoings" within the meaning of section 4 of the Railway Companies Act, 1867. The facts were as follows: An action was commenced by the executors and trustees of the will of Benjamin Piercy against the Wrexham Co. to enforce certain claims against the company. On the 23rd of July, 1897, an order of reference to arbitration was made in that action. While this arbitration was pending an order was made on the 8th of September, 1897, under the provisions of the Railway Companies Act, 1867, upon the petition of the Great Central Railway Co., a judgment creditor, appointing a manager and receiver until further order to manage the undertaking of the Wrexham Co., and the works and property comprised in such undertaking or connected therewith, and to receive the tolls or sums of money arising upon or out of the said undertaking. And it was ordered that the receiver and manager should, out of the money to be received by him, pay all expenses (if any) proper and necessary to be paid by him for the maintenance, management, and working of the said railway, and proper outgoings in respect of the said undertaking, the costs of the petitioners and respondent to the petition to be taxed by the taxing-master; and inquiries were directed (1) what was due to the petitioners upon their judgment debt, and (2) whether there were any other, and what, debts of the respondents, and whether the same, and which of them, were incumbrances or charges upon the undertaking, or tolls and moneys arising out of the same, or any and what part of the same respectively; and how the same respectively were created; and what were the right and priorities of the persons for the time being interested therein; and liberty to reply was reserved. An advertisement for creditors was issued, and Piercy's trustees lodged a claim against the Wrexham Co. as creditors in the proceedings under the order of the 8th of September, 1897. On the 16th of November, 1897, Piercy's trustees applied by summons that, notwithstanding the order of the 8th of September, 1897, and the advertisement for creditors to prove their claims in pursuance of the said order, the applicants might be at liberty to carry on the action and to proceed with the arbitration above referred to, the subject-matter of which arbitration proceedings being the same as the claim entered in the claim-book in chambers against the Wrexham Co.; and, in the alternative, as to how the claim of the said trustees against the said railway company was to be determined.

The Wrexham Co. and the Great Central Railway Co. were respondents to that summons.

On the 22nd of November, 1897, an order was made on the summons to this effect, as appears by the master's indorsement: "Order for liberty as asked within, and to include also liberty for the Wrexham,

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

&c., Railway Co., to continue to attend the proceedings by arbitration. Claimant's costs to go with the claim."

An award was made in the arbitration, and on the 15th of March, 1898, judgment was entered up in the terms of the award, which was to the effect that the company should pay and issue or transfer to Piercy's trustees £23,643 cash, £6,933 in ordinary fully paid-up stock of the company, £1,733 in Perpetual 4 per Cent. Preference Stock of the company, and £4,286 in C Debenture Stock of the company; each party to pay his or their own costs of the action, counterclaim, reference to arbitration and award. The effect of this award was that the claims of the Piercy trustees were considerably reduced.

The Wrexham Co., its directors, and Mr. Pollitt, the solicitor for the company, then applied that the costs incurred in the defence of the action and arbitration should be treated as proper outgoings, and should be payable in priority to the claims of the debenture-holder of the company.

Byrne, J., refused the application on the ground that as the undertaking could have been carried on equally well if the company had not resisted the claim of the Piercy trustees, the costs incurred in resisting such claim were not proper outgoings within the meaning of section 4.

The applicants appealed.

*C. A. Russell, Q.C.*, and *R. J. Parker*, for the appellants.

*Neville, Q.C.*, and *F. Thompson*, for certain debenture-holders.

*Whinney*, for other debenture-holders.

*M. Romer*, for the Great Central Railway Co.

*Cur. adv. vult.*

Jan. 30.—LINDLEY, M.R.—This is a case of some novelty and some little difficulty, and gives rise to the question of what ought to be done about some costs, which I will refer to presently, when an order appointing a receiver and directing inquiries has been made under the Railway Companies Act, 1867. Section 42 of the Act stopped the breaking up of a company by the seizure of its rolling stock. The Act provided that instead of doing that a judgment creditor might apply for and obtain a receiver, and if necessary a manager, by a petition in the Court of Chancery. This was in 1867. Then the Act goes on to say what the receiver is to do, how he is to deal with the money, "and all the money received by such receiver or manager shall, after due provision for the working expenses of the railway and for the proper outgoings in respect of the undertaking, be applied and distributed under the order of the court in payment of the debts of the company and otherwise, according to the rights and priorities of the persons for the time being interested therein." Then, on payment of the amounts so due, the court may discharge the receiver. Rules have been made for carrying that Act into effect, and the common form of order has been ever since the Act was passed to appoint a receiver and if necessary a manager, and to direct inquiries for the purpose of ascertaining how the assets ought to be distributed, and in this particular case the order directs an inquiry of what is due to the petitioner, who is an alleged creditor, and an inquiry "whether there are any other and what debts of the company, and whether the same and which of them are incumbrances or charges on the undertaking, or moneys arising out of the same or any and what part of the same respectively, and how the same were created, and what are the rights and priorities of the persons for the time being entitled in respect thereof." Now, the Act says nothing at all about costs, and if there were no jurisdiction to give costs I suppose nobody would get any costs under this Act, but of course that cannot be so. There must be somewhere or other some power for making an order for the payment of costs which are incurred by the petition and consequent on it, and ever since the Act of 1867 has been passed orders have been made for the payment of those costs. In this particular case the costs of the petitioner were ordered to be paid by the company.

Now, where does that power come from? Where is the jurisdiction to do that? You cannot find it in the Act, but that section of the Act of Parliament, like others sections, is based upon the footing that the courts have jurisdiction to order costs in those cases, and the court has always exercised such jurisdiction. Any doubt there may be about the jurisdiction of the court to order costs in distributing funds under an Act of Parliament which says nothing about them is removed by the important section which was put into the Judicature Act of 1890—section 5—which was passed for the purpose and with the objects which were explained by this court in *In re Fisher*, 42 W. R. 241, [1894] 1 Ch. 53, 450. It runs thus: "Subject to the Supreme Court of Judicature Acts and the rules of court made thereunder and to the express provisions of any statute whether passed before or after the commencement of this Act"—those last words are not in the rule: "The costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge." Then come these words, which are of importance—"and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid." The reason and the object of that section was that there was some doubt as to the jurisdiction of the Court of Chancery to order costs under special Acts of Parliament relating to the compulsory purchase of land. One of the instances which was mentioned was whether a railway company, for example, buying land under some special Act could be ordered to pay the costs of the investment and so forth. There was a difference of opinion about it, and that section was passed in order to remove all doubt. As I understand that section it is, as I said it is in *In re Fisher*, that where there is an Act of Parliament relating to funds to be distributed and proceedings to be taken for the purpose of having them distributed according to the Act, the court which has to do the distribution and award the money, has jurisdiction over the costs, and must make the proper order for the payment of them. Therefore, although the Railway Companies Act, 1867, says nothing at all about costs, I have not the slightest doubt that the practice which has prevailed from the beginning of ordering costs to be paid out of the funds in the hands of the receiver is perfectly justifiable, and, as I say, if there was before any doubt on the matter, that doubt is removed by the Act to which I have referred.

The facts in this case are as follow: The company had issued a number of debentures and some ordinary stock. In 1893 an action was commenced by the executors of a contractor claiming large sums of money from the company. The executors claimed £60,000 cash and a very large sum in debentures. £25,000 I am told. That was met by a counterclaim for the conveyance of some land. That dispute was, of course, a very complicated one, and an order was made to refer the whole matter to arbitration. That was done on the 23rd of July, 1897. On the 8th of September, 1897, an order was obtained by a judgment creditor appointing a receiver and manager, and

directing the inquiries to which I have referred. The consequence of that was that the executors of Piercy felt a little embarrassed. They did not know whether it was best or right to bring in their claim under the order directing inquiries, or whether it was better to go on with the arbitration, and therefore they took out a summons for leave to go on with arbitration. That summons was served upon the judgment creditor and upon the company, but it was not served, as far as I can see, upon the debenture-holders, and I do not see that it would be necessary, but I suppose their interests were represented. Upon that summons leave was given to the executors to carry on the proceedings in the arbitration, and leave was also given to the company to attend those proceedings. No order was drawn up; it was an order made in chambers, and the first question we have to consider is, What was the meaning of that order, what did it really mean? I cannot help thinking that the true meaning of it was that the company not only should attend the proceedings (which was an order not worth making) but that it should oppose the proceedings and do as it had been doing up to that time—fight the claim of the contractor's executors and fight on behalf of everybody interested in the assets of the company. We cannot doubt for a moment that that was the real meaning of the parties and of the order itself. But be that as it may, it becomes very important to determine, because this case to my mind turns upon the true effect of that order. I regard it, and we all regard it, as an order—an arrangement, because I dare say it was arranged, I do not know—to the effect that the company should oppose and fight that claim in the arbitration rather than the matter should be brought into chambers, and fought all over again in the interests of everybody. Then the arbitration proceeded, and an award was made in favour of the executors, but cutting down their claim very considerably, and in particular cutting down their claim to debentures. Instead of obtaining from the arbitration the large amount of debentures sought, they obtained a comparatively small number. They only got £4,300 C Debenture Stock, they got some ordinary Preference Stock and cash, and got a good deal, but they did not get anything like the quantity of debentures which they sought. So that in the result the upshot was that the company defended that claim for the benefit of other debenture-holders, and other debenture-holders got the benefit, for if the claim had not been resisted and fought the executors might have established a claim to a large sum of debentures which they would have recovered *pari passu* with the C debentures. Now, the arbitrator made no order as to costs—that is to say, as between the claimants, the contractor's executors on the one side and the company on the other. Each had to pay his own costs. Now the first question is, How are the company's costs to be obtained? In order to obtain them a summons was taken out for payment of these costs in priority to everybody and upon the footing that, although they could not be called "the working expenses" of the railway, yet they might and ought to be regarded as "other proper outgoings in respect of the undertaking." Byrne, J., was unable to adopt that view and he decided against the applicants and said they were not such costs as could be fairly and properly regarded as "other proper outgoings in respect of the undertaking," and he refused the summons. There is, then, an appeal to us, and the same contention was made before us that these costs ought to be regarded as proper outgoings in respect of the undertaking; but we feel the same difficulty that Byrne, J., did in that. They are certainly not working expenses of the railway, and without going so far as Kay, J., did in *In re Eastern and Midlands Railway Co.*, 45 Ch. D. 367, 39 W. R. Dig. 190, and saying that the proper outgoings must be equivalent to or substantially the same thing as working expenses—without cutting it down so narrowly as that—it would be stretching the ordinary meaning of the words "other proper outgoings in respect of the undertaking" to say that they included the costs of the litigation in respect of this claim. We are not prepared to do that, and therefore we do not differ from the construction put by Byrne, J., upon this section; but there is this to be said. It does not follow that there is no provision to be made for these costs, and taking the view which we do of the order giving the company leave to attend, and treating that as an authority to defend for the benefit of all the debenture-holders, we are of opinion that these costs incurred since the order, should be regarded as costs of the proceedings in the matter of this company, and that these should have priority over the debenture-holders who have got the benefit of the resistance to that claim. That, we think, is the fair upshot of the whole matter, and therefore we propose, while agreeing with Byrne, J., in the construction he put upon the Act, to vary the order, and add this declaration: "That the costs incurred by the Wrexham, Mold, and Connah's Quay Railway Co. in the defence of the action *Whitwham* v. *The Wrexham Co.*, in the arbitration of such action and proceedings consequent thereon since the 8th of September, 1897 (not before; they ask for costs before that, which they are clearly not entitled to, those costs are ordinary debts of the company so far as we can see), ought to be treated as incurred in prosecuting the inquiries directed by the order of the 8th of September, 1897, made in the above matter, and were incurred for the benefit of the debenture-holders and other creditors of the Wrexham Co., and ought to be paid with the costs of this appeal in priority to any future payments to them or any of them." Then there ought to be liberty to apply to the judge to whose court the proceedings in this matter are attached for payment and for it to be worked out. That is how the matter stands, and that exhausts the whole thing.

VAUGHAN WILLIAMS, L.J.—I entirely agree with the Master of the Rolls in the result of his judgment, and also in the reasons he has given for it.

ROMER, L.J.—I agree. I should like to add this, although I think it is covered by what the Master of the Rolls has said, but I should like to make it perfectly clear. It does not follow from our judgment that all costs incurred by parties to this order, or to the inquiries thereby directed, would of necessity be paid in priority to the claims of the debenture-holders or of the judgment creditors; for example, I can well understand that some costs under the order, or in carrying out or in answering the inquiries thereby directed, may have been incurred under such circumstances as would show that they were really incurred for the benefit—not, for example, of the debenture-holders, but, say, of the judgment creditors, and those ranking after them. In a case like that, for example, I think the costs would be provided for, but would not be provided for in priority to the debenture-holders. Or costs might be incurred by the company which were not really for the benefit of the debenture-holders or judgment creditors, in which case those costs would be provided for after providing for the costs of the debenture-holders and the judgment creditors. In the present case as decided by the judgment of the Master of the Rolls why we have given these costs in priority to debenture-holders and the judgment creditors the ordinary creditors and the shareho

because, as pointed out by the Master of the Rolls, the costs were really incurred for the benefit of all those classes.

Solicitors, *Norris, Allens, & Chapman*, for *J. B. Pollitt*, Manchester; *Field, Roscoe, & Co.*, for *Evan Morris & Co.*, Wrexham; *Sharpe, Parker, & Co.*, for *Alsop, Stevens, Harvey, & Crooks*, Liverpool; *Cunliffes & Davenport*, for *R. B. Lingard-Monk*, Manchester.

---

From Chan. Div.
(Lindley, M.R., and Vaughan Williams and Romer, L.JJ.) Jan. 22.

ATTORNEY-GENERAL *v.* BRIGHTON AND HOVE CO-OPERATIVE SUPPLY ASSOCIATION. (*a.*)

*Highway—Nuisance—Obstruction — Loading and unloading of vans—Injunction.*

*The private reasonable right to use a public highway in carrying on a business must, in a case of difficulty, give way to the public right of using the highway. What is a reasonable user of a highway depends on the facts of each particular case. It is not enough that the user consists in an aggregate of lawful acts.*

This was an appeal against a decision of Kekewich, J., by which he granted a perpetual injunction restraining the defendants from causing a nuisance to the public by obstructing and putting to unreasonable and excessive user the public highway on which their premises abutted, and by obstructing and using, to the interference with and danger of the public, the footway on the side of the highway.

The action was brought by the Attorney-General on the relation of James Pack, a lodging-house keeper, of 21, Lansdowne-street, Brighton, for an injunction to restrain the defendants, who carry on business in the same street, from causing a nuisance to the public and to the plaintiff by an alleged unreasonable user of the street, through blocking it with carts and vans, and causing an offensive smell by allowing accumulations of droppings from their horses. The plaintiff complained that the defendants used the street for loading and unloading their vans, so that not only the roadway but also the foot pavement was obstructed from early in the morning to late at night. In the result the question became only one as to the right of the public generally to restrain the alleged nuisance, the plaintiff abandoning any claim for private damage.

The defendants appealed.

*Warmington, Q.C.*, and *A. Beddall*, for the defendants, the appellants.—The purposes for which a highway exists have to be considered. You cannot enclose it. If you are willing to remove an obstruction you do not cause a nuisance for which an injunction will be granted. [VAUGHAN WILLIAMS, L.J.—You cannot test an unlawful obstruction by saying that you are always willing to move apart.] There is no evidence of inconvenience being suffered by the public. Public means not only people passing to and fro, but also the adjacent owners. If you cannot load and unload in the highway, business would stop. This is not an illegal exclusion of the public from the highway. [LINDLEY, M.R.—There is a conflict between private and public rights.] We can use the highway for our business as long as we do not unreasonably affect our neighbours. It is a mere question of excessive user. How are you going to measure excess. Are the public inconvenienced; if not, an injunction will not be granted. Our user is not excessive, therefore an injunction ought not to be granted.

They referred to *Rex.* v. *Cross*, 3 Camp. 224; *Rex.* v. *Jones*, 3 Camp. 230; *Attorney-General* v. *Sheffield Gas Consumers Co.*, 1 W. R. 185, 3 De G. M. & G. 304; *Original Hartlepool Collieries Co.* v. *Gibb*, 5 Ch. D. 713, 25 W. R. Dig. 121.

*Macmorran, Q.C.*, and *E. A. Parkyn*, for the respondent, were not called upon.

LINDLEY, M.R.—It appears to me that it is quite impossible for us to reverse this judgment, by which the learned judge has granted an injunction to restrain the defendants from causing a nuisance to the public by obstructing and putting to unreasonable use a public highway known as Lansdowne-street, or by obstructing and using to the interference with and danger to the public, the footway. Now, the substance of the case is this: It is said that the defendants have got a large business, a business which is beneficial to the public as well as to the shareholders. They have stores, and they supply things which the public want, and they carry on that business in a street the roadway of which is a little less than twenty feet wide. Their business evidently, from the evidence, has increased of late years, and the complaint is that they obstruct the street. Now, let us first of all look and see to what extent they obstruct, and without reference to anything about reasonable or unreasonable let us see what they do. They certainly block up one-half of the street for some distance by putting six vans—we will call it six, that being the number which is now apparently used—which are packed close together tail on towards the kerb and projecting into the road. The vans have horses, and the horses are turned round so far as they can be, so as to leave as much room as possible on the other side of the vans. There is no obstruction at all at night—that seems to be conceded—but during the day-time there are half-a-dozen vans there packed in the way to which I have alluded every other hour. They begin at 8.45 and go on until 9.40. Then there is an hour clear, then there is another hour loading and unloading and then there is another hour clear, and so on every other hour during the daytime. From 8.45 to 5.45 there is this accumulation of vans and horses, and there is the loading and the unloading across the pavement to such an extent that the foot passage is materially obstructed. There is evidence—evidence which I do not and cannot disregard—that the passage—I mean by that the carriage-passage—along the street is obstructed. I do not mean to say that it is stopped long, but the evidence is that it is such a nuisance to get along that people shirk the street. There is evidence that carriages have been turned back and there is evidence from one person, at all events, that if you drive along there you are very apt to be annoyed by these horses, which interfere with the passing horses. The passage left is very narrow and if there happens to be anything in the passage at the time you want to pass you cannot pass at all. Those are the facts, and upon those facts it is impossible to say there is not an obstruction to the right of way in fact.

Now, *primâ facie* that is enough to constitute a legal nuisance—a nuisance that is not a lawful nuisance, but a nuisance in point of law to a highway. The public have a right to pass and repass freely and without obstruction, not only over the half of the street occupied by the defendants' vans, but over the whole of the street. Of course there must be in all streets and in all populous places a good deal of give and take, and it would be ridiculous to say that because a cart is

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

standing opposite a house for a short time, that is such an obstruction as to amount to a nuisance. Of course that is absurd, and the whole difficulty in this case arises from the difficulty of drawing the line. I will refer presently to what I consider to be the line. Now let us look and see what the defendants have to say for themselves. They say they are carrying on a lawful business in a way which is reasonable, and so reasonable that it is really necessary if they are to carry on their business here at all, that they should do pretty much as they are doing. It strikes me if you look only at the carrying on of their business, that what they are doing is perfectly reasonable. They have a large business, there is a great deal of loading and unloading to be done; they have a lot of carts, and they do not dawdle as far as I can see—that is to say, that each cart is loaded and unloaded with fair dispatch; there is no complaint about that, and therefore you have to consider what is the consequence of their reasonable exercise of their rights coming into conflict with the rights of the public to use this highway. Now, I take the law to be that which was laid down long ago, and I believe with perfect correctness, in *Rex* v. *Russell*, 6 East 427, at p. 430. The facts there were not quite the same as here, but what I am going to read appears to me to express in better language than I could what the law is, and it has the great advantage of having stood the test, of the best part of a hundred years of criticism. What the court said was: "It should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public. That the primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance. That if the nature of the defendant's business was such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot." I take that to be the law—what does that mean? and in substance what does it come to? It comes to this, that in a case of doubt, in a case of difficulty, the private reasonable right to carry on one's business must give way to the public right of using the street. If the public right of using the street is so obstructed in fact in that, that right cannot be used to the extent which the law requires, then the private right must give way, and, to my mind, it is not an answer to say that the defendants can go on using this street in a way that is reasonable if you look to their interests alone. It is urged, as of course it is always urged, that it is difficult to draw the line. I admit that it is extremely difficult to draw the line. You may say that if a cart stands opposite a grocer's door for five minutes to take up some goods it is obstructing the street, and of course it is, to a certain extent, but it is to such an extent as that it would be ridiculous to say that that is an indictable nuisance, or an actionable nuisance, or a ground for an injunction. It is a question of degree. You may say, What is the difference between one cart and two? You cannot draw the line—nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? and yet who has any difficulty in saying that an oak-tree is a plant and not an animal? Now, when you come to look at the facts of this case there is such an amount of obstruction, obstruction to such an extent, as to block up this street so long and so much that people avoid it rather than face the inconvenience of going along it, and that is to my mind utterly unjustifiable. I think the injunction ought to be affirmed, with the variation that the word wilfully ought to be struck out. I think the appeal ought to be dismissed, and dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I agree, because I regard the decision in the court below as a decision upon a question of fact as to which there was evidence. I do not agree or I should not agree if the decision in the court below had been a decision of law resulting from the facts proved in evidence. I think it is right to make the observations that I am going to make because I cannot help feeling that the decision which we are giving to-day is one of great public importance in all populous places where commercial business is conducted, and I should not like it to be said hereafter that there has been a decision in the Court of Appeal, which shows that it is unlawful to do the particular kind of act which was done by the defendants here. Because if that were our decision here I should hesitate a long time before I could assent to it, because I think that such a decision would be a very serious blow to the interests of the public throughout the kingdom by preventing commercial business being securely carried on at all in crowded neighbourhoods. That there was a physical obstruction in this case, of course, is beyond a douht. There was less room in the highway by reason of what the defendants did. There was displacement in the room available by the presence of the defendants' carts there, but this action could not be supported merely by showing that there was a physical displacement or a physical reduction in the amount of room available for the public during the time that the defendants' carts were standing at their warehouse. It must be shown to support this action not only that there was such a physical displacement or physical reduction in the temporarily available use of the highway by the public; but it must be shown that such displacement or reduction was not consistent with the full user of the highway. Now, a highway is primarily, no doubt, for the purpose of the passage of her Majesty's subjects, but it is also for the purpose that those who pass along the highway shall be able to stop at such houses as abut on the highway, and either call for goods or persons there, or discharge goods or persons there. The fact that you temporarily reduce the width of the roadway does not make that act unlawful and does not make your obstruction an unlawful obstruction. It not only does not do so in a broad street, but it does not do so in a narrow street. If you have got a narrow street that will only admit of one vehicle going down, and which will not admit of two broad vehicles going down for the moment, no doubt if you have a cart drawn up at a house in that narrow street you are physically reducing that highway, it is no longer available for the public during the time that that cart is standing in a narrow street; but it is no more unlawful to call at a house in such a narrow street than it is unlawful to call at a house in a large street. In either case part of the proper and part of the lawful user of a highway includes access to the premises which abut upon the highway.

Then if the cases are looked at I do not think that there will be found any case, at all events of an indictment, in which there has been a conviction upon evidence which merely shows excessive user, a very large user of a lawful right as distinguished from an improper user of a highway. In *Rex* v. *Russell* there was obviously an improper user of the highway and in *Rex* v. *Cross* and *Rex* v. *Jones*; in all of them there was an improper user of the highway, but in each one of those three cases the judgment as delivered expressly asserts the right of access to houses provided it is reasonably exercised. To take the judgment of

Lord Ellenborough in *Rex* v. *Jones*, he says: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness." I will not occupy time by reading the other two judgments, but each one explicitly affirms the lawfulness of such user of the highway. So much for the common law cases, but in *Attorney-General* v. *Sheffield Gas Consumers Co.*, the same proposition is affirmed as plainly as can be by Lord Cranworth in delivering the judgment of the court. On the other hand, it cannot possibly to my mind be said, that no amount of user could possibly amount to a nuisance if that user consisted of an aggregate of lawful acts. I do not agree with that proposition at all. The truth of the matter is that you have always got in these cases, before you can answer the question, Aye or no, was that particular user necessary or reasonable? to take in consideration all the facts of the case. If you are dealing with a narrow street, a single carriage street, it obviously may be necessary to block up that street much more than it ever can be in a wide street with a wide roadway. Again, if a railway station or business premises have got a yard in which they can discharge, I take it that that would be one of the circumstances which might be taken into consideration in showing that it was wholly unreasonable in them, and unnecessary for them, having the benefit of such a yard, to obstruct the highway by discharging their wagons or loading their wagons at the kerb-side. And one of the circumstances that you have to take into consideration would be, if a man or a company have got so large a business that the aggregate of the occasions upon which they can lawfully use that highway would really deprive the rest of the public substantially of the use of the highway in the daytime; nobody, I think, can doubt that that would be an unlawful obstruction, because the unreasonableness of the proceeding is only demonstrated by showing the effect upon the public of the number of occasions upon which the defendants used the highway for this purpose.

In these circumstances I agree with the decision of Kekewich, J., because, as I understand, on the evidence before him, he has come to the conclusion that the user by the defendants of Lansdowne-street was unreasonable and unnecessary. In those circumstances I agree with his decision.

ROMER, L.J.—I agree in thinking that we ought not to interfere with the injunction granted by Kekewich, J., subject to the clerical alteration which has been pointed out by the Master of the Rolls. No doubt any tradesman is *primâ facie* entitled in respect of his bordering on a highway, to use that highway in a reasonable way for the purpose of unloading and loading goods from and into carts for the purposes of his business; and such loading and unloading would not of necessity be an unreasonable user of the highway merely because it might cause a temporary obstruction or some inconvenience to passers-by or others using the street. Whether a user by a tradesman of a highway for such purposes is reasonable or unreasonable is a question of degree and of fact to be determined in each particular case. It does not follow that because the user is really required or is useful for the purpose of carrying on that tradesman's business it must of necessity be held a reasonable user. For example, suppose a person established a very large business indeed requiring the use of an enormous number of vans, and his premises bordered on a very narrow highway, it might well be that in order to enable him to carry on his business he would require to keep the highway exclusively for himself and his wagons the whole day long, and so as not to allow anybody else to be able to come up or down that highway. I should say in such a case as that his user of that highway would not be a reasonable user of it, even though it might be useful or necessary for his business, it amounting practically to an appropriation of the highway to himself for the purposes of his business. Now in the present case the question is whether the user of the defendants of this highway is or is not, looking at the whole facts of the case, a reasonable user. In my opinion, on the evidence, it is not reasonable, for I think that it practically amounts to an appropriation by them of at least half this highway for several hours in every day except Sundays exclusively for the purposes of their business, making it, as it were, a part of their business premises—a private yard, as it were, of their own. And moreover during those hours they are, in my opinion, on the evidence, also seriously interfering with the public user of even that portion of the highway that they do not occupy or appropriate to themselves, and I am further satisfied that what they are doing has caused and is causing considerable inconvenience to the public, so much so that, in my opinion, on the evidence, the public are beginning to cease to use this highway because of the seriousness of the obstruction. In my opinion, what the defendants are doing amounts, on the whole, to an improper user of this highway on their part, and one which ought to be, and has been, properly restrained by injunction. Of course this order does not stop the defendants from using it for the purpose of loading and unloading in a reasonable manner. It only stops them from committing a nuisance—that is, using it in an unreasonable manner. And reasonable user is not a nuisance, and so is not restrained.

*Appeal dismissed.*

Solicitors, *Booth & Smee*, for *Fitzhugh, Woolley, & Co.*, Brighton; *Radford & Frankland*, for *Woods & Holmes*, Brighton.

---

## High Court of Justice.

Chan. Div. } Jan. 26.
Byrne, J. }

NOTT v. WILLIAMS. (a.)

*School — Subscriber to school — Management of school vested in subscribers*—Bonâ fide *subscriber.*

*In a case in which the management of a school and the right to appoint the teachers were, under a deed, vested in the subscribers to the school to the amount of twenty shillings and upwards,*

*Held, that certain persons, on behalf of whom subscriptions were sent to the treasurer of the school on the day of the election of head master, with a view to their voting at such election, and whose subscriptions were returned by him to the person sending the same, were not* bonâ fide *subscribers with a right to vote at such election.*

*It appears to be a right inherent in such a body of subscribers to refuse to admit a new subscriber for good cause.*

This was an interlocutory motion in the above action on the part of the plaintiffs suing on behalf of themselves and all other managers and subscribers

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

of a school at Saughall, in the county of Chester, to restrain the defendant James Williams and his son James Hyatt Williams from remaining in possession of the school premises, and the defendant J. H. Williams from teaching in, or intermeddling with, the school. The school was constituted by a deed of July, 1851, under the School Sites Acts, and therein it was provided "that the management, direction, control, and government of the school, and the situation, appointment, and dismissal of the schoolmaster and schoolmistress and their assistants shall be vested in and exercised by annual subscribers to the amount of 20s. and upwards to the said school." The head mastership of James Williams having properly terminated and a committee of selection having considered a new appointment, a general meeting of the managers was summoned for the 3rd of October, 1899, to elect a new head master. On the morning of that day the treasurer of the school received from a Mr. Harvey, who was himself a *bonâ fide* manager, postal orders to the amount of £19 19s. 6d., and a list of persons who expressed a wish to become subscribers. The treasurer returned these postal orders to Mr. Harvey. At the meeting the persons on behalf of whom these subscriptions had been sent appeared and claimed to vote as managers. Thereupon the chairman adjourned the meeting elsewhere. The would-be subscribers, however, remained behind, and purported to elect J. H. Williams, the defendant, as schoolmaster. At the adjourned meeting the old subscribers elected a Mr. Duckworth as schoolmaster. J. H. Williams affected to act as master, and when the old managers went to the school and introduced the new master he called upon the children to recite the multiplication table. The facts are further explained in the judgment.

*Levett, Q.C.*, and *E. P. Hewitt*, for the plaintiffs.—The managers of the school are empowered to make rules and are under no obligation to accept subscriptions. There is no evidence that these postal orders were in fact annual subscriptions.

*H. Lynn* and *T. A. Organ*, for the defendants.—The managers and subscribers are identical. The only question is whether the persons whose names were submitted to the treasurer had become subscribers to the school. The subscription money was properly sent to the treasurer. He returned it on his responsibility, but no resolution was passed at a general meeting of subscribers that the money should not be accepted. There is no inherent right in existing subscribers to exclude others without due cause. The deed is under the School Sites Acts and the school is constituted thereunder for the benefit of the whole parish. Every inhabitant of the parish has power to become a subscriber and take part in its management.

BYRNE, J.—In this case there is an injunction asked by persons who are undoubtedly annual subscribers and managers of the school (to put it shortly) to restrain the defendants from intermeddling in the school as masters or in the carrying on of its work. One of the defendants claims to be head master of the school. The plaintiffs sue on behalf of themselves and all the other managers and subscribers mentioned in the writ—that is to say, it is a representative action on behalf of the managers and subscribers of the school. It seeks an injunction to restrain the defendants, one of whom claims to be a master at the school, from acting as head master, retaining control in, or otherwise interfering with, the school. The remaining defendant is the father of the defendant who claims to be head master. His appointment duly and properly came to an end. Arrangements were then made for the election of a new head master and under the deed constituting the school it is provided "that the situation, appointment, and dismissal of the schoolmaster and schoolmistress and their assistants shall be vested in and exercised by annual subscribers to the amount of 20s. and upwards to the said school." After the matter had been before a committee of selection a meeting was appointed for the 3rd of October, 1899. On the 3rd of October, 1899, a letter was received by the treasurer of the school from Mr. Harvey containing postal orders for £19 9s. 6d., and a list of names of persons desirous of becoming subscribers. The 9s. 6d. is accounted for in this way. There were nineteen names of persons who had never subscribed before, but suggested that they wanted to subscribe and one of the persons named had subscribed, not £1, but a lesser sum, and the 9s. 6d. was to make up the amount. That came to the treasurer on the very day when the meeting was to be held to appoint the new schoolmaster, and it is very fairly admitted—though it must have been admitted on the facts as they came out—that it was a move on the part of one party in the district to obtain the appointment of their nominee as master. And of course the postponement until the last moment of paying the money was a favourable piece of tactics on their part, as they thought, because there would not be time before the meeting came on to take proceedings to stop them from attending at the meeting, or indeed to allow time perhaps for the other party to bring up twenty similar subscribers. The treasurer returned to Mr. Harvey, who was himself a *bonâ fide* subscriber and manager of the school, the postal orders which he had sent. Then the meeting takes place, and to the meeting there came these would-be members. The chairman sees at a glance that there are present others than those whom he recognizes as managers of the school and adjourns the meeting. The meeting then takes place at a subsequent period of the day, when these newly-introduced people were not present, and the master has been duly appointed at such meeting, unless these newly-introduced people are entitled to say that they were managers and were themselves entitled to appoint, for after the adjournment of the meeting they remained, as I understand, and themselves proceeded to appoint their candidate. Of course this has all led to a good deal of trouble, because when the managers of the school (I use the word as meaning the plaintiffs, and not these new persons whose money came on that particular day) went down to the school to introduce the new master, there was another supposed master in possession, and a discussion arose. The children were told, "This is your new master," whereupon the voice of the chairman was drowned at the direction of the defendant calling upon the children to recite the multiplication tables. Of course this sort of thing cannot go on, and therefore it is necessary, even on an interlocutory motion, to ascertain on the materials before me who is the duly elected person. I have come to the conclusion that the expression "the annual subscribers" who are made the persons to appoint and dismiss a schoolmaster means *bonâ fide* annual subscribers to the amount of 20s., and does not mean persons who simply choose to come forward with money in their hands to the amount of 20s. and to say, "Now I am coming to the meeting, and I am going to have a voice in the voting for a particular schoolmaster." To give an illustration. Suppose a candidate for the schoolmastership had chosen himself to find the money and bring up twenty or thirty new individuals on the morning, and say to the treasurer at the meeting (I do not know that it is any better because it arrived in a letter in the morning), "Here is my £1; I am going to vote." I do not think that

this can be the meaning; it must be *bonâ fide* annual subscribers. Having regard to what took place on this occasion, I cannot, on the materials now before me, regard these persons as *bonâ fide* annual subscribers. I agree that if a man says, "I wish to become an annual subscriber," he does not thereby legally bind himself to subscribe for more than the current year; but he is holding out certainly an expectation that if things go well with him he will continue his subscription. It is not suggested that five or six of these people, at any rate, found the money actually for the payment of their subscription. It is agreed that it is not proved before me that they did not find the money; but when I find Mr. Harvey, who was the collector general of the funds, and who in fact sends it in a lump sum, is able to pledge himself to all but five, I think that he must have some information which leads him to believe that the other four gentlemen did not find their own money. In the circumstances of this case I am of opinion that these persons were not at the time when they sought to vote and elect a schoolmaster *bonâ fide* annual subscribers within the meaning of the deed. Therefore I think that the second defendant was not duly elected master and that the other election was a good election. Of course this is not a final determination of the case, but it is a very important matter, and one which I am bound to decide as best I can on the materials before me. There will be an order to restrain the defendants from remaining in possession of the schoolhouse or other the premises belonging to or forming part of the school referred to in the writ of summons, and an order to restrain the defendant James Hyatt Williams until judgment in this action or further order from presenting himself at the said school, or teaching or attempting to teach therein. Costs will be costs in the action. There is one observation that I ought to have made. I did not overlook the other point that was taken, and probably I ought to have mentioned it. That is with reference to the power of the existing board of management in a proper case and for a right cause to refuse to admit a new subscriber. I think such a power as that must be inherent in the managers of a body of this description. I say for good cause, and it might be that there are very few cases in which you could make out good cause.

Solicitors, *Preston, Stow, & Preston; Baker & Nairne.*

---

Chan. Div. }
Buckley, J. } Feb. 14, 15.

TEBB v. CAVE. (*a.*)

*Landlord and tenant—Dwelling-house—Covenant for quiet enjoyment—Adjoining house of greater height—Injury to demised house—Smoking chimneys.*

*The erection by a lessor, of a building of such a height and so near the demised dwelling-house as to alter the ordinary currents of air and cause the wind to blow down the chimneys and make them smoke, and thus cause grievous annoyance to the lessee, is a physical interference with the house, and a breach of a covenant by the lessor that the lessee should enjoy the premises without any interference or disturbance by the lessor.*

Action.

This was an action by the lessee of a dwelling-house for damages against the lessor for having erected a building which caused the chimneys of the demised house to smoke. The house in question was a three-storey house in the Finchley-road, Hampstead, and in June, 1895, the plaintiff, its owner, let it to the defendant, who was a physician and surgeon, for twenty-one years, at a rent of £130. The lease contained a covenant by the lessee not to use the house otherwise than as a private dwelling-house and the residence of a physician and surgeon; and by the lessor, that the lessee, observing and performing the covenants and agreement thereinbefore contained, "shall and may peaceably hold and enjoy the said premises during the term hereby granted, without any interruption or disturbance whatsoever from or by the said lessor or any person or persons lawfully or equitably claiming through, under, or in trust for them or either of them." The house was not actually finished at the date of the lease, but was so soon afterwards. The defendant knew at the time that the plaintiff intended to practice his profession in the house. The defendant was also owner of the adjoining land, and at the date of the lease, or shortly afterwards, he began to build upon it a building to be used as residential flats. This building stood on the side of the demised house, a few feet away from it, and in August after the lease it had reached some ten feet above the ground. It was subsequently finished, being carried several feet higher than the demised house. The consequence was that when the wind lay in certain quarters the chimneys of the plaintiff's house on the side next the new building smoked, and the plaintiff was unable to have fires lit in some of the best rooms of his house which he desired to use as bedrooms from time to time for his patients. To remedy this zinc extensions, or tall-boys, were placed upon the front stack of chimneys, and were carried across the intervening space to the defendant's building for support, and these proved beneficial; but the same thing could not be done to the stack of chimneys at the back. Cowls were, therefore, placed upon these latter chimneys, but they proved ineffectual to prevent the smoking. The consequence was that there was a grievous annoyance to the plaintiff through smoke. The plaintiff therefore brought this action for an injunction against the defendant erecting or permitting to remain erected upon his land any buildings so as to obstruct the access of air to the plaintiff's chimneys so as to cause them to smoke, and for damages for breach of the covenants and obligations of the lease. At the trial, however, the plaintiff did not press for a mandatory injunction, and the case proceeded upon the question of damages.

*H. Terrell, Q.C.*, and *Lyttelton Chubb*, for the plaintiff.—The house was let for the purpose of being used as the residence of a physician and surgeon, and the defendant having rendered it unfit for that purpose is liable to an action for damages: *Robinson* v. *Grave*, 21 W. R. 223; *Aldin* v. *Latimer, Clark, & Co.*, 42 W. R. 553, at p. 554, [1894] 2 Ch. 437, at p. 444. But beyond this he is liable for the injury caused to the house generally, whether under his covenant for quiet enjoyment, or as having acted in derogation of his grant: *Sanderson* v. *Mayor of Berwick-upon-Tweed*, 33 W. R. 67, L. R. 13 Q. B. D. 547; and see judgment of Lindley, M.R., in *Robinson* v. *Kilvert*, 37 W. R. 545, at p. 547, 41 Ch. D. 88, at p. 95. *Dennett* v. *Atherton*, 20 W. R. 442, L. R. 7 Q. B. 316, has been dissented from in the cases last cited.

*Astbury, Q.C.*, and *Popham*, for the defendant.—The law has been carried to its extreme limits in *Sanderson* v. *Mayor of Berwick*, and the judgment of Fry, L.J., must be considered with reference to the particular facts of that case: see judgment of

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Lindley, M.R., in *Manchester, &c., Railway Co.* v. *Anderson*, [1898] 2 Ch. 394, at p. 401, 47 W. R. Dig. 168. *Aldin* v. *Latimer, Clark, & Co.* was decided upon the question of derogation from grant, and is no authority against the defendant, in an action on the covenant for quiet enjoyment. The defendant has a good defence to the charge of derogation in the knowledge by the plaintiff of the defendant's intention. Mere annoyance or inconvenience to the lessee is not sufficient to give an action upon the covenant: *Jenkins* v. *Jackson*, 37 W. R. 253, 40 Ch. D. 71; *Robinson* v. *Kilvert*. To give rise to an action there must be a physical interference with the demised property: *Manchester, &c., Railway Co.* v. *Anderson*. Interference with light or air is not actionable under a covenant for quiet enjoyment or as being in derogation of grant: *Potts* v. *Smith*, 16 W. R. 891, L. R. 6 Eq. 311, and *Birmingham, &c., Banking Co.* v. *Ross*, 36 W. R. 914, L. R. 38 Ch. D. 295. In no case has the interference with access of air causing chimneys to smoke been held actionable, although it was the second count in *Davies* v. *Marshall*, 9 W. R. 866, 10 C. B. N. S. 697, 709.

BUCKLEY, J.—The plaintiff's case has been put in two ways. He says he is entitled to recover in the first place under the covenant for quiet enjoyment because the acts complained of are an interference with the quiet enjoyment the defendant covenanted to give him; and secondly, that apart from that or in addition to that, the acts which have been done have been in derogation from the grant made to him by the lease. The cases which have been referred to on those two heads to some extent overlap each other, and I do not know that it is desirable or useful to keep them separate. When the lease of the house was granted the defendant knew that the plaintiff proposed to practice his profession of a physician and surgeon there, and this fact was, upon the authority of *Robinson* v. *Grave*, relied on as making the act of the defendant a derogation from grant. I do not think there is much to be made of that point. I have no doubt that a physician and surgeon does not like smoky chimneys, but I do not know that he dislikes them more than anyone else. Whether his house is occupied by patients, or by visitors, or by himself and his family, he is quite entitled to enjoy it in a condition of reasonable comfort. The next case cited, *Dennett* v. *Atherton*, was much nearer the point. If the law as there stated by Willes, J., was the law now I should have some difficulty in deciding in the plaintiff's favour. But that case was considered and commented on in *Sanderson* v. *The Mayor of Berwick-upon-Tweed*, where Fry, L.J., delivering the judgment of the court, said: "In coming to this conclusion we have not lost sight of the observations on the nature of such a covenant which were made by Willes, J., in *Dennett* v. *Atherton*. But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted, and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title nor the possession of the land may be otherwise affected." It is said by the defendant, and said truly, that that case is the utmost limit to which the law has been carried. It went beyond the question of title and possession, and to cases where the enjoyment of the demised land was substantially interfered with by the acts of the lessor. That case is again referred to in the judgment of Lindley, L.J., in *Robinson* v. *Kilvert*, 37 W. R., at p. 547, 41 Ch. D., at p. 96. Further observations upon the question will be found in the judgment of Stirling, J., in *Aldin* v. *Latimer, Clark, & Co.*, where the question arose both as to covenant for quiet enjoyment and as to derogation from grant. The defendant cited the observations of Lindley, M.R., in *Manchester, &c., Railway Co.* v. *Anderson*, where he says: "Even the judgment of Fry, L.J., in the case that carried it farthest, *Sanderson* v. *Mayor of Berwick*, in which he says that anything which substantially interferes with the enjoyment by the tenant is a breach of that covenant, must be taken with reference to the facts then before the court. . . . But to say that partly blocking up a street, which is an inconvenience to the public and an inconvenience to anyone residing near the place is a breach of covenant for quiet enjoyment, is going far beyond any authority I am aware of." That is the greatest qualification of *Sanderson* v. *Mayor of Berwick* which, as far as I know, is to be found. In these circumstances I have to consider whether the defendant in building so as to cause the smoke to be driven down the plaintiff's chimneys was or was not doing something which substantially affected the plaintiff in his enjoyment of the house, although it did not affect either his title or possession. It has been submitted that to be actionable there must be something in the nature of a physical interference with the land demised. The defendant has interposed something which causes the ordinary currents of wind which might or would be harmless in themselves to be diverted by an obstruction, and the wind to be driven down the chimneys, with the result that they smoke. It seems to me that that is a physical interference with the enjoyment of the plaintiff's house, and is within the covenant for quiet enjoyment, and is a breach of it. In these circumstances I need not consider how the matter would have stood upon the question of derogation from grant, in connection with which the plaintiff relies upon facts in respect of the nature of his occupation of his house. I rest my decision upon the covenant for quiet enjoyment.

*Order for inquiry as to damages.*

Solicitors for the plaintiff, *Thorneycroft & Willis.*

Solicitors for defendant, *Newman, Paynter, & Co.*

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 31.

REG. v. THE JUSTICES OF LONDON. (*a.*)

*Justices—Appeal—Order for maintenance of pauper—* 43 *Eliz. c.* 2, *ss.* 6, 7—*Poor Relief Act*, 1819 (59 *Geo.* 3, *c.* 12), *s.* 26—*Poor Law Amendment Act*, 1868 (31 *&* 32 *Vict. c.* 122), *s.* 36—*Police* (*Metropolis*) *Act*, 1839 (2 *&* 3 *Vict. c.* 71), *s.* 50.

*There is no appeal to quarter sessions from an order of justices against relatives for the maintenance of a pauper.*

*An order by a metropolitan police magistrate against the relative of a pauper that he should pay* 2*s.* 6*d. a week towards the maintenance of such pauper is not an order "in which the sum or penalty adjudged to be paid" is "more than three pounds" within section* 50 *of the Police* (*Metropolis*) *Act*, 1839.

Rule *nisi* for a *certiorari* to quash an order of the London Quarter Sessions.

---

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

On the 4th of May, 1899, orders were made by the magistrate of the Greenwich police-court against John Grist and Walter Grist, the illegitimate sons of Mary Ann Grist, that they should pay to the guardians of the Greenwich Union the sum of two shillings and sixpence a week, each, towards the relief and maintenance of Mary Ann Grist, who was poor and unable to work and had become chargeable to the union.

The Grists appealed to the London Quarter Sessions, who quashed the order, on the ground that the Grists, being illegitimate, were not liable to contribute to the support of their mother.

The guardians of the Greenwich Union, at whose instance the original order was made, did not appear before the quarter sessions, but they obtained the present rule *nisi* to quash the order of the quarter sessions, on the ground that the justices had no jurisdiction to hear the appeal.

Proceedings for an order for the maintenance of poor and impotent persons are taken under section 7 of 43 Eliz. c. 2, as amended by section 36 of the Poor Law Amendment Act, 1868.

Section 7 of 43 Eliz. c. 2 enacts as follows: "The father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of a sufficient ability, shall at their own charges relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed."

Section 26 of the Poor Relief Act, 1819, gave to any two or more justices for the county in which "such sufficient person" shall dwell the same power as, by virtue of section 7 of 43 Eliz. c. 2, the justices in their general quarter sessions had.

Section 36 of the Poor Law Amendment Act, 1868, enacts as follows: "So much of the Act of the forty-third Elizabeth, chapter two, and the fifty-ninth George the Third, chapter twelve, as enables orders of maintenance to be made by justices having jurisdiction in the place where the persons upon whom they are to be made dwell, and as prescribes the penalty for disobedience, and section 78 of the Poor Law Amendment Act of 1834 shall in respect of any order to be made hereafter be repealed; and such orders shall be made by the justices in petty session assembled at their usual place of meeting, having jurisdiction in the union or parish to which the poor person in whose behalf the same shall be sought to be made shall be chargeable, and shall be entered in the manner prescribed by the said Act of the eleventh and twelfth Victoria, chapter forty-three, for enforcing orders of justices."

Section 6 of 43 Eliz. c. 2 provides "that if any person or persons shall find themselves aggrieved with any sess or tax, or other act done by the said churchwardens and other persons, or by the said justices of peace, that then it shall be lawful for the justices of peace at their general quarter sessions, or the greater number of them, to make such order therein as to them shall be thought convenient, and the same to conclude and bind all parties."

*W. M. Thompson* showed caused on behalf of J. and W. Grist.—There is an appeal from an order for maintenance to the quarter sessions by virtue of section 6 of 43 Eliz. c. 2, which has not been repealed. The justices of the peace mentioned in section 7 are the same as those mentioned in section 6, from which an appeal is therein given. The words "at their general quarter sessions" in section 7 merely indicate that the assessment of the "sufficient persons" is to be made within the quarter sessions district in which they reside, and do not mean that the jurisdiction is to be exercised by the quarter sessions. Section 50 of the Police (Metropolis) Act, 1839, provides for an appeal from a metropolitan police magistrate to quarter sessions in every case of a summary order or conviction in which the sum or penalty adjudged to be paid exceeds three pounds. An order for the payment of two shillings and sixpence a week is an order within the meaning of that section.

*Humphries*, in support of the rule.—There is no right of appeal to quarter sessions. Under section 7 of 43 Eliz. c. 2, orders for maintenance were to be made by the quarter sessions. Section 6, therefore, could confer no right of appeal. The Poor Relief Act, 1819, gives to petty sessions a concurrent right to make orders for maintenance, and the Poor Law Amendment Act, 1868, takes the jurisdiction from quarter sessions and from the set of petty sessions mentioned in the Poor Relief Act, 1819, and gives it to another set of petty sessions. Section 78 of the Poor Law Amendment Act, 1834, merely gives directions as to enforcing the orders when made. In none of these provisions is any mention made of an appeal to quarter sessions. The orders in this case are not orders adjudging the payment of a sum or penalty exceeding three pounds, within the Police (Metropolis) Act, 1839.

CHANNELL, J.—The rule must be made absolute. There is clearly no appeal to quarter sessions from an order of the petty sessions ordering a person to contribute to the maintenance of his mother. The power to make these orders was originally given by 43 Eliz. c. 2 to the quarter sessions. It is true that in the same Act a right of appeal is given from acts done by justices, but that means only acts done by justices out of quarter sessions. It is doubtful how far that right of appeal exists at the present time, because a code relating to appeals has been enacted which might be held to take the place of the general provisions of the Act of Elizabeth.

The Poor Relief Act, 1819, gave to the petty sessions the same power to make orders as the quarter sessions had. That Act gave no right of appeal from the order of petty sessions, nor have any of the subsequent Acts done so. The result is that no such appeal exists. None of the appeals given by the Summary Jurisdiction Acts appear to fit the case; but I am inclined to think that where imprisonment is ordered there is an appeal.

It remains to consider whether there is a right of appeal under section 50 of the Police (Metropolis) Act, 1839, on the ground that the order was for the payment of a sum exceeding £3. The order in this case was one the payments under which might or might not exceed £3. That does not, however, make it an order for the payment of that amount. If the old woman died or received a legacy or obtained employment, the payments under the order would cease.

BUCKNILL, J., concurred.

*Rule made absolute.*

Solicitors for J. and W. Grist, *Foy & Co.*

Solicitors for the Guardians of Greenwich Union, *Saw & Co.*

## House of Lords.

From C. A. (England). Dec. 15.

FOX v. STAR NEWSPAPER (LIMITED). (a.)

*Practice—Nonsuit—Discontinuance—Ord. 26, r. 1.*

*A plaintiff can no longer elect to be nonsuited. Should he wish to discontinue the action at the trial, he must do so under ord. 26, r. 1, by leave of the judge.*

*Decision of the* Court of Appeal (46 *W. R.* 340, [1898] 1 *Q. B.* 636) *affirmed.*

Appeal from judgment of Court of Appeal (A. L. Smith, Chitty, and Collins, L.JJ., 46 W. R. 340, [1898] 1 Q. B. 636), affirming that of the Lord Chief Justice.

The action was brought for an alleged libel. At the trial before Lord Russell, C.J., and a special jury, the plaintiff's counsel said he should offer no evidence, and claimed to be nonsuited.

The Lord Chief Justice said he could not enter a judgment of nonsuit, and directed that judgment should be entered for the defendants. This judgment was affirmed by the Court of Appeal; and the plaintiff again appealed.

The appellant in person.

*Blake Odgers, Q.C., Temple Franks,* and *L. Williams* for the respondents, were not called upon.

Earl of HALSBURY, L.C.—This was an action for libel. After the jury had been sworn and the pleadings opened, the plaintiff claimed to be nonsuited. The Lord Chief Justice held that he was not entitled to be nonsuited, and directed a verdict for the defendants. The sole question on this appeal is, whether the old system by which a plaintiff at his own election could lose his writ as it was said, and at his election bring another action for the same cause, is still a system which exists in our law. I am very clearly of opinion that it does not. Our whole system has been changed, and I think the reason why the word "nonsuit" itself is not now to be found in the rules is that it was determined that the power of a plaintiff at common law to claim a nonsuit, or the plaintiff in equity to dismiss his bill at his own option, should no longer be permitted, and it is probable that the word discontinuance was supposed to apply to both forms of procedure, both at common law and in equity. Accordingly, by ord. 26, r. 1, the only mode by which a plaintiff can submit to defeat is under that order, unless he allows the proceedings to go on until the verdict is recorded against him. The word "discontinuance" no doubt had under the former system the more limited application, and the old system of nonsuit is manifestly no longer capable of being reconciled with the new procedure either in form or substance. The substance is that when it once comes into court, and when the plaintiff offers no support to his action, there must be a verdict for the defendant. This was the course pursued by the Lord Chief Justice. I think it was entirely right, and I move your lordships that this appeal be dismissed with costs.

Lords MACNAGHTEN, MORRIS, and SHAND concurred.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitor for appellant, *J. G. Lincoln.*

Solicitors for respondents, *Harrison & Davies.*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

## Court of Appeal.

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) Feb. 22.

BRENDA STEAMSHIP CO. (LIMITED) v. T. & H. GREEN. (a.)

*Ship—Charter-party—"Cargo to be brought to and taken from alongside steamer"—"Any custom of the port to the contrary notwithstanding"—Exclusion of custom.*

*By a charter-party a ship was to proceed to the Surrey Commercial Docks and there deliver a cargo of timber, "the cargo to be brought to and taken from alongside at charterer's risk and expense, any custom of the port to the contrary notwithstanding."*

*A custom of the port of London with regard to timber ships required the shipowner to place the timber either into barges or on to the quay.*

*Held, that the custom of the port was excluded by the charter-party, and that the charterers were bound to pay the expense of taking the cargo from the ship's rail to the barges or on to the quay.*

Appeal from the judgment of Mathew, J., reported in 4 Com. Cas. 209.

The plaintiffs were the owners of the steamship *Brenda*, and the defendants were the charterers.

By a charter-party, which was in the form known as the Chamber of Shipping Wood Charter (Scandinavia and Finland), 1898, *The Brenda* was to proceed to ports in the Baltic and there load a cargo of timber, and being so loaded, was to proceed to the Surrey Commercial Docks, and there deliver the same; "the cargo to be brought to and taken from alongside the steamer at charterers' risk and expense, any custom of the port to the contrary notwithstanding." The charter-party was in print, the names of the ports being written in.

The sum claimed by the plaintiffs in this action represented the cost of discharging the cargo at the Surrey Commercial Docks from the ship's rail into barges and on to the quay, which sum had been paid by the plaintiffs under protest to the stevedores employed in the discharge of the ship.

For the purposes of the action it was admitted that, in the absence of any provision in the charter-party negativing it, there was a custom in the port of London with regard to timber ships which enlarged the ordinary meaning of "alongside" and "delivery," by requiring the shipowner to do work outside his ship in placing the timber into barges or on to the quay, but that such custom did not require him to stow timber in the barge or to stack it on the quay.

Mathew, J., held that the custom of the port was excluded by the charter-party and gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

*English Harrison, Q.C.,* and *D. C. Leck,* for the defendants.—The present form of charter-party is new. It is a general form of charter, being in a printed form, and is to be read as applicable to other ports besides London. The words "any custom of the port notwithstanding" ought to be construed as extending only to the words immediately preceding, "at charterers' risk and expense," and not to the words "to be brought to and taken from alongside the steamer." The question of what is "alongside" the steamer is still governed by the custom of each port, but any custom as to risk and expense in other

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

respects is excluded. The meaning placed on the words "to be taken from alongside" in *Aktieselkalb Helios* v. *Ekman*, [1897] 2 Q. B. 83, 2 Com. Cas. 70, 163, 45 W. R. Dig. 149, is the correct one.

They also referred to *Stephens* v. *Wintringham*, 3 Com. Cas. 169; *The Nifa*, [1892] P. 411, 41 W. R. Dig. 223.

*T. E. Scrutton*, for the plaintiffs, was not called upon.

A. L. SMITH, L.J.—I am of opinion that the judgment of the learned judge is right. The question is whether the shipowners or the charterers are to bear the expenses of taking the cargo from the ship's rail and placing it in barges or on to the quay. Apart from any custom of the port, all that a shipowner has to do to deliver the cargo is to offer the cargo to the consignee over the ship's rail. The work of discharging has been called a joint operation, because, though one set of labourers frequently does the whole of the work, the shipowners' part of the discharge is finished when the cargo has been put over the ship's rail, it being the duty of the consignee to take it from the shipowner there. The charter-party here has, in my opinion, eliminated the custom of the port. I cannot agree with the contention that the words of exclusion refer only to the immediately preceding words, "at charterers' risk and expense"; they refer to the whole sentence. The custom of the port of London therefore being eliminated from the case, it was the duty of the charterers to take the cargo from the shipowners when put over the ship's rail. They did not do so, and the shipowners in consequence incurred the expense of taking it from the ship's rail to the barges and on to the quay. The shipowners are entitled to recover that expense from the charterers. With regard to the cases which have been referred to, the contest in each of them was whether the custom of the port was or was not inconsistent with the charter-party. The words in this charter-party cut out the custom altogether. The appeal must therefore be dismissed.

COLLINS, L.J.—I am of the same opinion. Apart from the custom of the port, the word "alongside" means at the ship's rail. If therefore the custom of the port is, as I think it clearly is, excluded by the express terms of the charter-party, the plaintiffs are entitled to recover the expense of taking the cargo from the ship's rail as an expense which ought to have been borne by the charterers.

ROMER, L.J.—I agree. I think that the argument of the defendants is too fine. The meaning of the charter-party is that, in considering the relative obligations of the shipowners and the charterers as to loading and discharging the cargo, the custom of the port is to be disregarded, and the relative obligations are to be determined by the general law.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Botterell & Roche.*

Solicitors for the defendants, *Lowless & Co.*

---

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 16.

KIMBER AND OTHERS v. ADMAMS. (a.)

*Vendor and purchaser—Covenant—Restrictive covenant—Meaning of "house"—Flats.*

*The term "house" in a restrictive covenant in a conveyance on sale prohibiting the erection of more than a certain number of houses on a certain piece of land, will be construed, in the absence of indications to the contrary, as being equivalent to a block of flats, but not to each single flat.*

This was an appeal from a decision of Cozens-Hardy, J., the substantial effect of which was that the term "house" in a restrictive covenant in a conveyance on sale must not be construed as synonymous with "flat."

By an indenture dated the 24th of December, 1885, four pieces or parcels of land situate in, and having a frontage of 400 feet to, Turney-road, Dulwich, were conveyed by the London, Brighton, and South Coast Railway Co. to J. C. Lovell and W. M. Yetts, in consideration of the sum of £800, and the said J. C. Lovell and W. M. Yetts thereby covenanted with the said railway company that no house should be erected on any part of the said four plots of less value than £500, and that not more than ten houses in all should be erected on the said four plots.

By four several indentures dated respectively the 20th of October, 1887, the 24th of July, 1888, the 2nd of September, 1889, and the 10th of September, 1892, certain portions of the aforesaid four plots of land (amounting together to one-half thereof) were conveyed to the respective plaintiffs; and by an indenture dated the 16th of November, 1899, the remaining half of the said four plots was conveyed to the defendant. All the above five indentures of conveyance lastly hereinbefore mentioned were expressly made subject to a restrictive covenant similar to that contained in the indenture of the 24th of December, 1885.

The defendant having proposed to erect on his half of the said four plots of land, and having already commenced to erect, four blocks of flats, each of which was planned to contain four separate flats—making sixteen flats in all—the plaintiffs moved before Cozens-Hardy, J., on the 26th of January, 1900, for an interlocutory injunction to restrain the defendant from proceeding with his proposed buildings, on the ground that the latter were a breach of the aforesaid restrictive covenant. It appeared from the evidence read at the trial that each of the proposed flats was intended to consist of two living rooms, a kitchen, a scullery, and offices, and would be calculated to let at about 7s. 6d. a week. The defendant admitted by his counsel (though only for the purposes of the motion) that he was bound, as between himself and the plaintiffs, by the terms of the said restrictive covenant. Cozens-Hardy, J., decided, however, that a flat was not a house within the meaning of the covenant, and declined to make the order asked for. From this decision the plaintiffs now appealed.

*Cozens-Hardy*, for the appellants.—A flat is substantially a separate house: *Rogers* v. *Hosegood*, *ante*, p. 202; *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (*Limited*), 24 W. R. 996, 1 Ex. D. 469. It is certainly a separate house for the purposes of burglary and house-breaking: *Evans and Finch's case*, Cro. Car. 473; *Lee* v. *Gansel*, 1 Cowp. 1. Certainly, too, it was a separate house under the old Franchise Law of 1832 (2 & 3 Will. 4, c. 45). I rely also on *Chapman* v. *Royal Bank of Scotland*, 30 W. R. 81, 7 Q. B. D. 136, per Huddleston, B., at p. 140, and *Yorkshire Fire Insurance Co.* v. *Clayton*, 30 W. R. 174, 8 Q. B. D. 421. Popular language would never call a block of flats a house.

*Buckmaster*, for the respondent, was not called upon.

(a.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

LINDLEY, M.R.—I have not the slightest hesitation in saying that, in my opinion, the judgment of the learned judge below is perfectly correct. [The learned judge read the covenant.] What does the word "house" mean in this covenant? Does it refer to the way in which the building is to be sub-divided and let? I think not. I know, of course, perfectly well that there are senses in which a portion of a house may be regarded as a separate house—for the purposes, for instance, of rating and the franchise. But when you come to use "house" in documents of this description, that interpretation can no longer be applied.

RIGBY, L.J.—I agree.

VAUGHAN WILLIAMS, L.J.—I agree. I assent, however, to the plaintiffs' argument so far as this, that I admit that, in construing this restrictive covenant, we must have some regard to its object. And if I found myself in this position, that I could see no object in this covenant so long as the term "house" were limited to a mere brick and mortar erection in its entirety, I should certainly go further and put on it a meaning that would cover its user as well. But that is not the case here. Anyone, I think, who is familiar with building estates in the neighbourhood of London will find no difficulty in discovering the object of this covenant, even if he be content to take the term "house" in its ordinary meaning of a brick and mortar erection in its entirety.

*Appeal dismissed.*

Solicitors, *Todd, Dennes, & Lamb; Cree & Sons.*

---

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) Feb. 5.

SPENCER *v.* LIVETT, FRANK, & SON AND JOHN AIRD & CO. (*a.*)

*Master and servant—Compensation for injury by accident —"Factory"—"Shipbuilding yard"—Ship in dock being repaired—Factory and Workshop Act,* 1878 (41 *&* 42 *Vict. c.* 16), *s.* 93; *Sched.* IV., *Part* II., *cl.* 24—*Workmen's Compensation Act,* 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7.

*By section* 7, *sub-section* 2, *of the Workmen's Compensation Act,* 1897, *a "factory" has the same meaning as in the Factory and Workshop Acts,* 1878 *to* 1891.

*By section* 93 *of the Factory and Workshop Act,* 1878, *non-textile factory means any premises named in Part II. of Schedule IV., which, by clause* 24, *includes "shipbuilding yards"—that is to say, premises in which any ships are made, finished, or repaired.*

*Held, that an ordinary dock in which a ship is repaired is not a "shipbuilding yard," and therefore not a "factory" within the Act of* 1897.

Appeal from the award of the Southampton County Court judge under the Workmen's Compensation Act, 1897.

The respondent on the appeal claimed compensation from Messrs. Livett, Frank, & Son, the appellants, and from John Aird & Co. for personal injuries by accident arising out of and in the course of his employment.

The appellants were ship's chandlers, who also undertook the painting of ships.

The British India Steam Navigation Co. employed the appellants to paint the inside of their steamship *Jelunga*, which was then at Southampton Docks. She was accordingly taken into the inner dock and made fast to the dock quay. For the purpose of painting her it was necessary to remove a quantity of stone ballast from her hold. By arrangement with the appellants, Messrs. John Aird & Co. undertook to do this part of the work, and for this purpose the appellants selected a number of men, including the respondent, who were paid by John Aird & Co., but who were under the control of the appellants' foreman.

The ballast was taken out of the ship's hold by means of the ship's crane worked by hydraulic power, which, together with the machinery which worked it, was wholly on board the ship. The crane was worked by one of the ship's crew. The ballast was put into a bucket attached to the end of the chain of the crane and lowered into barges belonging to John Aird & Co., and lying alongside the ship. While the respondent was in the hold filling the bucket the crane was set in motion without notice and the bucket struck and injured him. The respondent claimed compensation against both the appellants (Messrs. Livett, Frank, & Co.) and John Aird & Co., and the appellants clamed an indemnity against John Aird & Co. in case they were held liable to pay compensation.

The inner dock where the ship was lying was practically surrounded by warehouses, and on the dock quays there were a number of cranes placed at intervals which were used in loading and discharging ships.

It appeared that a firm, called Messrs. Day, Summers, & Co., were at the same time putting new ceilings in the ship, and one of the witnesses stated that it was a customary thing for Day, Summers, & Co. to do repairs to ships in that and any other dock, wherever they could get work.

The county court judge found that at the time of the accident the respondent was solely in the employment of the appellants, and not of John Aird & Co., and was employed in and about the crane and machinery which was being used to discharge the ballast; that the appellants were the "undertakers," and had at the time of the accident the actual use and occupation of the dock in which *The Jelunga* was, and were temporarily using the ship's engine and crane for the purpose of unloading the ballast from the ship into the dock; that the dock in which *The Jelunga* was, including the quay and all that part of the dock filled with water, was a "factory" within the meaning of section 7 of the Workmen's Compensation Act, 1897; that the ship's engine and crane used to discharge the ballast was a "factory" within the meaning of the Act; that it was the usual and ordinary course of business that ships should be repaired in the dock in question both as to the ship itself and her machinery; that *The Jelunga* was on this occasion in the dock for the purpose, amongst others, of repair, and was actually in course of being repaired at the time of the accident; and that the ship's engine and crane were being used in the performance of work necessary to be performed for repairing and painting the ship as described in the evidence. The learned judge came to the conclusion that the respondent was employed on or about machinery used in the process of unloading into a barge, and therefore on to a dock within section 23, sub-section 1, of the Factory and Workshop Act, 1895, and that consequently he was employed "on or in or about a factory," within section 7, sub-section 1, of the Workmen's Compensation Act, 1897; and further, that by section 93 of the Factory Act, 1878, and

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Schedule IV., Part II., clause 24*, the dock was a "factory" within the Act of 1897. He accordingly made an award in favour of the respondent for £40, and held that the appellants were not entitled to be indemnified by John Aird & Co.

*R. M. Bray, Q.C.*, and *S. H. Emanuel*, for the appellants.—The first point decided by the county court judge—namely, that the respondent, being employed on or about machinery used in the process of unloading from a ship on to a barge in a dock, was employed in or about a "factory" within section 23, sub-section 1, of the Factory and Workshop Act, 1895, and therefore came within section 7, sub-section 1, of the Workmen's Compensation Act, 1897, is now covered by the decision in *Hennessey* v. *McCabe*, *ante*, p. 231, [1900] 1 Q. B. 491. That case, which followed *Flowers* v. *Chambers*, 47 W. R. 513, [1899] 2 Q. B. 142, is conclusive upon the point against the respondent. The second question is whether the dock comes within the definition of "shipbuilding yard" in clause 24 of Part II. of Schedule IV. to the Factory and Workshop Act, 1878. It would be stretching the language of the enactment beyond all reason to hold that an ordinary dock is a "shipbuilding yard," that is, a place where vessels are repaired, merely because some repairs are executed upon one of the ships in the dock.

*Clavell Salter*, for the respondent.—It is admitted that the first point is concluded against the respondent by *Hennessey* v. *McCabe*. When the case was in the county court that decision had not been given. As regards the second point, it is a question of fact in each case whether the place is a "shipbuilding yard" within the definition in Schedule IV., Part II., clause 24, to the Factory and Workshop Act, 1878. The circumstances of each case vary, and the county court judge has found as a fact that this dock was used as a place in which repairs to ships were executed, and was therefore a "shipbuilding yard." This ship was being painted and repaired in the inner dock.

He referred to section 7, sub-section 3, of the Workmen's Compensation Act, 1897.

*E. F. Lever*, for John Aird & Co.

*Bray, Q.C.*, was not called upon to reply.

A. L. SMITH, L.J.—In this case the ship was in Southampton Docks, and the owners wanted to have her painted inside. In order to do so she was brought into the inner dock, and it was necessary to take out her ballast. This was done by means of the ship's crane with a bucket attached to the end of the chain. The ballast was loaded into the bucket and lifted out of the hold by means of the crane and was then lowered into lighters alongside. The respondent was working in the hold, loading the bucket, when the crane was set in motion, and the bucket struck him and caused the injuries complained of. The question is whether the Act applies in such a case. As I have had occasion to say more than once the Legislature has excluded ships altogether from the Act. In *Hennessey* v. *McCabe*, a ship was being loaded in a dock from barges by means of a steam winch, and we held that the steam winch was not used in the process of loading from a dock, and was not therefore a "factory" within section 7 of the Workmen's Compensation Act, 1897. That case was decided after the decision of the county court judge in the present case; otherwise his decision upon that point would have been different. That point therefore fails the respondent.

It was then said on his behalf that as section 7 of the Act of 1897 includes employment in a "factory," and as the word "factory" is to have the same meaning as in the Factory and Workshop Act, 1878—which defines a non-textile factory as, among other things, "any premises or places named in Part II. of the said schedule," that is, Schedule IV., "wherein . . . steam, water, or other mechanical power is used in aid of the manufacturing process carried on there"—this inner dock is a factory within the Act. In the first place I cannot see that there was any manufacturing process carried on there. But that is not all. Among the premises named in Part II. of Schedule IV. are (clause 24) "Shipbuilding yards, that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired." Can it be said that this inner dock was a shipbuilding yard? The phrase seems to me to mean a place where ships are built or repaired. I cannot think that upon the evidence in this case this dock was a shipbuilding yard. As my brother Romer pointed out during the argument, if the contention of the respondent is correct, one ship going into a dock where there are twenty or more ships loading and discharging for the purpose of being repaired would make the dock a factory so far as regards all the other ships. This point also fails the respondent. The appeal must therefore be allowed.

COLLINS, L.J.—I am of the same opinion. I only wish to add that section 7, sub-section 3, of the Act of 1897, so far from helping the respondent, is conclusive against him. It says that a workman employed in a factory which is a shipbuilding yard shall not be excluded from the Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard. That clearly implies that a dock like this in which a ship is being repaired is not a "shipbuilding yard."

ROMER, L.J.—I am of the same opinion. In my opinion the Legislature in defining a "shipbuilding yard" contemplated premises where the business of building, finishing, or repairing ships is carried on. It does not include premises where by a mere accidental circumstance a ship is repaired. The definition must be dealt with in accordance with common sense. Premises are not necessarily a "shipbuilding yard" because a ship happens to be repaired there.

*Appeal allowed.*

Solicitors for the appellants, *Speechly, Mumford, & Rodgers*, for *C. Lamport*, Southampton.

Solicitor for the respondent, *French & Co.*, for *E. R. Ensor*, Southampton.

Solicitor for John Aird & Co., *J. Robinson*.

---

* 60 & 61 Vict. c. 37, s. 7: "(1) This Act shall apply only to employment . . . on or in or about a . . . factory. . . (2) 'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891. . . ."

41 & 42 Vict. c. 16, s. 93: "The expression 'non-textile factory' in this Act means . . . any premises or places named in Part II. of the said schedule" (Schedule IV.) "wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there."

Schedule IV., Part II., clause 24: "'Shipbuilding yards,' that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired."

## High Court of Justice.

Chan. Div. Stirling, J. — Jan. 11, 12.

PAYNE v. THE CORK CO. (LIMITED). (a.)

*Company—Winding up—Voluntary winding up—Reconstruction—Sale of assets—Dissentient member—Purchase of interest—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

*Where a company is being wound up voluntarily, and a shareholder has dissented from a sale to a new company, he cannot be deprived by the articles of association from having the benefit of the provisions of section* 161 *of the Companies Act,* 1862, *relating to the purchase of his interest.*

Motion.

This was a motion by the plaintiff, who was the holder of 200 shares in the defendant company, for an injunction to restrain the company and its voluntary liquidator from carrying into effect certain resolutions and agreements, which had been passed and confirmed by general meetings of the company, for the purpose of reconstructing the company on the footing of a sale of its undertaking and property to a new company in consideration of partly-paid shares in such new company.

The plaintiff had given notice to the liquidator of his dissent from the resolutions, and required him either to abstain from carrying the resolutions into effect or to purchase the interest of the plaintiff at a price to be determined in the manner specified by section 161 of the Companies Act, 1862. The liquidator took up the position that the plaintiff was precluded by articles 130 and 131 of the company's articles of association from acquiring the rights given to dissentient members by section 161. The plaintiff thereupon commenced these proceedings.

The Companies Act, 1862, s. 161, provides that where any company is proposed to be or is in the course of being wound up voluntarily, and the whole or a portion of its business or property is proposed to be sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution, receive in compensation for such sale, shares or other like interests in such other company for the purpose of distribution amongst the members of the company being wound up, and any sale so made by the liquidators shall be binding on the members of the company, subject to the proviso that a dissentient shareholder may, by giving notice to the liquidators in the manner prescribed by the section, require the liquidators either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined as thereinafter mentioned.

Articles 130 and 131 of the company's articles of association were as follows:

"130.—Any such liquidator may (irrespective of the powers conferred upon him by the Companies Acts and as an additional power), with the authority of a special resolution, sell the undertaking of the company, or the whole or any part of its assets, for shares fully or partly paid up or the obligations of or other interest in any other company, and may by the contract of sale agree for the allotment to the members direct of the proceeds of sale in proportion to their respective interests in the company, and in case the shares of this company shall be of different classes, may arrange for the allotment in respect of preference shares of this company, of obligations of the purchasing company, or of shares of the purchasing company with any preference or priority over or with a larger amount paid up than the shares allotted in respect of ordinary shares of this company, and may further by the contract limit a time at the expiration of which shares, obligations, or other interest not accepted or required to be sold shall be deemed to have been refused and be at the disposal of the liquidator or the purchasing company.

"131.—Upon any sale under the last preceding article or under the powers given by section 161 of the Companies Act, 1862, no member shall be entitled to require the liquidator either to abstain from carrying into effect the sale or the resolution authorizing the same or to purchase such member's interest in this company; but in case any member shall be unwilling to accept the shares, obligations, or interest to which under such sale he would be entitled, he may, within fourteen days of the passing of the resolution authorizing the sale, by notice in writing to the liquidator, require him to sell such shares, obligations, or interest, and thereupon the same shall be sold in such manner as the liquidator may think fit, and the net proceeds shall be paid over to the member requiring such sale."

*Rowland Whitehead*, for the plaintiff.

*W. F. Hamilton*, for the defendants, the company and its liquidator.

STIRLING, J., said: The question which arises on this motion is whether the plaintiff, who is a shareholder in the defendant company and has dissented from the sale which has been agreed to be made, and has been approved by a resolution of the company, to a new company to be formed in consideration of the issue of shares, has been deprived of the safeguards which are attached by section 161 of the Companies Act, 1862, to sales under that section.

Now, the question which has been raised before me is whether the articles of association effectually deprive the plaintiff, as a dissentient shareholder, of the benefits conferred by section 161, and two of the articles of association are relied upon—namely, articles 130 and 131. They are, as has been observed, two of a group of clauses which are found under the heading "Winding up," and they relate to sales in a winding up. [His lordship read the articles, and continued:]

Now, what has taken place is this. On the 20th of November, 1899, an extraordinary general meeting was held, at which the following resolutions were passed: "(1) That it is desirable to reconstruct the company, and accordingly, that the company be wound up voluntarily, and that Mr. Thomas Rees, of 12, Aldgate, E., be and is hereby appointed liquidator for the purposes of such winding up. (2) That the said liquidator be and he is hereby authorized to consent to the registration of a new company to be called the Cork Co. (Limited), with a memorandum and articles of association in the form of a draft signed for the purpose of identification by the chairman of this meeting. (3) That the draft agreement signed for the purpose of identification by the chairman of this meeting be and the same is hereby approved, and that the liquidator be and he is hereby authorized, pursuant to section 161 of the Companies Act, 1862, and to article 130 of the company's articles of association, to enter into an agreement with the proposed new company (when incorporated) in the terms of the said draft, with such modifications as he may from time to time deem expedient, and to carry the same into effect." Then, upon the 5th of December, those resolutions were confirmed. The liquidator has proceeded to enter into, and to carry into effect, an agreement to the effect stated in the

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

third resolution. The plaintiff is a shareholder who opposed the passing of the resolutions and did not vote in favour of them at either of the meetings, and on the 9th of December he, by letter addressed to the liquidator, expressed his dissent from the special resolution, and required the liquidator to do one of two things, that is to say, either to abstain from carrying the resolution into effect, or to purchase the interest held by him at a price to be determined in manner specified in section 161 of the Companies Act, 1862. In answer to that application the liquidator sends a letter in which he states this: "The liquidator has been advised that the provisions of articles 130 and 131 of the company's articles of association, copies of which are annexed, preclude members from acquiring the rights given to dissentient members by section 161 of the Companies Act, 1862. Under these circumstances we presume you would wish the liquidator to assume that your letter of dissent is a notice under article 131 that you require him to sell the shares in the new company to which you would be entitled under the scheme of reconstruction, and that the net proceeds thereof should in due course be paid over to you." The plaintiff does not take that view of his letter, and has brought this action, and he now moves for an injunction to restrain the liquidator from carrying the agreement into effect without making proper provision for the payment to him of what may be found coming to him under the provisions of sections 161 and 162 of the Act.

Now, the question which I have to decide is whether these articles of association, 130 and 131, preclude the plaintiff from insisting on his rights under section 161. Under section 133 of the Act of 1862 certain consequences follow from a voluntary winding up of the company. It is provided: "The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." Then liquidators are to be appointed for the purpose of winding up the affairs of the company and distributing its property. Then, "Upon the appointment of liquidators all the power of the directors shall cease, except in so far as the company in general meeting or the liquidators may sanction the continuance of such powers." Then "The liquidators may, without the sanction of the court, exercise all powers by this Act given to the official liquidator," and among those is a power "to sell the real and personal and hereditable and movable property, effects, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in parcels" (Companies Act, 1862, s. 95).

Now, a power to sell means, in the absence of any contract, a power to sell for money, and a person who exercises such a power is bound to sell for money. But the Legislature has seen fit to extend the powers of voluntary liquidators by section 161, and has provided that: "Where any company is proposed to be or is in the course of being wound up altogether voluntarily and the whole or a portion of its business or property is proposed to be transferred or sold to another company the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed conferring either a general authority on the liquidators or an authority in respect of any particular arrangement, receive in compensation or in part compensation for such transfer or sale of shares policies or other like interests in such other company for the purpose of distribution amongst the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefits from the purchasing company." I pause there to observe that the agreement which was sanctioned by the resolution, and which has been agreed to be carried out, is a sale which falls within the terms of that portion of section 161. It is a sale in which they are receiving as compensation, or part compensation, certain shares in the new company. But the power which is conferred by that section is not absolute. It is subject to this proviso. It says: "Any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up, subject to this proviso, that if any member of the company being wound up, who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same, expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer—that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution."

Now, the object of this section is very clearly explained by Chitty, L.J., sitting as a judge of first instance in the case of *Cotton* v. *Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454, at p. 460, 41 W. R. Dig. 36. He says: "The 161st section is in substance this: When there is a winding up, whether voluntarily or by the court or under supervision, the duty of the liquidators under the Act of Parliament is to turn all the assets of the company into money, and having paid the creditors and the costs of the winding up then to distribute among the members according to their equities the surplus, if there be any. Then it was seen that there were many cases in which a company might wind itself up voluntarily or the like merely for the purpose of reconstruction, and that it would be very advantageous that there should be taken a power in substance for the company to reconstruct itself. That was one of the objects that was sought to be accomplished by the 161st section; but the gist of the enactment is this—that the liquidators in a winding up, instead of selling for money, may sell for shares; but as a safeguard against that, and against imposing possibly a liability upon a member of the company which is being wound up by seeking to force upon him shares which were not fully paid up, the Legislature has, by way of protecting his interest, said in substance that if he dissents he may receive the value of his shares in money. That is, in short, an explanation of the meaning and effect of the 161st section. It relates to what may be done where there is a winding up." In the present case we have a sale in a winding up to which this section 161 relates. The articles of association by article 131 say: "Upon any sale under the last preceding article, or under the powers given by section 161 of the Companies Act, 1862, no member shall be entitled to require the liquidator either to abstain from carrying into effect the sale or the resolution authorizing the same, or to purchase such member's interest in this company."

Supposing then that this sale was carried out exclusively under section 161, would that bind the plaintiff so as to deprive him of his rights under section 161? It seems to me that it would not—that the article would be *ultra vires* for that purpose. The Legislature has conferred on voluntary liquidators a power of selling in a particular way, and it has attached to that, provisions which constitute a safeguard for the protection of dissentient shareholders, and in my opinion it is not competent for the company, by articles framed in this way, to deprive the shareholders of that protection. It seems to me that the language of Byrne, J., in the case of *In re Peveril Gold Mines (Limited)*, 46 W. R. 198, [1898] 1 Ch. 122, at p. 126, with reference to a right conferred by another section, applies. He said this: "I am of opinion that the company had no right, having regard to the Act of Parliament, to enter into such contract as a condition and part of the general contract binding upon all shareholders, whatever separate or distinct bargain they might have the power to make with an individual who happened to be or to desire to become a shareholder. This article appears to be one more attempt to remove a statutory safeguard of the inexperienced intending shareholder. Not one per cent. of intending shareholders read the articles before applying for or accepting a transfer of shares, and a shareholder does not expect to find that he has entered into a special contract waiving his statutory rights." That seems to me to be applicable to the present case.

But then it is said that this is a sale which the company had power to authorize, and did authorize, by its articles of association, irrespective of section 161, and doubtless article 130 does purport to confer on the liquidator a power of doing this very thing irrespective of the powers conferred on him by the Companies Acts and by way of additional power. Then the question comes to this: Has the company power by its articles of association to confer such an additional power upon the liquidator? The Legislature has said that the liquidator shall sell for money, but it has conferred on a voluntary liquidator a power of selling for shares subject to certain safeguards. The first part of this article 130 purports to confer by way of addition on the liquidator the power of sale for shares, and by article 131 it purports to confer the power of doing so without regard to the safeguards imposed by section 161. Now, it seems to me that when the Legislature has conferred on a liquidator a power to do a particular thing, subject to certain safeguards being observed, it is not within the power of the company to say that the liquidator shall do the very same thing without regard to those safeguards. I take it that the meaning of the Legislature in imposing those safeguards is this, that the thing may be done, but if it is done it must be done in the way in which it has pointed out and in no other. The case is, in that respect, somewhat similar to the statutory power of borrowing. If a company is authorized to borrow up to a certain amount, that means that it may not borrow beyond, and it is well established that any attempt by the company to borrow beyond that amount is *ultra vires*. So here, the liquidator is authorized to do a particular thing in a particular way and on particular terms, and it seems to me it is beyond the powers of the company to authorize him to do the same thing upon other terms and in another way than that which is prescribed by the Legislature. Article 131 does not stop at the point to which I have read. It goes on: "But in case any member shall be unwilling to accept the shares, obligations, or interest to which under such sale he would be entitled, he may, within fourteen days of the passing of the resolution authorizing the sale, by notice in writing to the liquidator, require him to sell such shares, obligation, or interest, and thereupon the same shall be sold in such a manner as the liquidator may think fit, and the net proceeds shall be paid over to the member requiring such sale." Now, supposing that the earlier part of that article 131 were omitted—and practically for this purpose it must be omitted as being, in my opinion, *ultra vires*—this portion of the clause cannot be relied upon against the plaintiff. In that respect it falls precisely in terms within the recent decision of the Court of Appeal in *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate*, 47 W. R. 564, [1899] 2 Ch. 80. I desire to refer to the portion of the judgment of the Master of the Rolls which is found at p. 90 of the report in [1899] 2 Ch. as being in support of the view which I have already expressed with reference to the early part of article 131. The point which was decided precisely in *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* was this, that a stipulation contained in the articles of association with reference to the mode in which the shareholders were to be paid did not constitute an agreement within section 162. The Master of the Rolls says this: "I come to the conclusion that there was no agreement between the company on the one side and Mr. Baring-Gould on the other which could deprive him of his rights as a dissentient member under section 162. Any contrary interpretation of that section would come to this, that the company could by the articles of association made beforehand—before there was any dispute with a dissentient member—bind all the members, and deprive them of the benefits conferred on them in the event of their becoming dissentient members under section 162. I do not think this can be done by the articles of association. This is my view of the joint effect of sections 16, 161, and 162." The Master of the Rolls there appears to be of opinion, as I read his judgment, that it is impossible by articles of association to deprive the dissentient members of the benefits conferred on them by section 161.

Then as to the case of *Cotton* v. *The Imperial and Foreign Agency and Investment Corporation*, the sale there purported to be made, was not a sale in a winding up, and that was the ground of the decision. It was a sale by a company as a going concern under the power conferred on it by the memorandum of association, and as the Lord Justice pointed out, the validity of that sale could not be impeached by the liquidator, but the question would be, when he received the shares, which were the consideration for the contract of sale, what he was to do with them. That does not apply to the present case, because this is on the face of it a sale in a winding up. In my judgment, therefore, the plaintiff is entitled to the relief which he asks, and there ought to be an injunction, unless the liquidator is willing to give an undertaking which seems to me may be very well in the form given by the liquidator in the case of *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate*, which is stated at p. 82 of the report—namely, not to part with the assets of the defendant company without setting apart a sufficient sum to answer what may be found due to the plaintiff.

Solicitors, *Fraser & Christian; Ashurst, Morris, Crisp & Co.*

Chan. Div. } Jan. 23.
Byrne, J. }

*In re* DUKE OF NORFOLK'S PARLIAMENTARY ESTATES. (*a.*)

*Settled land—Scheme for improvement approved by trustees, who had not capital moneys in their hands—Improvements executed at expense of tenant for life—Reimbursement—Settled Land Act*, 1882, *ss.* 21, 22, 25, 26.

*Trustees for the purposes of the Settled Land Acts may approve a scheme by the tenant for life for the execution of improvements thereunder, although at the time of giving such approval they have not in their hands capital moneys for the execution of such improvements; and when, after such approval, the tenant for life, with the knowledge of such trustees, has expended money for such purpose, it is lawful for the trustees, if such early expenditure is for the advantage of all parties concerned, and subject to the proper certificate being obtained, to reimburse him out of capital moneys which may subsequently come to their hands.*

Summons.

This was an application under the Settled Land Act, 1882, by the Duke of Norfolk, as tenant-in-tail of certain Parliamentary estates, for the purpose of determining whether he was entitled to be reimbursed by his trustees for certain sums of money advanced by him for the purpose of paying for improvements executed on such estates.

The facts of the case were as follows:

Under section 58 of the Settled Land Act, 1882, the applicant had the powers of a tenant-for-life over such estate. He had from time to time submitted to his trustees schemes for the improvement of the estates at a time when they had not in their hands any capital moneys or moneys sufficient to pay for such improvements. The applicant accordingly executed the improvements at his own expense. At the present time the trustees had capital moneys in their hands sufficient to pay for the improvements.

*Ingle Joyce* and *Dixon*, for the applicant.—Nothing in the Act requires that capital moneys must be in the hands of the trustees before a scheme is submitted to them for their approval. [They referred to sections 2 (9), 21 (3), 26 (2) (3) of the Settled Land Act, 1882; *In re Millard's Settled Estates*, 41 W. R. 577, [1893] 3 Ch. 116.] [BYRNE, J., referred to *In re Marquis of Bristol's Settled Estates*, 42 W. R. 46, [1893] 3 Ch. 161.] In *In re Millard* it is not stated that the trustees must have the capital moneys in their hands before they sanction a scheme.

They referred to *Round* v. *Turner*, [1889] W. N. 38; *In re Tucker's Settled Estates*, 43 W. R. 581, [1895] 2 Ch. 468; *In re Hotchkin's Settled Estates*, 35 W. R. 463, 35 Ch. D. 41.

*Levett, Q.C.*, and *Stone*, for the trustees.—There is nothing in the Settled Land Act to allow such a dealing with capital moneys as is here proposed. [They referred to sections 21, 22, sub-section 3; *In re Millard's Settled Estates*, and *Marquis of Bristol's Settled Estates*.] To enable trustees to give their approval they must have the money in their hands. Otherwise it may happen that new trustees may be fettered in the exercise of their discretion by something that former trustees have done. Section 26, sub-section 2, shows that to a valid scheme the consent of the trustees is necessary.

*Dixon*, in reply.—In *In re Hotchkin's Settled Estates* there was no capital money in the hands of trustees when the improvements were executed.

He referred to *Duke of Marlborough's Settlement*, 34 W. R. 377, 32 Ch. D. 1.

BYRNE, J.—This case raises an important question under the Settled Land Act, 1882, and one which does not appear to have been the subject of reported decision; it is, whether or not trustees for the purposes of the Act may approve a scheme for improvements submitted to them by the tenant for life before they have moneys in their hands available for the proposed expenditure. There is a second question, which falls for decision in case the first should be answered in the affirmative—viz., whether or not, when a scheme has been approved in such circumstances, and the improvements have been executed and paid for by the tenant for life in anticipation of moneys becoming afterwards available for the purposes of the approved scheme, the trustees are entitled, either with or without the approval of the court, to reimburse the tenant for life the moneys so expended. The trustees may not apply capital moneys in their hands in or towards payment for improvements unless prior to the execution of the work a scheme has been submitted to and approved by them. There are no words in the Act in terms negativing the right of trustees to approve of a scheme in anticipation of moneys coming to their hands, but I have to consider the scope and provisions of the Act to see whether or not such a right is conferred upon them. It has already been determined in the case of *In re Millard's Settled Estates* that a prospective order cannot be made by the court authorizing payment by the trustees for work to be done under an approved scheme out of moneys not in their hands at the time when the order is asked for. That was a decision of the Court of Appeal turning upon section 26 (2) (iii.) and it was recognized by the Master of the Rolls in his judgment that there are no negative words to say the court cannot make such an order, but he points out that under the other clauses of the same sub-section the trustees cannot pay except upon certificates, which cannot be given prospectively, and takes that as an indication that it was never intended that the court should make a prospective order, and he states that he cannot find in the Act anything which authorizes the court to make prospective orders of the kind. That case does not decide the point now before me, although it has an important bearing upon it from the reasoning adopted, and I will mention particularly one passage in the Master of the Rolls' judgment where he says at p. 120: "What is wanted is protection—that is, protection for those interested in the land; and as practical men we know that to authorize a thing to be done is a very different thing from approving it when it has been done." It was urged on behalf of the tenant for life, and it is the fact, that in *In re Millard* the schemes had been approved by the trustees, and it was never suggested in argument, or in the judgments, that such approval was not within the power of the trustees, although the point, if a sound one, would have afforded a complete answer to the application; and the observation is of great weight, though it must not be pressed too far, as the point does not appear to have been suggested or argued and it may have been passed by as immaterial, having regard to the construction placed by the court upon the clause of the sub-section under which the order was sought. The case of *In re Marquis of Bristol's Settled Estates* was on an application made under section 15 of the Settled Land Act of 1890, and it determined that a prospective order could not be made under that section to take effect upon moneys which might thereafter arise,

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

but in the course of his judgment Kekewich, J., in considering the meaning of section 26 of the Act of 1882, makes some observations ([1893] 3 Ch. 166) showing that in his view the use of the words "to be expended" points to moneys in hand, and he says: "It seems to me there would be very great difficulty in holding that if expenditure were sanctioned now, there being no money out of which that could be made, there would not be a charge which would have to be raised in the same way as any other charge on the land." To some extent this line of reasoning is applicable to an objection to a construction of the section which would give a power to approve a scheme in anticipation of subsequent receipt of moneys, as there would undoubtedly be grave difficulty, to say the least of it, in the way of refusing a subsequent order for payment on proper evidence that the moneys had been expended in accordance with the scheme previously approved, especially having regard to the fact that the scheme to be submitted under section 26 (1) must show the proposed expenditure for the execution of the improvement. *In re Tucker's Estate*, also an application under the Act of 1890, deals with the principle upon which the court ought to exercise its discretion in respect of allowing the tenant for life to be reimbursed moneys he has expended without first submitting any scheme, and the observations which have been referred to of the Master of the Rolls and Lopes, L.J., in that case about the duty of a tenant for life to submit a scheme must be read in view of the fact that it does not appear by the report that there were no capital moneys available at the time the tenant for life made the expenditure.

I do not think that section 2, sub-section 9, or section 33 of the Act really afford any assistance in the matter, and I only mention them to show that they have not been overlooked. Capital money arising under the Act shall, "when received," be invested in any of the modes pointed out by section 21 of the Act including (iii.) in payment for any improvement authorized by the Act. The words "when received" point to the expression "capital money arising under the Act" being used as including money to arise at a future date, and I do not see any good ground for limiting it so as to exclude moneys which may arise at a future time, though not receivable immediately or within any given period. Section 22, sub-section 1, provides that capital money shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court at the option of the tenant for life and shall be invested or applied by the trustees or under the direction of the court accordingly, and sub-section 2 provides that the investment or application by the trustees shall be made according to the direction of the tenant for life; section 25 describes improvements authorized by the Act; and then section 26 deals with the procedure to be adopted where the tenant for life is desirous that capital money shall be applied in or towards payment for an authorized improvement. The tenant for life may submit for approval to the trustees or to the court, as the case may require, a scheme for the execution of the improvement. I do not think that I ought to put so narrow a construction upon section 26, sub-section 2, as to hold that it means that the capital money must be actually in the hands of trustees before a scheme is approved by them; or upon section 26, sub-section 3, as to say that it means that the money must be actually in court before a scheme is approved, and, indeed, I think it is clear that a literal construction to that effect is impossible, and I may refer to section 22, sub-section 7, which shows that securities for capital money are not capital moneys, although they may be converted into money which shall be capital money arising under the Act. It would be a *reductio ad absurdum* to say that, there being thousands of pounds of what had been capital moneys invested in consols, and in court, or in the hands of the trustees, it is necessary as a preliminary to the approval of a scheme that the consols should be converted into actual cash. Then it is suggested that if there is money receivable under an existing contract either presently or in the near future, or if there be securities in court or in the hands of trustees capable of being immediately converted into cash, the amounts so receivable or capable of being turned into cash may in effect be regarded as money in court, or in the hands of the trustees, as the case may be, so as to be in substance and effect moneys in court or in hand; but I feel the difficulty that the moment a departure is made from the supposed literal construction the matter is very much at large, and I do not see where to draw the line. Is it to be at money immediately payable under a contract, money payable by instalments under a contract, money to be paid in a year, or in two years, or in twenty years? I was much impressed by the argument that if trustees or the court may approve a scheme before capital moneys are available, the tenant for life and the trustees or the court may be really committing the estate to an expenditure before the period arrives at which a judgment ought to be exercised, and section 53 of the Act and the observations of the Master of the Rolls and Kekewich, J., that I before quoted, are appealed to in support of this argument. But I think the true answer is to be found in this. The scheme of the Act is to give wide powers to the tenant for life and to give power of consent to trustees upon the footing that they will act fairly in the exercise of their respective powers, and that neither the trustees nor the court will sanction schemes which are improvident or which will unduly fetter any discretion which ought to be exercised at a later date; and there is always this safeguard that tenants for life and trustees joining in improvident schemes or not acting with a due regard to the interest of the remaindermen are running the risk of the possible establishment of a personal liability against themselves. The Act is framed for honest folk, and what are considered sufficient safeguards and protection are provided for the parties interested. I think the observation of the Master of the Rolls is to be read with regard to the subject-matter of the case before him, and that he is dealing with the case of safeguards provided by the Act before payment can be actually made, and not with the case of approval of a scheme. I can see many considerations weighing against the contrary view. Suppose, for example, a tenant for life is desirous of selling a portion of his estate with the special object of effecting what he considers a great improvement upon the remainder of it. I think it would be most unfortunate if he should be obliged first to sell and then to find that the trustees did not approve of his scheme. Upon the whole case and a consideration of the terms of the Act I have come to the conclusion that a scheme may be approved, although there are not at the time capital moneys in the hands of the trustees for carrying it out.

Upon the second question I am of opinion that, if after a proper scheme has been duly approved the tenant for life, with the knowledge of the trustees, *bonâ fide* expends money for the purpose of and in accordance with such scheme, early expenditure being for the advantage of all parties interested, there is no prohibition to be found in the Act against the trustees, when they have capital money in their hands, adopting his expenditure and recouping him what he has actually spent, subject to the proper certificate being obtained. The question of what

might happen should the tenant for life die after his expenditure and before recoupment, and another tenant for life succeed and direct the moneys to be applied in some other way does not arise for decision, and I therefore express no opinion about it. I ought to add that in the present case there is not the faintest suggestion that the several schemes, the payments in anticipation by the tenant for life, and the repayments by the trustees have been otherwise than prudent and for the advantage of all persons interested.

Solicitors, *Few & Co.*

---

Chan. Div. } Farwell, J. } Dec. 13, 14.

HEXTER *v.* PEARCE. (*a.*)

*Specific performance—Lease of minerals—Undivided moiety—Inconvenience.*

*An agreement by one of two tenants in common of land to make a lease of the minerals contained in his share can be enforced by specific performance.*

*Inconvenience caused by the other tenant in common having granted a lease of the minerals contained in his share to another person is not sufficient ground for the court to refuse specific performance in such a case:* Price *v.* Griffith, 1 *De G. M. & G.* 80, *distinguished.*

Action for specific performance of a contract to make a lease of the clay and other minerals in or upon an undivided moiety of and in certain freehold lands.

The defendants, P. W. Pearce and his wife, were together entitled to the whole fee simple of an undivided moiety of certain lands at Kingsteignton. In 1894 they, together with the owners of the other moiety, by deed granted a licence to the defendant Wilkinson to dig and remove potter's clay from the fields in question and some other lands for five years from the 29th of September, 1893, upon certain terms as to rent and royalties.

In 1896 P. W. Pearce and his wife agreed with the plaintiffs to grant them "a full and proper lease to work, dig, and sell the clay or other minerals in and upon the said moiety of the lands" for seven, fourteen, or twenty-one years at the option of the plaintiffs from the expiration of the licence to the defendant Wilkinson.

Subsequently, in 1898, the defendant Wilkinson, who had received notice of the agreement last referred to, obtained from the defendants P. W. Pearce and his wife and the owners of the other undivided moiety a lease or licence to mine, dig, raise, and remove the clay in and from the entirety of the lands in question, and this lease purported to commence at the expiration of the former licence granted to him. The defendants Pearce consequently refused to carry out the agreement of 1896, and the plaintiffs brought the present action. The evidence showed that there was still a large quantity of the clay left in the land, and that it had often been worked simultaneously by different persons at different places.

*Warmington, Q.C.*, and *Badcock, Q.C.*, for the plaintiffs.—There is no direct authority for granting specific performance in a case as the present, but *Burrow* v. *Scammell*, 30 W. R. 310, 19 Ch. D. 175, and *Porter* v. *Lopes*, 7 Ch. D. 358, 26 W. R. Dig. 157 are similar. A tenant in common can do all that an owner can do; he can sell, lease, or dispose of his share of the property. To give only damages would be to give a tenant in common a right which the owner of the entirety has not. Specific performance is the appropriate remedy for the breach of a contract dealing with land. The reason for refusal, which consists in the fact that a decree for specific performance may result in a law suit, applies also to the case of a conveyance, and in that case it is clear that there would be no refusal.

*Vernon Smith, Q.C.*, and *Ward Coldridge*, for the defendants Mr. and Mrs. Pearce.—This mine is one which cannot be satisfactorily worked in common. Our defence is twofold: (1) The agreement is too uncertain to be enforced; (2) it affects an undivided moiety of a mine and is therefore inconvenient: see the *dictum* of Knight-Bruce, L.J., in *Price* v. *Griffith*. 1 De G. M. & G. 80, at p. 84. The proper remedy in this case is damages and not specific performance.

*T. L. Wilkinson*, for the defendent Wilkinson.—The evidence shows that specific performance of this agreement would be impracticable.

*Warmington, Q.C.*, replied.

FARWELL, J., after stating that in his opinion the agreement was not too uncertain to be enforced, and that there was a sufficient amount of the clay in question still remaining, continued as follows: The point in the case is therefore whether specific performance ought to be granted of a contract for letting an undivided moiety of mineral property, and I am asked to decide generally that the court will not grant specific performance of such a contract. No authority has been cited to me which shows the existence of such a rule, unless I could read the *dictum* of Knight-Bruce, L.J., in *Price* v. *Griffith*, as sufficient. The case was really decided, as was pointed out by Bacon, V.C., in *Burrow* v. *Scammell*, on the ground that the agreement was void for uncertainty. The *dictum* of the Lord Justice is in one sense merely a truism; but I think it means that there was a clear intention on the part of the lessor to grant a lease of the entirety and nothing else, and there would have been some hardship in compelling him to grant a lease of a moiety only when he did not intend it, having regard to the fact that it was a lease of mineral property. The present case is different in the material point that here there is a clear intention to grant a lease of the moiety. The case of *Burrow* v. *Scammell* is to some extent an authority, if authority were needed, for holding that the court will give specific performance of a contract relating to an undivided moiety. To my mind the whole doctrine of specific performance rests on the ground that a man is entitled in equity to have the specific article for which he has contracted, and is not bound to take damages instead. The right to sue on the contract is the same in law and in equity, but the remedies differ, and the court of equity will grant the equitable remedies in all cases unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or, in some rare cases unless there would be a great hardship imposed on an innocent grantor or lessor by reason of some mistake which he has made, although the other party has not contributed to it.

I think the case which Knight-Bruce, L.J., had in mind could fall into this second class. I am not aware that the court has ever taken into consideration the comparative convenience or inconvenience of the plaintiff and defendant apart from the considerations which I have mentioned. Whether the contract is convenient or not is for the parties to consider before they enter into it. As regards a purchaser from a tenant in common, whether the purchase is of the fee or a term of years, I cannot myself see that

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

such purchaser need have any greater difficulty in working the minerals than the tenant in common would himself have had. I cannot assume that the defendant Wilkinson will act unreasonably. If he acts reasonably, I find on the evidence before me that there is no difficulty in working the clay. If I assumed that he was going to act unreasonably I should not allow his intended impropriety to constitute a foundation for a defence which he would not otherwise possess. I think this is a case in which I ought to give specific performance.

Solicitors, *Crowders, Vizard, & Oldham*, for *Windeatt & Windeatt*, Totnes; *Mann & Crimp*, for *T. & J. Hutchings*, Teignmouth.

---

Q. B. Div.
(Channell and Bucknill, JJ.) } Feb. 1.

KEMBLE (*Plaintiff*) *v.* ADDISON (*Defendant*).
SPOONER (*Claimant*). (*a.*)

*Bill of sale — Registration — Validity — Affidavits — Description of grantor's occupation—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10 (2).

*A married woman living apart from her husband was employed as manager of a dressmaking business at a weekly salary. In a bill of sale of which she was the grantor, and in the affidavit filed on registration, she was merely described as a married woman.*

*Held, that the registration was bad because her occupation was not described.*

Appeal from an interpleader issue tried in the Westminster County Court.

In October, 1899, the plaintiff having recovered judgment against the defendant for a debt incurred in May, 1899, seized in execution certain goods at 3, Cork-street, where the defendant resided.

The claimant claimed the goods under a bill of sale granted by the defendant on the 5th of August, 1899.

At the trial of the interpleader issue it was contended that the bill of sale was bad because the affidavit filed on registration did not contain a proper description of the occupation of the defendant.

The defendant was a married woman living apart from her husband.

At the time when the bill of sale was executed she was employed as manager of a dressmaking business in High-street, Kensington, at a weekly salary. In the bill of sale she was described as "Dorothy Addison, the wife of Robert Addison, of 3, Cork-street, Burlington-gardens." In the affidavit it was stated: "The said Dorothy Addison resides at 3, Cork-street, Burlington-gardens, and is a married woman"; no other description of the occupation of the defendant being given.

The county court judge gave judgment for the claimant. The plaintiff appealed.

*Macaskie*, for the appellant.—Section 10 (2) of the Bills of Sale Act, 1878, requires that an affidavit shall be filed on the registration of every bill of sale which shall contain "a description of the residence and occupation of the person making or giving the same." The description of the defendant in the affidavit is insufficient. She ought to have been described as a dressmaker. The bill of sale is therefore void as against the appellant.

He cited *Luckin* v. *Hamlyn*, 18 W. R. 14, 21 L. T. Rep. 366; *Allen* v. *Thompson*, 4 W. R. 506, 25 L. J. Ex. 249; *Adams* v. *Graham*, 12 W. R. 282, 33 L. J. Q. B. 71; *Downs* v. *Salmon*, 36 W. R. 810, 20 Q. B. D. 775; *Feast* v. *Robinson*, 63 L. J. Ch. 321; *Usher* v. *Martin*, 61 L. T. Rep. 778, 38 W. R. Dig. 20.

*Biron*, for the respondent.—The description of the defendant in the affidavit is a sufficient description, because it is one which enables her to be identified by those who knew her at her place of residence.

He cited *Throssell* v. *Marsh*, 53 L. T. Rep. 321, 34 W. R. Dig. 22; *Phillips* v. *Burt*, 2 F. & F. 862; *Bath* v. *Sutton*, 27 L. J. Ex. 388, 7 W. R. C. L. Dig. 13.

CHANNELL, J.—The point is not free from difficulty, but I think the appeal must be allowed and that the bill of sale is bad by reason of the misdescription of the grantor's occupation in the affidavit. The cases clearly show that the occupation of the grantor of a bill of sale, if he or she has one, must be described, and that the occupation so described must be the one with which he in fact occupies himself. I do not quarrel with the language of Romer, J., in *Feast* v. *Robinson* where he says: "The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours. The intention is that such a description shall be given that if inquiry be made in the place where the person resides he may easily be identified." In that passage Romer, J., merely adopted the view expressed by Martin, J., in *Luckin* v. *Hamlyn*. The difficulty is to know what is the knowledge of the man's neighbours and who are his neighbours. In the case before Romer, J., the grantor of the bill of sale was a partner in several businesses, but he neglected them and spent his time amusing himself in the country; at the same time he was more than a sleeping partner of the businesses and he was known to the creditors of the different businesses as the only monied man in them. The bill of sale, however, was given over his goods in his country residence and persons inquiring about him there would have identified him by the description of his occupation as given in the bill of sale—that is to say, "a gentleman of no occupation." They would have identified him more readily by what he seemed to be doing than by reference to businesses which he neglected. It was accordingly held that the description was sufficient, the judge no doubt treating as the grantor's neighbours the persons who knew him at the place where he resided.

In the present case, the lady, the grantor of the bill of sale, in fact occupied herself by attending to a dressmaking business in Kensington. She received a salary for so doing, and, as was obvious to everyone, she went to business daily. She was at the same time residing in Cork-street, and it may be that people who knew her in Cork-street did not know what her business was, but knowing that she went from home daily during business hours they must have been aware that she had some business. Can it therefore be doubted that she had an occupation within the meaning of the Act, and that that occupation was that of a dressmaker? If the occupation had been merely of a temporary character, it would not have been necessary to describe it. In some cases the description of such a temporary occupation might even be misleading. There was no evidence, however, that the defendant's occupation in this case was temporary. I think, therefore, that the defendant had at the date of the bill of sale an occupation within the terms of the Act, that that occupation was that of a dressmaker, and that as the affidavit did not describe her as of that occupation there was a misdescription, and the bill of sale is bad.

BUCKNILL, J.—I am of the same opinion. Each case must be governed by its own particular circum-

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

stances, and the question for the court is in each case whether the Act has been reasonably complied with. The Act does not require the most minute description of the occupation of the grantor of a bill of sale, but it does require a description sufficient to afford a guide to persons desirous of making inquiries for their own protection. There must be a sufficient description to enable such persons to identify the grantor of the bill of sale.

The facts of the present case are that the grantor was a lady having a residence in Cork-street. She did not stay at her residence during the day, but employed herself in a dressmaker's business in Kensington. This she did, not as a mere *dilletanti*, but in order to earn her livelihood. Ought that fact to have been stated in the affidavit? Clearly it ought to have been stated. As it has not been stated the Act has not been complied with, and the bill of sale is bad.

*Appeal allowed.*

Solicitor for the appellant, *James Hall.*

Solicitor for the respondent, *F. Hastings Dauney.*

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 31.

HENDERSON (*Respondent*) *v.* MERTHYR TYDFIL URBAN DISTRICT COUNCIL (*Appellants*). (*a.*)

*Solicitor—Costs—Solicitor employed at a fixed salary—Solicitors Act,* 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 5.

*A public body employed a solicitor to do their legal and other work at a fixed annual salary. The costs of the public body in legal proceedings to which they were a party having been ordered to be paid to them by the other party to the proceedings,*

*Held, that they were entitled to charge, as part of such costs, sums in respect of the services of their solicitor, provided that such sums did not exceed an undue proportion of the solicitor's salary, having regard to the work done*

Appeal from the Glamorganshire County Court.

The Merthyr Tydfil Urban District Council employed a qualified solicitor as clerk at an annual salary of £400. For this salary he was required to perform all the duties, legal, parliamentary, or otherwise, of his office, including the prosecution and defence of legal proceedings brought by or against the council, and to devote the whole of his time to such duties. He was paid his out-of-pocket expenses.

In an action brought against the council, judgment was entered for the council with costs, to be taxed as between solicitor and client. On taxation the registrar disallowed all the items except those which represented disbursements, on the ground that, inasmuch as the council were not liable to pay the profit costs to their solicitor, they were precluded from recovering such costs from the other side by virtue of section 5 of the Solicitors Act, 1870. The items allowed amounted to £17, and those disallowed to £11. The council applied to the county court judge to review the taxation. He refused to do so, but gave leave to appeal.

*R. V. Bankes* (*Lewis Thomas* with him), for the appellants.—The agreements between solicitors and their clients referred to in sections 4 and 5 of the Solicitors Act, 1870, are agreements by which a lump sum is agreed to be paid by the client to the solicitor in some particular litigation, and not, as in the present case, agreements whereby an annual payment is made for the solicitor's services. It follows that the proviso in section 5, that the client who has entered into an agreement of the kind referred to shall not be entitled to recover from any person more, by ways of costs, than is payable by him under such agreement, does not apply. A proportion of the salary paid by the appellants to their solicitor would presumably be paid for his services in the litigation in respect of which the costs were awarded. The registrar ought to have allowed the profit costs, so as to indemnify the appellants to that extent. No one could say what was the exact proportion of the salary referable to this litigation, but the amount of the items, £11, was not an unreasonable proportion. *Galloway* v. *Corporation of London*, 15 W. R. 1032, L. R. 4 Eq. 90, assists the appellants.

*John Sankey*, for the respondent.—The registrar was right. Costs are an indemnity. The appellants would have had to pay their clerk his salary whether the action had been brought or not. The respondent is only liable to pay to the appellants the costs in which they have been involved by the proceedings. As they are bound to pay to their solicitor his disbursements only, these are the only costs which they can charge against the respondent.

CHANNELL, J.—The appeal must be allowed. The district council have a considerable quantity of work to be done, both of a litigious character and of a non-litigious character. They made a bargain with a solicitor to do the whole of this work for the annual sum of £400 and out-of-pocket expenses. It is said that when in the course of litigation they obtain an order for the payment of their costs by the other side, that is only by way of indemnity. That is, no doubt, true. Again, it is said that the appellants' agreement with their clerk is only valid by virtue of section 4 of the Solicitors Act, 1870. Section 5 of the same Act provides that where there is an agreement between a solicitor and his client, such as is mentioned in section 4, for paying a lump sum in respect of the solicitor's services, "the client shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of such agreement more than the amount payable by the client to his own attorney or solicitor under the same." We have to apply that provision to the present case. It is a provision easy to apply when the agreement relates only to the work in the bill which is being taxed, but it is not easy to apply when the agreement relates both to that and other work. The registrar in taxing the bill in this case finds that £11 of the bill is charged as the remuneration of the solicitor for his work, and he strikes out that amount on the ground that the work was paid for by the salary of £400 allowed by the council to their solicitor.

The terms of the remuneration of the solicitor were that he was to be paid £400 a year for the work comprised in the bill and for other work. A certain proportion then of the £400 would be paid in respect of the work comprised in the bill. It cannot in the present case be shown that £11 was an undue proportion of the £400 to be paid for this work. It is for the party objecting to the allowance of the usual costs in such circumstances to show that the allowance will give more than an indemnity, and in all ordinary cases, such as the present, it is impossible for him to show it. In some cases, however, he may be able to do so. If, for instance, by reason of the case going to the House of Lords, the litigation had become very expensive and the profit costs had amounted to, say,

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

£500, the council only paying to their solicitor £400 for the whole year's work, then it would be apparent that £500 was too much. They would not be paying their solicitor £500 in respect of the particular work and therefore could not recover it.

Here, however, the registrar was wrong in disallowing the whole of the profit costs. The unsuccessful party was liable to pay the proportion of the £400 paid in respect of the work comprised in the bill. It must be assumed until the contrary is shown that £400 is a proper sum to be paid to the solicitor for his year's work and also that £11 is a proper sum to be paid to him for this part of his work. The council must therefore be presumed to be paying their solicitor £11 out of the £400 for this very work. It seems to me, therefore, that, unless something could be shown which it is most improbable in this case can be shown, the whole of the £11 ought to have been allowed. There ought, therefore, to be a review of the taxation. Cases such as this arise frequently, and I believe they are always dealt with in the way I have mentioned.

BUCKNILL, J., concurred.

Solicitors for the appellants, *Morgan & Upjohn*, for *John Vaughan*, Merthyr Tydfil.

Solicitors for the respondent, *H. P. Beecher*, for *F. Sydney Simons*, Merthyr Tydfil.

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 24.

STANTON (*Appellant*) *v.* BROWN (*Respondent*). (*a.*)

*Landlord and tenant—Reservation of exclusive sporting rights—Severability—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *s.* 3.

*A lease of a farm contained a reservation to the lessor of "the exclusive right . . . to enter upon the said farm for the purpose of sporting or otherwise."*

*Held, that the reservation was severable and was not wholly void as being in contravention of the Ground Game Act*, 1880, *and that a person who with the permission of the tenant was shooting partridges on the farm was liable to be convicted of trespassing in pursuit of game.*

Case stated by justices of the county of Gloucester.

The respondent was charged on an information preferred by the appellant with having unlawfully trespassed in search of game upon lands in the occupation of Josiah Hook.

At the hearing of the information the following facts were proved:

By an indenture of lease dated the 12th of March, 1888, and made between Charles Holborow Stanton of the one part and Josiah Hook of the other part, a farm and land were granted to the tenant for the term of seven years from the 29th of September, 1888.

After the reddendum in the lease the following reservation appeared: "Reserving nevertheless unto the said lessor all the timber and other trees now standing or growing upon the said farm or lands, and the exclusive right of the lessor and his friends to enter upon the said farm for the purpose of sporting or otherwise."

This lease expired by effluxion of time, and the tenant continued to occupy the farm as tenant from year to year up to the date of the hearing.

The lessor had for many years past authorized his brother, the appellant, to shoot game on the farm, and this authority was acted upon from time to time.

On the 6th of September, 1899, and on a previous occasion, the appellant entered upon the land with the consent of the lessor for the purpose of shooting partridges, and he found the respondent also shooting partridges there. He claimed that he was entitled to do so under a permission granted to him by the tenant.

The tenant gave evidence that after the expiration of the lease he had continued to hold the land without any new arrangement being entered into between him and the lessor. He considered that he had joint rights of shooting all game with the landlord and stated that he had never shot any game himself, but he had given permission to others, including the respondent.

On these facts the justices were of opinion:

Firstly, that the terms of the lease subsisted so far as consistent with a tenancy from year to year.

Secondly, that, having regard to the decision in the case of *Jeffryes* v. *Evans*, 13 W. R. 864, the reservation in the lease (which operated as a re-grant by the tenant) was an agreement, condition, or arrangement which purported to divest or alienate the right of the tenant to kill and take ground game, and was therefore *ipso jure* void under the 3rd section of the Ground Game Act, 1880.

Thirdly, that the said exclusive reservation of sporting in the lease was inseverable in its terms and that there was no authority to support the contention that it could be held to be good in part as to winged game, and void in part as to ground game. Being a criminal or penal case they were of opinion that they should construe the Act strictly, and that they could not cure any defect or rectify the reservation by the importation of any implied words that might or ought to be introduced to express the contention that ground game was excepted from the reservation.

Fourthly, that as a natural consequence the parties to the lease were thrown back upon their common law rights, and that by the common law the tenant had the right to kill both the winged and ground game on the land and could lawfully authorize the respondent to do so.

They did not consider that the assertion of right by the respondent was presented in a form that ousted their jurisdiction, but they dismissed the information on the points of law above set forth.

The opinion of the court was asked on the questions: (1) Has the term "sporting" a more limited interpretation since the passing of the Ground Game Act, 1880, than it had before, and does it now include shooting or coursing hares and rabbits? (2) Whether or not upon the said questions of law the said justices were correct in their determination as aforesaid? (3) If not, what should be done or ordered by the said court in their premises?

The Ground Game Act, 1880, s. 1, confers on every occupier of land "as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land." The right is exercisable only by the occupier himself or by persons duly authorized by him in writing as mentioned in section 1 (1). By section 3, "Every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void."

*W. L. Richards*, for the appellant.—The reservation

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

of sporting rights is severable, and the fact that it is void as to ground game does not avoid it altogether. Section 3 of the Ground Game Act, 1880, avoids an agreement only so far as it is contrary to the express provisions of the Act: *Gaskell* v. *King*, 11 East, 165; *Harrington* v. *Kloprogge*, 2 B. & B. 678*n*.

The respondent was not represented.

*Cranstoun* (who had been instructed on behalf of the justices, but had no *locus standi*) referred as *amicus curiæ* to *Beardmore* v. *Meakin*, 20 L. J. Notes of Cases, p. 8, as showing that a reservation in a lease which contravened the provisions of the Ground Game Act, 1880, did not invalidate the rest of the instrument.

CHANNELL, J.—I think that this is a very clear case. Looking at the provisions of section 3 of the Ground Game Act, 1880, it seems to me that that section cannot mean that an agreement as to game which contains something in contravention of the occupier's right to destroy ground game is to be void in its entirety, and the case of *Beardmore* v. *Meakin* shows that that is not its meaning. The section cannot mean that the reservation is void in its entirety for it applies not only to agreements made since the passing of the Act, but has also a retrospective operation as regards agreements made before that date; on that construction of the section, therefore, the Legislature would, in the case of a reservation prior to the Act, at the same time give the occupier the ground game and also take away the reservation to the landlord of the winged game. I think that the word "void" in this section means that the agreement is to be void so far as it is contrary to the enactment. The appeal must therefore be allowed, and the case remitted to the justices.

BUCKNILL, J.—I agree.

*Appeal allowed.*

Solicitor for the appellant, *A. H. G. Heelas*, Stroud.

---

Q. B. Div.
(Grantham and Channell, JJ.) Jan. 16.

CHARNOCK (*Appellant*) *v.* MERCHANT (*Respondent*). (*a*.)

*Criminal law—Evidence—Evidence of accused person—Previous convictions and cross-examination as to—Prevention of Cruelty to Children Act*, 1894 (57 & 58 *Vict.* c. 41), *ss.* 1, 12—*Criminal Evidence Act*, 1898 (61 & 62 *Vict.* c. 36), *s.* 1, *sub-section* (f); *s.* 6.

*By section* 1 (f) *of the Criminal Evidence Act*, 1898, *it is provided that a person charged and called as a witness in pursuance of that Act shall not, with certain exceptions, be required to answer any question as to his previous conviction; and section* 6 *provides that "this Act shall apply to all criminal proceedings notwithstanding any enactment in force at the commencement of this Act. . . ."*

*The appellant was charged before a court of summary jurisdiction with an offence under the Prevention of Cruelty to Children Act*, 1894, *section* 12 *of which Act provides that in any proceeding against any person for an offence under that Act such person shall be competent, but not compellable, to give evidence. He gave evidence on his own behalf, and in cross-examination was asked whether he had been previously convicted of an offence under the same Act. He answered in the affirmative. The justices convicted him.*

*Held, that the evidence as to the appellant's previous conviction was not admissible, and therefore that the conviction was bad.*

*Section* 1 *of the Criminal Evidence Act*, 1898, *applied.*

Case stated by the justices of the peace for the county of Hereford sitting at the petty sessions of Wigmore.

On the 27th of June, 1899, an information was preferred by the respondent, an inspector of the National Society for the Prevention of Cruelty to Children, against the appellant, a master of a public elementary school, under section 1 of 57 & 58 Vict. c. 41, charging him with having unlawfully and wilfully assaulted a child in his charge under the age of thirteen years. At the hearing it was proved that the appellant committed the offence charged. The appellant was called as a witness on his own behalf by his counsel, who pointed out to the court that section 12 of the Act under which the charge was laid gave him the right to do so. Upon cross-examination the appellant was asked whether he had been previously convicted of a similar offence. His counsel objected to the question on the ground that it was inadmissible under section 1, sub-section (*f*), of the Criminal Evidence Act, 1898. The justices overruled the objection on the ground that as the appellant had tendered his evidence under the provisions of 57 & 58 Vict. c. 41, s. 12, the section of the Criminal Evidence Act, 1898, did not apply, and they therefore allowed the question to be put. The appellant admitted that he had been previously convicted of a similar offence. The justices convicted him. In the case they stated that the appellant's answer in no way affected their minds, as the fact of his previous conviction was well known to all of them.

The questions stated for the opinion of the court were:

1. Whether under the circumstances stated in the case the question as to the previous conviction was admissible.

2. Whether, if the question was wrongly admitted, the conviction was thereby invalidated, as the justices found the appellant guilty of the offence charged on the facts proved before them.

*H. Lynn* (*T. A. Organ* with him), for the appellant.—The justices were clearly wrong. By the Prevention of Cruelty to Children Act, 1894, it is provided that any person charged under that Act may give evidence on his own behalf. In his cross-examination there are no restrictions as to what questions may be put to him. In this case the justices appear to have been of opinion that as the appellant was prosecuted under that Act the question as to his previous conviction was admissible. This is clearly not so. Section 1 (*f*) of the Criminal Evidence Act, 1898, provides that a person charged and called as a witness in pursuance of that Act shall not be asked or required to answer any question tending to show that he has been convicted of any other offence, and section 6 of the same Act provides that that Act "shall apply to all criminal proceedings, notwithstanding any enactment in force" at the commencement of that Act. [The court here stopped counsel.]

*Cecil Walsh*, for the respondent.—The decision of the justices was right. The appellant tendered himself as a witness, not in pursuance of the Criminal Evidence Act, 1898, but in pursuance of the Prevention of Cruelty to Children Act, 1894, under which Act he was proceeded against. Section 6 of the Act of 1898 does not make any alteration in the provisions of Acts prior to it which are not inconsistent with it. In the Act of 1894 there is no provision inconsistent with the Act of 1898. Section 1 of the Act of 1898 was only intended to apply to indictments, and not to

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

proceedings before a court of summary jurisdiction. However, even if the question as to a previous conviction in this case was not admissible, the conviction should stand, because the justices state, in the case, that the answer to such question did not affect their decision, as the fact of the previous conviction was well known to them, and therefore, as a court of summary jurisdiction, they were entitled to make use of such knowledge.

GRANTHAM, J.—I am of opinion that the conviction was wrong, and that the magistrates adopted an illegal course. The question they allowed to be put to the appellant was legally inadmissible. The justices state in the case that the appellant's answer as to his previous conviction in no way affected their minds as the fact of that previous conviction was well known to all of them, and it may be that the fact of the previous conviction did not affect their judgment, but this they do not state. It was argued on behalf of the respondent that, owing to the words in section 6 of the Criminal Evidence Act, 1898, "notwithstanding any enactment in force at the commencement of this Act," the provisions of section 1 of that Act do not apply to alter the provisions of previous Acts which are not inconsistent with it. As to this argument I can only say that since the Act of 1898 it has always been the practice of judges in prosecutions under the Criminal Law Amendment Act, 1885, to apply the Act of 1898. I am therefore of opinion that the conviction was wrong and that it should be quashed.

CHANNELL, J.—I am of the same opinion. Section 6 of the Act of 1898 has established one principle that must be observed in all criminal courts and cases. If it were not so the defendant in prosecutions under the Criminal Law Amendment Act, 1885, could still be cross-examined as to previous convictions, and if he did not give evidence on his own behalf counsel for the prosecution would be entitled to comment on that fact in his reply. Since the Act of 1898, however, the practice of the judges has always been to the contrary, and section 6 of that Act clearly shows that that practice is the right one. I am therefore of opinion that this conviction must be quashed.

*Appeal allowed and conviction quashed.*

Solicitors for the appellant, *Baker & Nairne.*

Solicitors for the respondent, *Chester, Broome, & Griffiths*, for *Corner & Co.*, Hereford

---

Q. B. Div.
(Grantham and Channell, JJ.) Jan. 16.

COUNCIL OF THE PHARMACEUTICAL SOCIETY OF GREAT BRITAIN (*Appellants*) *v.* WHITE (*Respondent*). (*a.*)

*Poison—Sale of—Agent only authorized to take orders and give receipts—Pharmacy Act*, 1868 (31 & 32 *Vict.* c. 121), *s.* 15.

*By section* 15 *of the Pharmacy Act*, 1868, *it is enacted that no person shall sell or keep an open shop for the retailing, dispensing, or compounding poisons not being a duly registered pharmaceutical chemist or chemist and druggist.*

*The respondent, who carried on the business of a seedsman and florist, acted as agent for a chemical company who manufactured a certain weed-killer which contained a poison—namely, arsenic. The respondent did not keep the article on his premises, but was authorised to take orders for it, which he sent on to the manufacturers, and to receive payments and give receipts.*

*Held, that he had not committed any offence under section* 15 *of the Pharmacy Act*, 1868.

Appeal from the county court of Worcestershire.

In this case the action was brought under the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 15, to recover a penalty from the defendant for selling a certain weed-killer admitted to contain a poison—namely, arsenic, he, the defendant, not being a duly registered pharmaceutical chemist or chemist and druggist.

From the facts found by the learned county court judge it appeared that the defendant carried on business as a seedsman and florist, and that he acted as agent for the Boundary Chemical Co., Liverpool, the manufacturers of the said weed-killer, with authority to take orders for the said article, and to receive money and give receipts in respect of such orders. The defendant did not keep the weed-killer on his premises, as the company delivered it to the purchasers.

On the 27th of May an inspector, instructed by the plaintiffs, visited the defendant's shop and asked for two gallons of the weed-killer. The defendant said that he did not keep the article in stock but that he would send the order on to Liverpool or that the purchaser could do so himself. The inspector asked the defendant to send for it and paid him the purchase-money.

The learned judge gave judgment for the defendant on the ground that he was not the seller of the weed-killer within the meaning of the section. From this decision the society now appealed.

Section 15 of the Pharmacy Act, 1868, enacts as follows: "From and after the 31st of December, 1868, any person who shall sell or keep an open shop for the retailing, dispensing or compounding poisons . . . not being a duly registered pharmaceutical chemist or chemist and druggist, or who . . . shall fail to conform with any regulations as to the keeping or selling of poisons made in pursuance of this Act . . . shall for every such offence be liable to pay a penalty or sum of five pounds. . . ."

*Crump, Q.C.* (*T. R. Grey* with him), for the appellants.—The judge has found that the respondent was the agent of the company in Liverpool, and that he was not the seller. He was wrong in so finding. The respondent was clearly the seller within the meaning of the section, the object of which is to protect the public by requiring that these poisons should be sold by a qualified person. If the retailer of the poison does not come within the section, the object of the section would be defeated. In the present case the respondent is the person who sells and who keeps an open shop; he is therefore the person who is required to be properly qualified: *Templeman* v. *Trafford*, 30 W. R. 78, 8 Q. B. D. 397. The section applies to everyone who sells, whether on his own account or for any other person: see Hawkins, J., in *Pharmaceutical Society* v. *Wheeldon*, 24 Q. B. D. 683. In *Pharmaceutical Society* v. *London and Provincial Supply Association*, 28 W. R. 957, 5 App. Cas. 857, it was held that the actual seller must be a qualified person. Whether he be principal or agent matters not. If the agent contracts to sell the poison it is immaterial that the poison is not kept on his premises. Lord Blackburn in that case says: "A person shall not only not sell, but shall not keep an open shop for the sale." The respondent, as the facts show, clearly comes within the provisions of the section, as he both keeps a shop for the sale and conducts the sale.

*Cavanagh*, for the respondent, was not called upon

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

GRANTHAM, J.—I have no doubt that in this case the county court judge was right. He has found as a fact, and there was evidence before him to justify that finding, that the defendant did not sell this article. The evidence as to the position of the defendant was practically uncontradicted. He was a florist, and knowing what was useful for killing weeds he was ready to advise people where to get it, and he thought he might assist his own business and make a little money, and so he arranged with the firm in Liverpool, who were the sellers and who as it were kept the shop for it, that he would tell people who wanted to buy weed-killer to go to them. He said in his evidence that if anybody came to him for it he told them they could either send the order direct to the company at Liverpool, or if they liked he would take the order and send it on, and he was provided with bill-heads by the Liverpool firm for the purpose of giving receipts for the money which was paid him on their account. For that recommendation he was entitled to receive a commission of 25 per cent.

That being so, it seems to me that he was not the person who was managing the sale. He was merely the conduit pipe to introduce the one person to the other. Suppose a person goes into a chemist's shop to buy some poison and in that shop there is some unqualified person whom he requests to provide him with some rat poison. The assistant says, "There is my master at the other counter, if you go to him you can get it." Thereupon the master, who is a qualified person, hears what is asked for and supplies it. Can it be said that the assistant who first saw the purchaser and told him where to go is the person who sold it? Certainly not; and if that is so in a shop where the poison was kept, how could it be said that the person who did not keep it on his premises at all, who did not make it and did not deliver it, was the seller or the person who managed the sale? I quite accept, as I am bound to do, the judgment of Lord Selborne in the House of Lords in the case of *The Pharmaceutical Society* v. *London and Provincial Supply Association* (*Limited*), and, although it does not apply to this case directly, I think the learned county court judge has been guided by it. I also accept the judgment of Hawkins, J., in the case of *The Pharmaceutical Society* v. *Wheeldon* which has been cited, but I do not think it touches this case at all. I do not think that the county court judge could have come to any other conclusion than the one to which he did come.

CHANNELL, J.—I am of the same opinion. I think the county court judge must be taken to have found as a fact that the defendant had not the control and management of the sale. The cases clearly establish that a person acting in the control and management of the sale is liable as seller, although he is not the principal but only the agent. Here, however, it seems to me there was ample evidence upon which to find that the defendant had not the control and management of the sale. As far as I can gather from the cases the person having the control or management of the sale was the person who might do or might not do the things which the Act required to be done with reference to the sale. The respondent was merely a messenger or something of the sort, though he received 25 per cent. commission. He might be supposed to get that commission because, as a florist, he recommended this substance as an effective weed-killer, and it was obviously for that reason he was employed.

*Appeal dismissed. Leave to appeal upon terms as to costs.*

Solicitors for the plaintiffs, *Flux, Thompson, & Flux.*

Solicitors for the defendant, *Timbrell & Deighton*, for *Dobbs & Hill*, Worcester.

Q. B. Div. (Ridley and Darling, JJ.) — Nov. 1.

BARNACLE v. CLARK. (a.)

*School board — Disqualification of member — Member "concerned . . . in any work done under the authority of such board"—Sale of gravel and sand to contractor with the board—Elementary Education Act*, 1870 (33 & 34 *Vict.* c. 75), *s.* 34.

*The respondent, a member of a school board, supplied sand and gravel to a builder who had entered into a contract with the said school board for the erection of some school buildings. The sand and gravel were used in the course of the said contract being carried out, and the respondent, when selling the said sand and gravel to the contractor, knew they would be so used.*

*By section* 34 *of the Elementary Education Act*, 1870, *it is enacted that "No member of a school board shall in any way share or be concerned in the profits of any bargain or contract with, or any work done under the authority of, such school board."*

*Held, that the respondent had committed an offence within the above section, he having been concerned in work done under the authority of the school board of which he was a member.*

Case stated by justices in and for the county of Northampton.

This was information preferred by Henry Edwin Barnacle, of Stanwick, in the county of Northants, clerk in holy orders, against Christopher Clark, of Stanwick aforesaid, farmer, for that he, the said Christopher Clark, between the 28th of January and the 11th of February, 1899, at Stanwick aforesaid, then being a member of the Stanwick School Board, did share or was concerned in the profits of a certain bargain or contract with, or certain work done under, the authority of the school board or managers appointed by them—to wit, did supply sand and gravel to one Alfred Traynar, of Islip, in the said county, builder, he being then a contractor with the said school board for the building of schools at Stanwick aforesaid, contrary to the form of the statute in such case made and provided.

On the hearing of the information it was proved (*a*) That the defendant did supply sand and gravel, and between the times mentioned in the said information to the said Alfred Traynar; (*b*) that the said Alfred Traynar was between the times mentioned in the said information a contractor with the Stanwick School Board under a contract in writing for the building of schools at Stanwick aforesaid, and that such sand and gravel were to the knowledge of the defendant sold to the said Alfred Traynar to be used in the building of the said schools; (*c*) that part of the sand and gravel supplied by defendant to the said Alfred Traynar was delivered by the defendant at the site of the said schools, and part was fetched from the defendant's sandpit by the said Alfred Traynar or his agents.

Such evidence was strengthened by the production of an account which the defendant furnished to Traynar, and the payment of which was acknowledged by the receipt signed by the defendant at the foot thereof.

At the time the defendant did supply such sand and gravel aforesaid it was proved that he was then acting as chairman of the said Stanwick School Board.

The proceedings in this prosecution were taken under the 34th section of 33 & 34 Vict. c. 75 (The Elementary Education Act, 1879), and it was contended on the part of the prosecutor that the defen-

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

dant's action came within that section, in that he was sharing or being concerned in the profits of the bargain or contract with Traynar, or work done under the authority of the said school board.

It was not suggested on the part of the prosecution that the defendant had made any excessive profit out of the sand and gravel supplied to Traynar, and it was contended that the only place at Stanwick where sand could be purchased was from him, the defendant, and that if he had not supplied the sand the contractor, Traynar, would have had to go some miles before he could obtain a supply, which would have been more expensive, owing to the cartage. The contractor, Traynar, in his examination in chief stated that he bought some sand from Rushden to mix with defendant's sand, this, he stated, because the Rushden sand was a little finer. It was admitted by the contractor that he obtained the leave of the architect of the schools before using the sand and gravel purchased from the defendant, and that in dealing with the defendant he paid for the sand and gravel at the regular charges, and also that before the contract was signed the defendant was a stranger to him.

As a point of law it was contended on behalf of the defendant that sand and gravel were such products of the soil as would come under the exception in sub-section 1 of section 34 of the Education Act, 1870, by analogy to the exception under section 46, sub-section 2 (*a*) of the Local Government Act, 1894. It was also contended that the word "profits" governed the whole of section 34 of the Education Act, 1870, and that the whole of the work done by Traynar was so done under and in pursuance of his written contract with the school board, and that the defendant did not in any way share, nor was he concerned in, the profits of such contract.

It was further contended that, even if the word profits did not govern the latter part of the said section, the supply of sand and gravel to Traynar was not work done under the authority of the said school board.

The justices decided that the defendant had not been guilty of any offence within the meaning of section 34 of 33 & 34 Vict. c. 75, and they therefore dismissed the information.

The question for the opinion of the court was whether, upon the facts of the case above stated, the justices' decision was erroneous in point of law.

By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 34: "No member of a school board and no manager appointed by them shall hold or accept any place of profit the appointment to which is vested in the school board or in any managers appointed by them, nor shall in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of such school board or managers appointed by them, provided that this section shall not apply to: (1) Any sale of land or loan of money to a school board; or (2) any bargain or contract made with or work done by a company in which such member holds shares; (3) the insertion of any advertisement relating to the affairs of any such school board in any newspaper in which such member has a share or interest, if he does not vote with respect to such sale, loan, bargain, contract, work, or insertion. Any person who acts in contravention of this section shall be liable, on summary conviction, to a penalty not exceeding £50, and the said place of profit and his office as a member or manager shall be vacant."

*Austin Metcalfe*, for the appellant.—The respondent clearly infringed the provisions of section 34. He was concerned in the profits of a contract with the school board or was concerned in work done under the authority of that board. It could not be said that he came within the exemptions contained in the proviso to the section on the ground that this sale of gravel and sand was a sale of land. This case came within the authority of *Nutton* v. *Wilson*, 37 W. R. 522, 22 Q. B. D. 744.

*G. Sills*, for the respondent,—The decision of the justices was right. The respondent in no way shared in the profits or loss of the work. He only sold his sand in the ordinary way to the contractor. Section 34 created a criminal offence, and therefore it must be construed strictly. It only provides that a member of the school board shall not be concerned in the profits of any work undertaken by or carried out under the authority of the school board. It does not provide that a member of a school board may not supply goods to the contractor. It must be shown that the member is interested in the contract itself. There was no evidence that the respondent in any way shared in the profits of the contract. This case was distinguishable from *Nutton* v. *Wilson*. In the case of *Le Feuvre* v. *Lankester*, 2 W. R. 307, 3 E. & B. 530, which was an action to recover penalties under 5 & 6 Will. 4, c. 76, from the defendant for having acted as mayor while disqualified by being interested in a contract with the council, it was held he was not liable. Coleridge, J., there stated that "in order to make it a case which can be brought within the statute, the person must have a share or interest, directly or indirectly, in a contract or employment with, by, or on behalf of the council." In the present case the respondent was not in any way so concerned.

*Metcalfe*, in reply, cited *Tomkins* v. *Jolliffe*, 51 J. P. 247.

RIDLEY, J.—It appears clear to me that the decision of the justices was wrong, and that the respondent brought himself within the operation of section 34. No doubt the respondent unwittingly offended against the statute, and it is not suggested that what he did was done for any corrupt purpose; but nevertheless he ought to have been convicted. The object of the Legislature in enactments such as the Act under which the information in the present case was taken out, was discussed in *Nutton* v. *Wilson*, a somewhat similar case to the present one. That was an action to recover penalties under the Public Health Act, 1875, alleged to have been incurred by the defendant for having acted as a member of a local board after he had become disqualified owing to his being concerned in contracts entered into by the board. The decision in that case shows the lines upon which we ought to construe the Act which we are dealing with in the present case. Lindley, L.J., in that case said (on p. 748): "To interpret words of this kind, which have no very definite meaning, and which, perhaps, were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise."

The object of the Legislature in the Act we are now construing is obviously the same. The respondent supplied sand and gravel to the contractor. Did he in any way share or was he concerned in the profits of any bargain or contract or work done under the authority of the school board? It is not necessary for me define the expression "profits of any contract or bargain," but it is quite clear that the respondent was "concerned . . . in work done under the authority of" the school board. I think, therefore, the justices were wrong, and that they ought to have convicted the respondent.

DARLING, J.—I am of the same opinion. The object of such legislation as this is clearly expressed by Lindley, L.J., in *Nutton* v. *Wilson*. We ought not to be hypercritical in interpreting provisions of this nature, for the object is clearly that members of a public body such as a school board should be beyond the suspicion of deriving profit, either directly or indirectly, by reason of their being members of such board.

*Appeal allowed; case remitted to convict.*

Solicitors for appellant, *Samuel Price & Sons*, for *Darnall & Price*, Northampton.

Solicitors for respondent, *Nicholson, Graham, & Graham*, for *James Heygate*, Wellingborough.

## Court of Appeal.

From Chan. Div. (Lindley, M.R., Rigby and Vaughan Williams L.JJ.) — Feb. 13, 16; March 8.

*In re* MARYON-WILSON.
WILSON *v.* MARYON-WILSON. (*a.*)

*Inland Revenue—Settlement estate duty—Legacy by testator in satisfaction of previous covenant—Settlement of legacy by instrument outside will—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 5, 6 (2), 8 (4)—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19—*Effect of covenant to pay "without any deduction."*

*Settlement estate duty arising under section 5 of the Finance Act*, 1894, *is in all cases primarily payable, in the absence of indications of a contrary intention, out of the settled property.*

In re Webber, Gribble *v.* Webber, 44 *W. R.* 489, [1896] 1 *Ch.* 914, *overruled.*

*This primary incidence may, however, be shifted on to the residuary estate by the presence of clear indications of intention*—e.g., *by a direction to pay "without any deduction."*

*Decision of* Kekewich, J. (47 *W. R.* 635, [1899] 2 *Ch.* 489), *affirmed on the point of law, but reversed on the point of construction.*

Appeal from the decision of Kekewich, J., given on the 24th of June, 1899 (47 W. R. 635, [1899] 2 Ch. 489).

By an indenture of settlement dated the 23rd of July, 1895, and made in contemplation of the then intended marriage of his daughter Eva Kathleen Maryon-Wilson, the late Sir Spencer Maryon-Wilson, baronet, covenanted with the trustees of the said settlement that, in case the then intended marriage of his said daughter should take place, his executors or administrators should, within six calendar months from his decease, pay over to the said trustees the sum of £25,000, with interest on the same at the rate of £3½ per cent. per annum from the day of his death, "without any deduction." The said settlement further provided that the said sum of £25,000 should be held upon the trusts therein more particularly declared, including an ultimate trust in favour of Sir Spencer Maryon-Wilson, his executors, administrators, and assigns. The marriage of the said Eva Kathleen Maryon-Wilson was subsequently solemnized.

By his will, dated the 1st of August, 1896, Sir Spencer Maryon-Wilson, in pursuance of the above covenant, devised certain freehold estates to trustees for the term of 2,000 years, to the intent that they should raise and pay (*inter alia*) the said sum of £25,000, together with interest thereon as before mentioned, to the trustees of the said settlement.

The testator died on the 31st of December, 1897.

A question having arisen as to whether the settlement estate duty of 1 per cent. imposed in respect of the said sum of £25,000 under section 5 of the Finance Act, 1894, ought to be paid out of the £25,000, or out of the residuary estate of the testator, it was decided by Kekewich, J., (1) that the duty was primarily payable out of the settled sum of £25,000; and (2) that the testator's covenant to pay "without any deduction" had not the effect of shifting the burden on to the residuary estate.

From this decision the defendants, the trustees of the settlement of the 23rd of July, 1895, now appealed.

*Butcher, Q.C.*, and *Austen Cartmell*, for the appellants.—(1) Settlement estate duty in a case such as this is primarily payable out of the residuary estate: *In re Webber*, 44 W. R. 489, [1896] 1 Ch. 914. The present case is not within the exception grafted on to the above decision by section 19 of the Finance Act, 1896. We rely also on the reasoning used in the decision in *In re Gray*, 44 W. R. 406, [1896] 1 Ch. 620. (2) The burden of paying this duty is anyhow thrown on to the residuary estate by the covenant to pay "without any deduction" in the settlement of the 23rd of July, 1895: *In re Parker-Jervis*, 47 W. R. 147, [1898] 2 Ch. 643; *In re Lord Fitzhardinge*, 80 L. T. Rep. 376.

*Warrington, Q.C.*, and *O. Leigh Clare*, for the respondent.

*Austen Cartmell* replied.

*Cur. adv. vult.*

March 8.—LINDLEY, M.R.—The sections of the Finance Act, 1894, which are important are sections 1, 2, 5, 6 (2), 8 (3) and (4), 9, and 14 (1). The Finance Act, 1896, s. 19, is also important. I do not stop to comment on their exact language. The argument for the appellants, so far as it is based on the Finance Acts, is reducible to the following propositions: (1) That by the Act of 1894, ss. 5 and 6 (2), the settlement estate duty is payable by the executors of the testator; (2) that the Finance Act does not say by whom the duty so payable is ultimately to be borne in a case like the present, section 8 (4) not applying; (3) that, consequently, the duty must be borne by the residuary legatees. The first two of these propositions are correct, but the third is, in my opinion, erroneous, although it was adopted by North, J., in *In re Webber*. The executors pay the settlement estate duty as trustees for somebody, but as trustees for whom? Certainly not as trustees for the residuary legatees, who take no interest whatever in the fund in respect of which the settlement estate duty is payable. The executors pay that duty as trustees for those who are beneficially entitled to that fund, and upon plain principles of equity the executors are entitled to be repaid out of that fund what they have by law to pay in respect of it. In my opinion it lies upon the beneficiaries of that fund to show why this burden, which thus falls upon them, should be borne by somebody else. The settlement estate duty, although described and imposed as a further estate duty, is imposed, not on the general estate of the deceased, but on specific portions of it, and ought in common fairness to be borne by those who take those portions. To facilitate collection the executors have to pay it, but this I regard as mere machinery. The Legislature by the Finance Act, 1896, has

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

amended the law as expounded by North, J. (see 59 & 60 Vict. c. 28, s. 19), and has declared that the settlement estate duty payable in respect of property settled by a will is to be borne by the settled property. Kekewich, J., treats this enactment as a recognition by the Legislature of the soundness of the reasoning which led to the decision. I cannot so regard the enactment. It corrected a mistake, and so saved further litigation. If North, J.'s, reasoning is adopted and applied to all settlements of money to be paid on death, we shall have this extraordinary anomaly—that if a settlement is made by will the settlement estate duty is to be borne by the settled property, whereas if the settlement is made by deed that duty is not to be borne by that property at all. This is an utterly irrational conclusion, and is not one at which we are compelled to arrive by the language of the statutes themselves. If there were nothing else in the case, the settlement estate duty would, in my opinion, have to be borne by the settled fund.

But then we have to consider the covenant of the testator. He covenanted to pay his daughter's trustees £25,000 "without any deduction." These words are very important. They show that possible deductions were thought of, and that the settlor clearly intended that his daughter's trustees should be paid £25,000 in full, without any deduction of any sort or kind. It is urged that there is no difference between a covenant to pay £25,000 and a covenant to pay £25,000 without deduction. But, however this may be, the latter form of expression leaves no room for doubt as to the intention of the parties, whilst, if the words "free from deduction" are omitted, the intention is by no means equally clear. The language of the covenant in this case is too plain to be got over. It is agreed on all hands that the daughter's trustees are to receive £25,000 free from estate duty. But it is urged that the "settlement estate duty," although called a "further estate duty," and made payable by the executors of the covenantor in respect of the settled fund, ought not to be treated as a deduction from it, but rather as a charge on it when paid over. I cannot accede to this argument. It may be conceded that the settlement estate duty is a charge on the settled fund, and that, so far as the Finance Acts are concerned, the executors have to pay it simply for facility of collection. But in the present case we have to consider the trustees of the daughter's settlement on the one hand, and the testator's residuary legatees on the other, and, as between them, his covenant is so plainly worded as to preclude any deduction from the £25,000 in favour of the residuary legatees. They are entitled to nothing out of the testator's estate until the £25,000 has been paid without deduction, pursuant to his covenant. The executors have to pay the settlement estate duty not simply because the statute requires them to pay it, but also because their testator has thrown the burden of it on his general estate, in exoneration of the £25,000 which was settled on his daughter. Similar observations apply to the trusts of the term of 2,000 years created by the testator's will to raise and pay the £25,000 in performance of his covenant—that is, without deduction as above explained. As between the daughter's trustees on the one side and the devisees of the estates subject to the term on the other side, the burden of the settlement estate duty falls on the latter and not on the former. In other words, the trustees of the term must, if necessary, raise and pay not only £25,000, but also the settlement estate duty payable in respect of it. The result, therefore, is that the decision appealed from must be reversed, and the duty in question, and the costs of the litigation, must be borne by the testator's general estate.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

*Appeal allowed.*

Solicitors, *Evans, Foster, & Wadham; Bell, Steward, & Co.*

---

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 14.

MILBANK v. MILBANK. (*a.*)

*Practice—Affidavit of documents—Documents of title—Privilege—Particulars—Production.*

*As the authorities stand, privilege can be claimed for several deeds which are merely described as "a bundle of documents." The fact, however, that a transaction is embodied in a document which is protected from production on the ground of privilege, does not take away the right to have particulars of the transaction, if the same is pleaded in too general a way.*

This was an appeal from an order of Kekewich, J., refusing the plaintiff discovery and particulars of certain documents. The facts were as follow:

The action was brought to establish the title of the plaintiff to a certain freehold estate. In her statement of claim she alleged that her deceased husband was (subject to a legal mortgage in fee made in 1883) tenant in tail of the estate, with remainder to the defendant for life, with remainder to his first and other sons in tail, with remainders over; that her husband had created a base fee which had afterwards been enlarged by him into a fee simple; and that by his will he had devised the estate to her.

By his defence, the defendant denied the enlargement of the base fee, and pleaded that the mortgagees of the estate, in valid exercise of their statutory power of sale, had sold and conveyed the estate to him for valuable consideration, and that he had purchased the same in good faith and without notice of any claim which the plaintiff's husband, or she as claiming through him, might have had to the estate in priority to the title of the mortgagees, and he relied on his title as *bonâ fide* purchaser.

He also pleaded that he had remortgaged the estate so purchased by him to the same mortgagees; and that the action could not be maintained in their absence.

The defendant made an affidavit of documents, in which he claimed privilege from production for "documents numbered 1 to 21 in a bundle marked A," on the ground that they related solely to the defendant's case and not to the case of the plaintiff, and did not tend to support it, and did not contain anything impeaching the case of the defendant.

The plaintiff took out a summons for an order that the defendant should make a further and better affidavit of documents, and in particular set out full and sufficient particulars of the documents so numbered 1 to 21; and, further, that all such documents or other documents (if any) relating directly or indirectly to the alleged purchase and mortgage transactions might be produced for the inspection of the plaintiff.

The plaintiff also took out a summons for particulars of (1) the alleged sale and conveyance by the mortgagees, stating when such sale and conveyance were executed, and what was the valuable consideration for the same; and (2) the alleged remortgage, stating when the same was executed, and for how much; and for inspection of the documents.

---

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The summonses came on to be heard before Kekewich, J., on the 20th of January, 1900, when the defendant by his counsel offered to insert in the order a statement that the bundle marked A included the documents in question.

Kekewich, J., held, on the authority of *Taylor* v. *Batten*, 27 W. R. 106, 4 Q. B. D. 85, that privilege had been properly claimed, and that no further affidavit of documents could be required. He also held that as the plaintiff was not entitled to discovery she could not obtain further information about the documents by way of particulars.

The plaintiff appealed.

*Warrington, Q.C.*, and *Buckmaster* (*Marcey* with them), for the appellants.—A plaintiff is entitled to have particulars of a transaction which is set up by a defendant, and is of a nature to defeat the claim in the action. It was argued that if there is no right to particulars information cannot be got by way of discovery. But this case is the reverse to that proposition. The plaintiff is entitled to have particulars of this transaction. She has to reply on this defence, and cannot do so without knowledge of this transaction which is pleaded in the defence. But if the plaintiff is entitled to have particulars, the defendant cannot defeat that right by making an affidavit on an application for discovery.

They referred to *Taylor* v. *Batten*, 27 W. R. 106, 4 Q. B. D. 85; *Ind, Coope, & Co.* v. *Emmerson*, 34 W. R. 636, 33 Ch. D. 323, and 36 W. R. 243, 12 App. Cas. 300; *Attorney-General* v. *Emerson*, 31 W. R. 191, 10 Q. B. D. 191; and to ord. 31, r. 15, and ord. 19, r. 6.

*Warmington, Q.C.*, and *John Henderson, contrà.*—The rule of the court is that nothing shall be done to impair privilege which has been properly claimed and has been held to exist.

They referred to *Bewicke* v. *Graham*, 29 W. R. 436, 7 Q. B. D. 400; *Morris* v. *Edwards*, 37 W. R. 721, 23 Q. B. D. 287, 15 App. Cas. 309, 39 W. R. Dig. 162; *Budden* v. *Wilkinson*, 41 W. R. 657, [1893] 2 Q. B. 432; *Roberts* v. *Oppenheim*, 32 W. R. 654, 26 Ch. D. 724.

*Buckmaster* replied.

LINDLEY, M.R.—I do not think there is any real difficulty in this case, although these questions about documents are very important. The application before us is two-fold, and it is necessary to distinguish one application from the other. It is an appeal from an order of Kekewich, J., refusing particulars and refusing inspection. Now, I will address myself, first of all, to the particulars. The plaintiff is claiming certain estates, which the defendants say she is not entitled to and they say they are. They say in their defence, paragraph 3, that certain mortgagees whose mortgage was created in 1883, and is in no way disputed, have in the valid exercise of their statutory power of sale sold and conveyed these estates to the defendants. That is the long and short of it. Now the plaintiff says, "I want the particulars of that transaction." Without going further I cannot conceive that this is such a plea as the defendant ought to be allowed to maintain without particulars. I quite agree that you might have taken out a summons to strike it out, but you need not do that. The plaintiff does not want to strike it out. The plaintiff wants particulars of the transaction which is here referred to. Notwithstanding the ingenious arguments we have heard about production I cannot see that they have any relevancy at all upon the question of the particulars the defendant ought to give of that transaction if his pleading is in such a general way as to be technically irregular and insufficient. It appears to me on that short ground that the plaintiff is entitled to the particulars of that transaction. Now, it does not follow because that transaction is embodied in a deed that the plaintiff is not entitled to the particulars of the transaction. It is not asking for a copy of the deed or the contents of the deed. It is a false point altogether to say that because I am not bound to produce a deed I am not bound to answer any questions relating to the transaction which is embodied in the deed. It is a totally different thing.

As regards the inspection there is greater difficulty, and as the authorities now stand I am not prepared to say that a defendant cannot claim privilege for a lot of deeds which are simply described as a "bundle of documents." I think that we have gradually slid into a lax practice about that, because by allowing affidavits in that form and holding them sufficient a person may render it utterly impossible for anybody to test whether the documents put into the bundle do or do not relate to his case exclusively. I think there is great danger of persons being able to obtain protection for documents to which they are not really entitled by having regard to that form which is comparatively modern. The right to put documents into a bundle was a concession to prevent what was very often a grievous oppression in compelling defendants to set out a long list of documents which nobody cared anything at all about. But, on the other hand, I think we have been a little lax in opening the door to enable defendants to obtain protection for documents which, if they described them properly, they would not be able to obtain protection for. I merely say that because I think we have been a little lax, but as the decisions stand I am not prepared to say that that affidavit now it has been patched up by the statement embodied in the order is not technically sufficient. It was originally obviously insufficient for this reason—namely, the pleadings show that they must have deeds relating to the matter which they had not disclosed at all. That made the affidavit obviously wrong, but that has been patched up to this extent, that it is now to be treated by us as it has been treated by the court below, as if it is a bundle of documents relating to the transactions. Having regard to those authorities beginning with *Taylor* v. *Batten*, followed by *Morris* v. *Edwards* and by *Budden* v. *Wilkinson*, I am not prepared to say that those documents are not protected. I rather think they are. Therefore our order must be in favour of this appeal as regards particulars, but not as regards inspection.

RIGBY, L.J.—I agree in granting the particulars and refusing inspection.

VAUGHAN WILLIAMS, L.J.—I agree. There are two observations I wish to make. One is that we are now making the order for these particulars because the allegations in paragraph 3 are too general. If the facts relied upon in paragraph 3 had been properly pleaded they would have been pleaded with more particularity. There has been a good deal of discussion about particulars. Particulars at different times in the history of proceedings at law and in equity have differed somewhat. Sometimes particulars have been mere matters that were allowed in order that there might not be a surprise at the trial. Sometimes they have been limitations of the claim, whether it was the claim of the plaintiffs or the claim of the defendants so as to limit the field of the evidence at the trial, but particulars under the Judicature Act are allowed for quite a different purpose—they are really supplementary to the pleading, they are amendments of the pleading, and these particulars we are ordering to-day are amendments of the pleading. I do not wish to say anything as to matters that we have not got to decide to-day, as to

what may be the effect of rule 15 of order 31, but, speaking for myself, it seems to me that the defendants here will be rash if they consider that those particulars are not a pleading within the meaning of rule 15 of order 31, because it is as an amendment to the pleading that we are really ordering these particulars. It would not, it seems to me, be at all right that the defendant, if he ought to have set out these matters in his defence, should get any advantage or avoid any liability by his own failure to have done that which he ought to have done. One word more about rule 19*a* of order 31. I wish to say of that, that I am expressing no opinion as to how far the learned judge, if he had been asked to do so, which he was not, could have looked at the papers in this bundle when an application was made for production and inspection.

Solicitors, *G. M. Saunders; Burch, Whitehead, & Davidsons.*

---

From Q. B. Div.
(A. L. Smith, Collins, and Vaughan Williams, L.JJ.) Dec. 8.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (*Appellants*) *v.* BISHOP (*Respondent*). (*a.*)

*Inland revenue—Income tax—Life insurance company—"Annual profits and gains"—Participating policyholders—Return of surplus by way of bonus—Income Tax Act,* 1853 (16 & 17 *Vict. c.* 34), *Schedule D.*

*By the articles of the charter of a life insurance company which had a capital divided into shares, it was provided that the company could issue participating policies, that the insurance business should be conducted on the mutual plan, and that, after the owners of the capital stock had received dividends to the amount of 7 per cent., the other earnings of the company should be allowed to accumulate, and that every five years a balance should be struck and the surplus (after deducting a sufficient sum to cover risks and obligations) be divided among the policyholders.*

*Held, that such surplus was an annual profit or gain of the company liable to be assessed to income tax under Schedule D of the Income Tax Act of* 1853.

Last *v.* London Assurance Corporation, 34 *W. R.* 233, 10 *App. Cas.* 438, *and* New York Life Insurance Co. *v.* Styles, 14 *App. Cas.* 381, 38 *W. R. Dig.* 89, *considered.*

*Decision of the* Divisional Court (Darling *and* Channell, JJ.), 47 *W. R.* 556, [1899] 2 *Q. B.* 439, *affirmed.*

This was an appeal by the plaintiffs from a decision of the Divisional Court, 47 W. R. 556, [1899] 2 Q. B. 439. The facts and arguments sufficiently appear from the judgments.

*Sir R. T. Reid, Q.C.*, and *Foote, Q.C.* (*C. H. Neish* with them), for the appellants.

*Cripps, Q.C.*, and *Danckwerts*, for the respondent, were not called on.

A. L. SMITH, L.J.—This is an appeal against a judgment of my brother Darling and my brother Channell. Speaking for myself I cannot doubt that they were right in the opinion which they formed. It is a question whether three sums of £80,000 made by the Equitable Life Assurance Society of the United States in this country are liable to be charged with income tax under Schedule D. The court below held that those sums are liable, and the Equitable Life Assurance Society appeal.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Now, this is by no means virgin soil. Similar, though not identical, cases to this have already been twice before the House of Lords. In *Last* v. *London Assurance Corporation*, 34 W. R. 233, 10 App. Cas. 438, it was decided in favour of the Crown, and in *New York Life Assurance Co.* v. *Styles*, 14 App. Cas. 381, 38 W. R. Dig. 89, it was decided in favour of the subject; in the one that income tax was payable, in the other that it was not payable; and a very excellent argument has been addressed to us as to the distinction between these two cases. The Equitable Life Assurance Society contend that this case falls within *Styles' case*, in which the House of Lords held that income tax was not payable. On the other hand, the surveyor of taxes contends that this case falls within the decision in *Last's case*, and the court below have held that he is right.

Now, first of all, what has *Last's case* decided? There had been prior to the judgment of the House of Lords a considerable divergence of opinion; starting between my brother Day and myself, it went on in the Court of Appeal between Lord Esher, M.R., and Cotton, L.J., on the one side, and Rigby, L.J., on the other, and culminated in the House of Lords with Lord Blackburn and Lord Fitzgerald on the one side, and Lord Bramwell on the other.

Now, what did *Last's case* decide? I will just read the head-note because it describes tersely the facts and the decision in that case. It runs thus: "A life insurance company issued 'participating policies' at an increased premium, according to the terms of which at the end of each quinquennial period 'the gross profits' of such policies were thus dealt with: two-thirds were returned by way of bonus or abatement of premiums to the holders of such policies then in force; the remaining third went to the company who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division among the shareholders. Held, . . . that the two-thirds returned to the policyholders were 'annual profits or gains' and assessable to income tax."

That was a company managed by directors; it had shareholders and there were shares, and it had, as in the present case, participating policyholders who were not members of the company but, by taking out policies with that company, participating in bonuses, and paying, of course, an increased premium, they were entitled to the return of a bonus or an abatement of the premium they paid if and when the profits made by the company were sufficient to allow the return of bonuses or an abatement of premiums to the persons who took out participating policies. It was argued in that case all the way through, from the time it was before my brother and myself up to the House of Lords, whether these returns or bonuses which were made to these participating policyholders were profits, or whether they were part of the expenses of carrying on the business of the company; and the House of Lords ultimately held, after a conflicting decision, that they were not part of the expenses of carrying on the company, but that they were profits made by the company, because it was out of these profits that the bonuses which were made by the company were returned, and therefore they being "gains and profits" made by the company in the way of their business—it matters not in what form they dealt with the profits after they had been earned—income tax attached to them before the return was made to the policyholders. Now, that undoubtedly is the decision in *Last's case.*

I will cite the way in which Lord Bramwell, who was the dissentient judge in the House of Lords in *Styles' case*—which I am coming to in a moment—describes the decision in *Last's case*, in short. He says (at p.

turned into 7 per cent. He says that is so slight as to justify him saying that the principle of this decision does not apply to a company with a very small capital. But that can make no difference in point of principle; and also I think when it is examined it is not a fact in substance, because although that is the capital of the company, and the 7 per cent. is what the shareholders divide, still if we accept the principle of *Last's case*, what this company are doing is, they are carrying on an enormous business and making an enormous profit. It is true that after they have made a profit they distribute that profit to persons other than themselves, but the management of it, the whole conduct of the business earning the annual profits, is just as much done by the company here as it was done in the case of the company in *Last's case*. If those are profits before they are distributed, they are just as much profits in the hands of the company here as they were in the hands of the company in *Last's case;* and I consider that *Last's case* does decide it. The principle of it is that where you have this division between a company and policyholders who are not members of the company, then those sums are not part of the expenses of earning the profits but are themselves the profits earned. For these reasons I am clearly of opinion that the judgment of the court below is right.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. We have not got in this case to decide a question of abstract justice as to the incidence of taxation. We have to deal with a statute, and we have to ascertain what is the line drawn by that statute, and we have to decide on which side of that line this particular case comes; and if the case comes plainly upon one side of the line, it is no good for those who wish that the case were on the other side of the line to say, the case is not much over the line; it is only a little past the line.

Now, before saying anything else as to this case, I would like to point out that it does not matter when you are dealing with the question whether or not a particular receipt is a profit for the purpose of taxation, whether or not, for the purposes of distribution or carrying on the business, the machinery of a company is used. The decision in *Styles' case* is a decision which is really based upon the relations of the members of the insurance association in that case to each other; and the fact that their relationship was worked out by means of any incorporated company was not allowed to differentiate the case, or affect the case, in any degree whatsoever. And so I agree in the present case. The mere fact that the relation of the parties interested in this business was worked out in this case by the machinery of an incorporated company, does not make any difference whatsoever. But you have to look and see who are interested in the matter, and if you find as a fact that there are those interested in the matter who take a profit outside and beyond the portion of the surplus which is paid to the vendors in reduction really of the cost of insurance, in such a case the company is not merely machinery for working out the mutual relation of the members of the mutual insurance co.; it is something else. It is a company the machinery of which is used for the purpose of making a surplus beyond the expenditure and applying that surplus not merely in reduction of the costs of insurance to which the members contribute, but also in paying the profit as such to someone else. Of course when you look at *Last's case* there is, as a fact, a very significant difference between *Last's case* and *Styles' case*, and between *Last's case* and the present case —that is to say, in *Last's case* the machinery of the company was not used only for the purpose of distributing the surplus of the receipts beyond the expenditure in the reduction of the cost of insurance, but one-third of such surplus was handed over as profits to the company and dealt with for good and all as profits. In *Styles' case* there was no such dealing with any part of the surplus whatsoever. The whole of the surplus was appropriated to the reduction really of the cost of insurance; but in the present case it is not true to say that the whole of the surplus is used in reduction of the cost of insurance, because there is some of it paid to the shareholders of the company, who are entirely different people to the members of the mutual insurance body. They, it is true, are only shareholders in a company which in a sense came into existence for the purpose of working out the relations of the members of the mutual insurance to one another, but they are at the same time something different and they receive moneys as profits in which the members of the insurance have no interest whatever—that is to say, they receive the difference between the 4 per cent. and the 7 per cent. clearly as profits going into their pockets. That difference between 4 per cent. and 7 per cent. on the £20,000 deposit provided by the shareholders does not differ in kind one jot from the one-third profit that went to the company in *Last's case*, and I agree therefore, to the full, that this case is really governed by *Last's case*.

I want to say one word about the surplus here. It seems to me that Lord Halsbury when he delivered his judgment in *Styles' case* was of opinion that if you had one insurance company which consisted simply of members of a mutual association and you had no such outside body receiving profit as you had in *Last's case*, yet if that insurance company made a surplus by the investment of their money in a trade or business, that would clearly be carrying on a business and making a profit thereby; and I do not understand him to say that in that case he would have excluded any part of the surplus from taxation whether it was returned to the members or whether it was not; but as I understand the decision of the majority, they do draw a distinction and they seem to say that in respect of so much of the surplus as arises from the mutual insurance business, by which I suppose is meant so much as arises from the rates of premium charged, over and above the actuarial rates in principle or by a fortunately healthy state of things, the profit being above what was necessary for the purpose by what I may call an accident, that in such a case you are to charge the income tax on so much of the surplus as is made by what I will call outside business, and not to charge it in respect of so much of the surplus as comes from the excess which has been collected for the purpose of the premiums.

Now in the present case I do not understand that the appellants in any way suggest that they are exempt from taxation in any respect excepting in respect of so much of the surplus as comes from the business done by this company in respect of participating policies. They do not deny that if the premiums had been invested, or still less if they had been invested in carrying on a subsidiary business, that so much of the surplus is taxable; but even in respect of so much of the surplus as is properly attributable to the business of issuing these policies to the participating members, it seems to me for the reasons which my brethren have given and which I also have tried to express, that it is plain that the income-tax must be paid, because the company do not in respect of that part of the surplus pay it all back to the members of the mutual association, but really pay a part of it as a profit to a body outside the mutual insurance association, or outside the aggregate of the participating policyholders in the shape of the 7 per cent. which is paid to the shareholders of this company.

*Appeal dismissed.*

Solicitors for the appellants, *Neish, Howell, & Macfarlane.*

Solicitor for the respondents, *Solicitor of Inland Revenue.*

## High Court of Justice.

Chan. Div. North, J. — Nov. 23.

*In re* PARRY AND HOPKIN'S ARBITRATION. (*a.*)

*Will—Tenant for life and remainderman—Leaseholds—Permissive waste—Liability of tenant for life.*

*Where a claim was made by a legal remainderman against the estate of a deceased ligal tenant for life on account of dilapidations on a freehold and leasehold estate,*

*Held, that in spite of covenants to repair, the estate of the tenant for life was not liable.*

Morgan Thomas, who died on the 23rd of December, 1885, by his will dated in 1885, gave a freehold dwelling-house and also certain leasehold dwelling-houses to his wife Mary for her life, and after her death to his niece Sarah Thomas absolutely.

There was a covenant in both leases that the lessee would, during the term, repair and keep in repair the dwelling-houses and premises, and deliver them up in good repair at the end of the term.

Mary Thomas died in December, 1897, and by her will appointed Edward Hopkin and Richard Thomas her executors.

The testator's niece Sarah Thomas (now Sarah Parry) claimed £368 12s. 6d. by way of dilapidations against the estate of Mary Thomas, on the ground that both the freehold and leasehold hereditaments had been allowed to go out of repair during the life of Mary Thomas.

The matter by agreement between the parties was referred to an arbitrator, who stated a special case for the opinion of the court as to the question of law.

It was submitted by the executors that there was no cause of action by a remainderman against the representatives of the tenant for life for permissive waste.

*L. M. Richards*, for the executors of Mary Thomas, referred to the case of *In re Cartwright, Avis* v. *Newman*, 37 W. R. 612, 41 Ch. D. 532.

*Rowland Rowlands*, for Sarah Parry, relied on *In re Betty*, [1899] 1 Ch. 821, 47 W. R. Dig. 211.

NORTH, J.—I do not think this action will lie against the tenant for life. The leaseholds are given to a tenant for life and remainderman, and the tenant for life is bound to perform the covenants. I think the case of *In re Betty* is to be distinguished, as in that case an equitable tenant for life was held liable for the consequences of not performing the covenants to repair. Here a legal tenant in remainder claims as against a legal tenant for life for losses occasioned by failure to repair. *In re Cartwright* is to the point, though it was a freehold estate which was concerned in that case, and not leasehold; but I do not see what difference that makes in principle. I know of no action to enforce such a claim as this.

Solicitors, *T. Protheroe Price*, for *T. T. Lewis*, Bridgend; *Wrentmore & Son*, for *Stockwood*, Bridgend.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. — Jan. 16; Feb. 15.

BRITISH MOTOR SYNDICATE *v.* TAYLOR. (*a.*)

*Patent — Infringement — Patented articles bought in England and sent abroad for sale—"Making use of" the invention—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *Schedule I., Form D —Damages—Assessment.*

*A person who transports patented articles from place to place in the United Kingdom, but so that the articles are not serving the purpose for which they are patented, does not "exercise" or "put in practice" the patented invention; but the export abroad of such articles with a view to a sale is at least indirectly a "making use" of an invention, and is an infringement within the meaning of Schedule I., Form D, of the Patents, Designs, and Trade-Marks Act*, 1883.

*The measure of damages is what the defendants would have had to pay for permission to do that which they wrongfully did.*

This was a summons to vary the certificate of the master upon an inquiry as to damages.

The plaintiffs were the owners of a patent for apparatus for starting gas motors, and on the 15th of November, 1897, brought this action for infringement.

On the 4th of April, 1898, a judgment was taken by consent for an injunction and delivery up of the infringing articles, and for an inquiry as to what damages had been sustained by the plaintiffs by reason of the defendants' infringement of the letters patent.

The master assessed the damages on the basis that the defendants infringed in respect of twenty-seven articles, and that the plaintiffs were entitled to damages to the amount of £10 in respect of each. The defendants contended that they infringed as regards eight articles only, and that the amount of damages ought to be £3 instead of £10.

As to the first question, the evidence showed that the defendants bought in England twenty-seven infringing articles; that they sold seven of them and used another in England, and that as regards the remaining nineteen, they sent them abroad to their French house in Paris, where they sold them to various foreign firms.

*Hume Williams, Q.C.*, and *Lainé*, for the applicants the defendants.

*Moulton, Q.C.*, and *A. J. Walter*, for the plaintiffs.

STIRLING, J., after stating the facts, said: The question is whether there has been an infringement in respect of these nineteen articles. This depends on the construction of the patent. The form of the patent is that found in the first schedule to the Patents, &c., Act of 1883, Form D. It confers on the patentee the sole privilege to make, use, exercise, and vend the invention within the United Kingdom, and to have and enjoy the whole profit and advantage from to time accruing by reason of the invention, and commands all her Majesty's subjects that they do not at any time during the continuance of the patent either directly or indirectly make use of or put in practice the invention or any part of the same.

The defendants in this case did not make the invention if (as seems not probable) that applies only to the manufacture of the patented article. Passing by for the moment the words use and exercise, did they vend it in the United Kingdom?

It appears to me to be established by the case of

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

*Badische Anilin und Soda Fabrik* v. *Johnson*, 45 W. R. 481, [1897] 2 Ch. 322, 46 W. R. 255, [1898] A. C. 200, that in order that a sale may be an infringement, some material part of the transaction of the sale must be done in England. I think this is brought out very clearly by the observations of Lord Herschell in advising the House of Lords. Now, in the present case there is no evidence that any part of the transaction of sale took place within the United Kingdom; all that appears to have been done within its limits was to send the infringing articles beyond those limits with a view to a sale there.

There remains then to be considered the words "use, exercise" in the granting part of the patent, and the expressions "make use of or put in practice" in the prohibitory part. On this Lord Herschell makes some observations which are to be borne in mind: "Supposing that a case of vending could not be established, that no part of the sale was constituted in this country, and that the only charge possible were a charge of using, I do not intend to express any opinion but I desire distinctly to reserve my opinion whether the mere transport from place to place in this country of a patented article would necessarily be a using in this country." He goes on to point out that there may be cases—viz., those where the article is, when applied in a particular way of itself serving the purpose for which it is patented, these may be an infringement. He then adds that "in a case where the person transporting it or warehousing it gets no advantage out of the patent—that is to say, where it can be no more easily, and no more safely, and no more advantageously carried, warehoused, or stored, than if the article were not a patented one, but were an article entirely outside the patent—it by no means follows that the transporting from place to place or otherwise dealing with the patented article in that kind of way would constitute a using," and he said, "I do not desire to decide that point now, but I wish to draw attention to that distinction."

The patented articles in the present case, when being transported from place to place in this country were not serving the purpose for which they were patented, and in my opinion the defendants did not during that transport "exercise" or "put in practice" the patented invention. What the defendants did was to carry these articles out of the kingdom with a view to selling them—that is, with the object of turning them to profitable account. By so doing the defendants attained two objects: (1) They prevented an order being made for the delivering up or destruction of the infringing articles; and (2) they actually obtained the benefit of the proceeds of sale. Is that or is it not "to use" the invention, or "directly or indirectly to make use of it"? The question is a difficult one, and there is very little authority on it. In *Von Heyden* v. *Neustadt*, 28 W. R. 496, 14 Ch. D. 230, the patent was for a new process of making a well-known chemical product, and James, L.J., in delivering the judgment of the court, says: "A person who makes, or procures to be made abroad, for sale in this country, and sells the product here, is surely indirectly making, using, and putting in practice the patented invention." Again, in *United Telephone Co.* v. *Sharples*, 33 W. R. 444, 29 Ch. D. 164, Kay, J., says: "It is admitted by the counsel for the defendant that if a man buys abroad, imports into this country, has in his possession here and sells, although to a foreign customer, an instrument which he knows would, if made, sold, or used in this country, be an infringement of an English patent, that would be an infringement of such patent. I confess I have little hesitation in acceding to this," and his lordship held that on that ground there had been an infringement in the case before him. [In the report of the same case in 2 Rep. Pat. Cas. 28, the words are "that would be a user which would be an infringement of the patent."] The first meaning assigned to the word "use" in Johnson's Dictionary is "to employ to any purpose"; it is therefore a word of wide signification. It seems that "use" and "make use of" are wider than "exercise" and "put in practice," and without saying that no limit is to be placed on the two former expressions in the patent, I think that they are not confined there to use of a patented article for the purpose for which it was patented. In my opinion the transport within the United Kingdom of articles made according to the plaintiff's patent in the circumstances which occurred in this case, was indirectly at least "making use" of those articles within the meaning of the patent, and consequently is an infringement.

The remaining question is as to the amount of the damages. The principle on which these are to be assessed were discussed in the recent case of *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.*, 16 Rep. Pat. Cas. 209. [His lordship referred to the judgment of Collins, L.J., p. 216.]

The plaintiffs seek to have the damages assessed on the principle that the measure is the sum which the defendants would have to pay for permission to do that which they wrongfully did.

His lordship reduced the amount assessed by the master at £10 per article to £5 per article, on the ground that on the evidence £10 per article was more than the defendants would have had to pay for permission to do that which they wrongfully did.

Solicitors, *Everett & Hodgkinson*, for *Parker Woodward*, Nottingham; *Norris, Allens, & Chapman.*

---

Chan. Div. } Feb. 27.
Byrne, J. }

BALDWYN v. SMITH. (a.)

*Lunacy—Lunatic—Contract to purchase real estate—Contract carried out by committee under direction of court—Voidable contract—Conversion of lunatic's estate.*

*A direction by the Master in Lunacy to the committee of a lunatic to carry out a contract by such lunatic for the purchase of real estate, and to provide the purchase-money out of such lunatic's personal estate, amounts to an election on the part of the lunacy authorities to confirm the voidable contract of such lunatic, and the result will be to effect a conversion of the estate so contracted to be purchased as between the lunatic's heir-at-law and next-of-kin, and such estate will accordingly descend to the heir.*

Point of law.

This was an action set down for argument as a point of law. The plaintiffs, who were the personal representatives of William Baldwyn, deceased, claimed as against the defendants, his co-heiresses, a declaration that certain hereditaments known as the Badsey estate formed part of the deceased's personal estate, or alternately that the said estate devolved on the defendants as real estate subject to a lien or charge of £3,703 14s. for unpaid purchase-money, and subject to the obligation of the defendants to exonerate the personal estate of William Baldwyn to the amount aforesaid, with interest thereon from the date of the contract to purchase the said estate.

The point of law raised was, whether, assuming William Baldwyn, deceased, to have been a person of

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

unsound mind at the date of the said contract, a conversion of his personal estate into real estate was effected by two orders, dated respectively the 12th of August, 1892, and the 7th of August, 1895 (made in the matter of William Baldwyn, a person of unsound mind), so as to bind his next-of-kin.

The facts of the case were as follow:

On the 30th of June, 1890, Baldwyn attended a sale by auction, at which certain freehold hereditaments at Badsey, near Evesham, in the county of Worcester, were put up for sale. Baldwyn bid for the property and was declared the purchaser. It was assumed, for the purpose of the argument, that he was at this time of unsound mind. Before the purchase had been completed, Baldwyn was adjudged a lunatic, and one Edward Grantham Righton was appointed his committee.

On the 12th of October, 1892, the Master in Lunacy made an order to the following effect:

That the contract dated the 30th day of June, 1890, entered into by the said William Baldwyn, for the purchase of certain hereditaments and premises at Badsey, near Evesham, in the county of Worcester, belonging to William Smith, of Evesham aforesaid, be carried into effect and that the purchase of certain buildings adjoining the said land retained by the said vendor at the request of the said William Baldwyn be effected at the price of £100, and that the Masters in Lunacy do settle and approve of a proper assurance thereof to the said William Baldwyn and that the said Edward Grantham Righton as such committee of the estate do pay the sum of £3,309 6s., the balance of the purchase-money, and all interest due thereon and the sum of £100 out of any money in his hands available. That the said Edward Grantham Righton, as committee of the estate of the said William Baldwyn, do give the necessary notice for calling in the sum of £4,000 due from William Chichester secured by mortgage dated the 12th day of July, 1869, upon premises at Dymock, in the county of Gloucester, and do in the name and on behalf of the said William Baldwyn take such proceedings and do and execute such acts, deeds, and things as the Masters in Lunacy shall approve of for making the same available.

On the 7th of August, 1895, the Master in Lunacy made a further order "that the purchase of the Badsey estate mentioned in the order dated the 12th of August, 1892, be forthwith completed," and that the said E. G. Righton do, out of the moneys received by him as directed in the schedule thereto and "any money in his hands available for that purpose, pay the sum of £3,703 14s. 10d., the purchase-money for the said estate and interest thereon." It was alleged that the master in making these orders expressly left open the question as to the effect of the orders to operate a conversion of Baldwyn's estate as between his co-heiresses and next-of-kin. Nothing, however, to this effect was inserted in the orders themselves.

Baldwyn died on the 26th of November, 1898, intestate.

*Rowden, Q.C.*, and *Buckmaster*, for the plaintiffs.—It is a rule of the court in dealing with the property of a lunatic never to alter the devolution of the property: *Attorney-General* v. *Marquis of Ailesbury*, 36 W. R. 737, 12 App. Cas. 672. Strictly speaking there cannot be a contract with a lunatic: *In re Rhodes, Rhodes* v. *Rhodes*, 38 W. R. 385, 44 Ch. D. 94; Lunacy Act, 1890, ss. 120, 123. When the court adopted the contract in this case it did not desire to abandon its general principles and to effect a conversion. If conversion was effected at all, it was effected by the committee, but this was beyond the power of a committee. All that the orders meant to effect was a change in the lunatic's investments.

*Levett, Q.C.*, and *Napier*, for the defendants.—The contract was affirmed by the master, and in this way a conversion was effected: *Lawes* v. *Bennett*, 1 Cox Ch. Cas. 167. An order in lunacy may effect a conversion: *Jones* v. *Green*, 16 W. R. 603, L. R. 5 Eq. 555; *In re Freer, Freer* v. *Freer*, 31 W. R. 426, 22 Ch. D. 622. If an order in lunacy is not to have its natural effect there must be some words inserted in the order for the purpose: *In re Barker*, 29 W. R. 873, 17 Ch. D. 241.

*Rowden, Q.C.*, replied.

BYRNE, J.—In this case a man of unsound mind, but not so found, contracted to purchase certain real estate. He was subsequently found to be of unsound mind, and his committee was ordered to carry out the contract. I take it to be that the court exercised on behalf of the man the power of confirming the contract, which he might have exercised on his own behalf had he subsequently become sane. The court acting exactly as it would do in the case of an infant with a view to benefit the lunatic, ordered the contract to be carried out. I take it that this acted as an election on the part of the lunatic not to reject a voidable contract. Different considerations suggest themselves when the question is whether real estate shall be purchased or whether it shall be sold. I hold here that there has been a confirmation of the contract with the necessary legal consequences, and that a conversion has been effected. The estate so purchased descends to the defendants as the lunatic's co-heiresses, and the action must be dismissed with costs.

Solicitors, *Crowders, Vizard, & Oldham*, for *Smith & Smith*, Evesham; *Smiles & Co.*, for *E. S. Wood*, Winchcomb.

---

Chan. Div.
Buckley, J. } March 6, 7, 8.

## HONOUR v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. (a.)

*Insurance—Life policy—Practice—Declaration as to future interests—Refusal to accept premiums—Repudiation of policy—Action by holder.*

*The court will refuse to make a declaration as to the validity of a policy of life assurance during the life of the assured, even when the society issuing the policy has refused to accept from the holder premiums due upon it upon the ground that the policy is void.*

Action.

By a policy of assurance dated the 8th of July, 1897, the defendant society, in consideration of a payment in advance of £48 10s., and of half-yearly payments of like sums to be made at the office of the society on or before the 16th of December and June in every year, promised to pay to the executors or administrators of one Powis, or to his assigns, £4,000 upon satisfactory proof of his death. This policy was made to replace an earlier one made temporarily, and was, on the 6th of July, 1897, assigned by Powis to the plaintiff.

Due notice was given of the assignment to the society. Two of the premiums having been paid, the plaintiff made a legal tender of a third on the 16th of June, 1898, the day on which it was payable, but the society refused to receive it.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

The plaintiff thereupon brought this action, alleging that the society were still refusing to take the premium, and that the refusal was a repudiation by the society of the policy and all contracts thereunder. He claimed a declaration that the policy of assurance and the contracts thereunder were valid and subsisting, and that he was entitled to the benefit of them, and for an injunction to restrain the society from repudiating by words or acts the policy and contracts.

The defendants, in their defence, alleged that the policy was null and void, because it was really effected by the plaintiff, who had not any insurable interest in it, and not by Powis, who was his agent only, and also on the ground that it was obtained by misrepresentations. They counterclaimed for a declaration that the policy was void and ought to be delivered up to be cancelled.

The defendants at the trial raised a preliminary objection that the action was premature, the declaration asked for being as to future rights.

*Bray, Q.C.*, and *Sheldon*, for the defendants.—The person assured is still alive; the plaintiff has no present rights under the policy, and cannot come now and ask to have the question of the validity of the policy tried: *Bright* v. *Tyndall*, 25 W. R. 109, 4 Ch. D. 189; *Kevan* v. *Crawford*, 26 W. R. 49, at p. 52, 6 Ch. D. 29, at p. 42. He may have an action for damages.

*Cooper Willis, Q.C.*, and *N. C. Home*, for the plaintiff.—In *Bright* v. *Tyndall* the question raised was fictitious. Here the plaintiff has done an act repudiating the policy. It is clear that the plaintiff could bring an action for damages, which implies the validity of the contract; why, then, should not the court make a declaration to that effect?

*J. M. W. Holmes* held a watching brief for the Star Life Assurance Co.

BUCKLEY, J.—It is a matter of common experience that the court does not take upon itself to define the rights of parties until the time comes when those rights are present rights. At present the plaintiff has no claim under the policy. Before the life assured by the policy drops the society may get further information as the facts upon which they rely by way of defence. Why should they be called upon at this date to prove their case? The plaintiff could bring an action for damages for repudiation of the policy, but he does not do that as the damages would probably be *nil*. It is, however, to be remembered that the condition of the policy is that the premiums should be paid on or before the days mentioned, and that the defendants have refused to accept the payments. And I understand that they intend to refuse to accept those that become payable in the future. The plaintiff must not be prejudiced by their conduct. I shall refuse to make the declaration and injunction asked for by the plaintiff upon the defendant society undertaking not to rely upon the non-payment of the premiums upon the proper days in any action the plaintiff may bring in the future in respect of the policy.

[Upon this decision the plaintiff agreed to put a certain witness in the box, and the defendant society withdrew their objection to the date of the action, and the trial of the claim and counterclaim proceeded with the result that the court declared the policy null and void.]

Solicitors, *Hugh Rose-Innes; John W. Sykes.*

---

Q. B. Div.
(Channell and Bucknill, JJ.) Feb. 6.

REG. v. DE GREY.
*Ex parte* KING'S LYNN DOCK CO. (*a.*)

*Poor law—Rating—Appeal against assessment to quarter sessions—Parish council—Notice to—Service of proper notice upon not a condition precedent to entertaining appeal—Poor Relief Act*, 1743 (17 *Geo.* 2, *c.* 38)—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73).

*The service of notice on the town council of a municipal borough is not a condition precedent to the hearing by the quarter sessions of appeals from a poor rate.*

Reg. v. Justices of Kent, 80 *L. T. Rep.* 622, *not followed.*

Rule *nisi* for a *mandamus* to the recorder of King's Lynn, commanding him to hear and determine, or to enter and respite, two appeals between the King's Lynn Docks and Railway Co. and the Assessment Committee of the King's Lynn Poor Law Union with respect to two several rates or assessments made for the relief of the poor of the parish of St. Margaret's, in the borough of King's Lynn, dated respectively the 21st of November, 1898, and the 26th of May, 1899.

The King's Lynn Docks and Railway Co. appealed to the recorder from the two rates. The notices of the appeal were addressed to the Churchwardens and Overseers of the Poor of the Parish of St. Margaret's, in the borough of King's Lynn, in the county of Norfolk, and to the Assessment Committee of the King's Lynn Poor Law Union. The notices were served on the clerk of the peace of the borough, who also held the office of town clerk. The recorder, upon the authority of *Reg.* v. *Justices of Kent*, 80 L. T. Rep. 622, 47 W. R. Dig. 108, declined to hear or to enter and respite the appeals on the ground that notice had not been served upon the town council of the borough.

The rule *nisi* was obtained on the grounds (1) that the town council of King's Lynn were not entitled to notice of the appeal; (2) that if they were entitled to notice they had had it; (3) that in any case the appeals ought to have been entered and respited.

*Marshall, Q.C.* (*Cunningham Glen* and *A. M. Talbot* with him) showed cause.—By 17 Geo. 3, c. 38, s. 4, and 41 Geo. 3, c. 23, s. 4, persons wishing to appeal against the rate or assessment made for the relief of the poor must serve notice of appeal in writing upon the churchwardens and overseers of the parish. By the Local Government Act, 1894, ss. 5 and 6, the power of appointing overseers of the poor is vested in, and the powers, duties, and liabilities of the overseers, or of the churchwardens and overseers in respect of appeals as to poor rates are transferred to, the parish council. Section 52, sub-section 5, of the same Act, says that all enactments in any Act relating to any powers, duties, or liabilities transferred by this Act to a parish council from overseers, or churchwardens and overseers, shall be construed as if any reference therein to them referred to the parish council. In King's Lynn there is no parish council, but there is a town council, it being a municipal borough, so that it comes under section 33 of the Local Government Act, which provides that the Local Government Board may on the application of the council of any municipal borough make an order conferring on that council any powers, duties, or liabilities of overseers, and any powers, duties, or liabilities of a parish council. An order of the Local Government Board dated the 7th of April, 1897,

(*a.*) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

transferred the powers, duties, and liabilities of the overseers respecting appeals or objections by overseers in respect of the valuation list or appeals in respect of the poor rate, to the town council; and the terms of section 6 of the Local Government Act were made to apply subject to the modification of town council for parish council. The town council, therefore, is substituted for the overseers, and must receive notice in writing of an appeal. It was so held in regard to a parish council in *Reg.* v. *Justices of Kent.* [CHANNELL, J.—In that case, which was decided by Darling, J., and myself, I am satisfied that our attention was never called to the real point. If it was wrong, I should like to be a party to setting it right.] Service of notice on the clerk of the peace who happened to be town clerk as well, is not a service on the town council.

They referred to *Reg.* v. *White*, 14 Q. B. D. 358; *Reg.* v. *Justices of Wilts*, 8 B. & C. 380; *Reg.* v. *Surrey Justices*, 29 W. R. 260, 6 Q. B. D. 100; *Reg.* v. *Inhabitants of Skircoat*, 28 L. J. M. C. 224, 7 W. R. C. L. Dig. 3.

*Littler, Q.C.* (*F. K. North* with him), in support of the rule.—The service was good since the town council knew all about the matter. Notice to the overseers is still a good notice. Nowhere in the Local Government Act is it said that notice is to be served on the town clerk instead of the overseer. So long as the notice came to the knowledge of the town council, there is no provision as to the form of the notice. But notice is not a condition precedent to hearing or entering and respiting the appeal; the authorities show that the decision in *Reg.* v. *Justices of Kent* cannot stand. The matter is not covered by Act of Parliament. Section 52 of the Local Government Act says nothing about borough councils, and the order of the Local Government Board does not deal with that section.

They cited *Shrewsbury Railway Co.* v. *Leominster Overseers*, 21 J. P. 149; *Liverpool United Gaslight Co.* v. *Everton Overseers*, 19 W. R. 412, L. R. 6 C. P. 414, and *Reg.* v. *Justices of Surrey.*

CHANNELL, J., said: We have come to the conclusion that the rule must be made absolute. The real question, though two or three others have been argued, is whether the decision of Darling, J., and myself in the case of *Reg.* v. *The Justices of Kent* is right or not. Of course, in another court, before other judges, there might be a question whether it was binding or not, but the rule was moved before Darling, J., and myself, and I think I have my learned brother's authority, from what passed then, to say that he would concur in the view I take about the case now. There were two points decided there. One point was that by the operation of the Local Government Act—it was the Act there, and not the order of the Local Government Board, as in the present case—a parish council, where there is one, has been substituted for overseers in all matters relating to appeals against a poor rate. It was decided by the court that that was so, and that, in consequence, by virtue of section 52 of that Act, the word "overseers" in the old Act of Geo. 2 is to be read as parish council. I have now somewhat more doubt than I had at the time whether we were right, because that point has been more fully argued. I am not prepared to say that we were wrong, and I am still inclined to think we were right.

But then there was another point—namely, that in the case of an appeal against a poor rate the giving of proper notice is a condition precedent to the hearing and determination by the court of quarter sessions. Now, that previous decision of ours was given *per curiam*, perhaps the stronger thing to say is that it was a mistake. It arose from our attention not having been called to the fact that there is a difference between the old Act of Geo. 2 on this point and the other Acts under which it has been held that notice of appeal is a condition precedent to the hearing. We did not have our attention specifically drawn to the difference between poor rate and other appeals. In these circumstances, whatever would have been the decision of two other judges, we certainly are not bound to follow that case, and I do not think other judges would be bound to follow that decision, because they would see on the face of the report that the cases of *Shrewsbury Railway Co.* v. *Leominster Overseers; Liverpool United Gaslight Co.* v. *Overton Overseers;* and *Reg.* v. *Surrey Justices*, were not drawn to our attention. At any rate, whether the other judges would say so or not, I am quite clear that it is right that I should say we are not bound by it. That being so, the learned recorder has jurisdiction, assuming that he came to the conclusion that the right notices had not been given, to entertain the appeals and direct them to be adjourned according to the provisions of the statute of Geo. 2. No specific application was made to him on the point, and in many cases that would be fatal, but I do not think that could be said here. It is not necessary to make a formal application for adjournment. Consequently we must hold, that, although the recorder was right, having regard to the fact that *Reg.* v. *Justices of Kent* was quoted to him, yet he had jurisdiction to entertain the case and order an adjournment, and therefore the *mandamus* must go.

BUCKNILL, J., concurred.

*Rule made absolute.*

Solicitors, *Burton, Yeates, & Hart*, for *Coulton & Son*, Lynn; *Crossman, Pritchard, Crossman, & Block*, for *Seppings & Wilkin*, Lynn.

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 29.

FELTON AND ANOTHER v. BOWER & CO. (*a.*)

*London—City of London Court—Jurisdiction—Issue of summons with leave—Cause of action arising within the city—London (City) Small Debts Extension Act,* 1852 (15 & 16 *Vict. c. lxxvii.*), *s.* 39—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 185.

*In the City of London Court it is not necessary, in actions where the jurisdiction of the court is based on the cause of action arising within the city, that the leave of the judge or registrar should be obtained for the issue of the summons.*

Appeal from the decision of Lawrance, J., in chambers, granting a writ of prohibition directed to the City of London Court.

The plaintiffs, who are wire merchants trading in Germany, brought an action against the defendants in the City of London Court to recover £1 6s., the balance of the price of goods sold and delivered.

The defendants' place of business is at Hull, and none of the defendants reside within the City of London.

The goods were ordered by the defendants at 23, Billiter-street, in the City of London, from W. F. Dennis & Co., who are the sole agents for the plaintiffs in London.

The action was commenced by a default summons,

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

which was issued in the ordinary way and not by leave of the judge or registrar, as is required by section 74 of the County Courts Act, 1888, in cases where the defendant does not reside within the district of the court, and no copy of the affidavit, mentioned in the County Court Rules, ord. 5, r. 9*a*, was served with the summons as is required by ord. 7, r. 3*a*.

At the trial of the action before the registrar the defendants objected to the jurisdiction of the court on the ground, among others, that the necessary steps in pursuance of section 74 of the County Courts Act, 1888, had not been taken. The registrar overruled the objection and—the defendants having declined to contest the action on the merits—gave judgment for the plaintiffs.

The defendants thereupon applied to the High Court for a writ of prohibition restraining the City of London Court and the plaintiffs from further proceeding in the action. Lawrance, J., to whom the application was made, granted the writ. The plaintiffs appealed.

Section 39 of the London (City) Small Debts Extension Act, 1852, enacts as follows: The "summons in any action commenced in the City of London Court may issue provided the defendant or one of the defendants shall dwell or carry on business or have employment within the City of London or the liberties thereof at the time of the action brought, or provided the defendant or defendants shall have had employment therein at some time within six months next before the time of the action brought, or if the cause of action either wholly or in part arises therein."

Section 185 of the County Courts Act, 1888, enacts as follows: "The courts held by virtue of the London (City) Small Debts Extension Act, 1852, shall be held by the name of the City of London Court, and shall be a court of record, and its decisions shall be subject to appeal in the same way and on the same conditions as decisions of a county court are subject for the time being. The judge and officers of the City of London Court shall respectively have and exercise the like jurisdiction, power, and authority in all respects, except the power of appointing officers, as are for the time being possessed and exercised by the judge and officers respectively of a county court. The rules and orders in force for the time being for regulating the practice of and costs in the county courts, and forms of proceedings therein, shall be in force in the said City of London Court, to the exclusion of any other rules and orders; and the same fees shall be taken for proceedings in which jurisdiction is hereby given to the court as upon similar proceedings in the county courts, and such fees shall be applied in the same manner as fees taken under the provisions of the said London (City) Small Debts Extension Act, 1852, provided that nothing in this Act shall take away, lessen, or diminish any of the powers, rights, or privileges of the judge of the said court, or the authority of the mayor, aldermen, and commons of the City of London in common council assembled, in relation to such court, or to the judge or officers thereof, or to the fees taken therein, as such powers or authority heretofore existed."

Section 74 of the same Act enacts as follows: "Except where by this Act it is otherwise provided, every action or matter may be commenced in the court within the district of which the defendant, or one of the defendants, shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the court within the district of which the defendant, or one of the defendants, dwelt or carried on business at any time within six calendar months next before the time of commencement, or with the like leave in the court in the district of which the cause of action or claim wholly or in part arose."

*Danckwerts, Q.C.* (*H. Niebel* with him), for the plaintiffs.—The City of London Court, prior to 1888, had power, by virtue of section 39 of the London (City) Small Debts Extension Act, 1852, to issue summonses against a defendant resident out of its jurisdiction, when the cause of action arose within its jurisdiction, without the leave of the judge or registrar. Sections 74 and 185 of the County Courts Act did not take away that jurisdiction inasmuch as general legislation does not repeal particular legislation without express words. On the contrary, the jurisdiction was saved by the proviso that the powers, rights, and privileges of the judge of the court should not be taken away, lessened, or diminished. *Kutner* v. *Phillips*, 39 W. R. 526, [1891] 2 Q. B. 267, is in point.

*Bonsey*, for the defendants.—Obtaining the leave of the judge or registrar is a matter of procedure, not of jurisdiction, and section 185 of the County Courts Act expressly substitutes its own procedure for the old procedure of the City of London Court.

CHANNELL, J.—The question is whether, where the defendant resides outside the jurisdiction of the City of London Court, and it is not shown that he has, or has had, employment within the jurisdiction, but the cause of action arose wholly or in part within the jurisdiction—whether in that case it is necessary to obtain the leave of the judge or registrar for issuing the summons. Mr. Danckwerts says that *Kutner* v. *Phillips* is a binding authority. I am going to follow *Kutner* v. *Phillips*, but, at the same time, I am not sure that it is an authority for the present case. Some of the reasoning of the judgments in the case is applicable to the present one, and some is not. The question in *Kutner* v. *Phillips* was whether the provisions of section 39 of the London (City) Small Debts Extension Act, 1852, and section 74 of the County Courts Act, 1888, were consistent or inconsistent in regard to the jurisdiction of the court over defendants who have employment within the city. Nothing could be clearer than that in regard to that jurisdiction the two provisions were not inconsistent. So far as the decision in *Kutner* v. *Phillips* rested upon that consideration it is not an authority for the present case, because I think the two provisions are inconsistent in so far as they relate to the point at issue here.

Section 39 of the Act of 1852 gives jurisdiction where the cause of action arose within the jurisdiction. Section 74 of the County Courts Act, 1888, gives the same jurisdiction with a qualification. The two provisions are, therefore, inconsistent. Therefore the reasoning on which *Kutner* v. *Phillips* was decided is not binding on us.

It has, however, been pointed out that the Act of 1852 deals specially with the City of London Court, and that the County Courts Act, 1888, is a general Act. The rule in that case is that general legislation does not overrule special legislation unless a clear intention is expressed in such general legislation to repeal the special legislation. I can see nothing in the County Courts Act, 1888, to show that it was intended that the City of London Court should no longer exercise the jurisdiction to issue without leave summonses in cases where the cause of action arose within its jurisdiction. It follows that the court can still exercise that jurisdiction without leave. The rule for a prohibition ought therefore to be discharged.

BUCKNILL, J.—I agree with my learned brother as regards the inconsistency between section 39 of the

Act of 1852 and section 74 of the County Courts Act, 1888. But one cannot read the judgments in *Kutner* v. *Phillips* without seeing that the jurisdiction of the City of London Court has not been interfered with by the County Courts Act except in so far as the jurisdiction has been added to. It was intended, while making new rules for the court, to leave its jurisdiction unimpaired.

*Appeal allowed.*

Solicitor for the plaintiffs, *H. H. Crawford.*

Solicitors for the defendants, *Prebble & Hall.*

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 29.

PALMER *v.* SNOW. (*a.*)

*Sunday—Sunday trading — Barber — Words* ejusdem generis—*Lord's Day Observance Act*, 1676 (29 *Car.* 2, *c.* 7), *s.* 1.

*A barber is not within* 29 *Car.* 2, *c.* 7.

Case stated by the stipendiary magistrate of South Staffordshire.

An information was laid by the respondent against the appellant charging that he, being a tradesman—to wit, a barber and hairdresser—did work of his ordinary calling on the Lord's Day, contrary to the Lord's Day Observance Act, 1676.

Section 1 of the Act provides as follows: "No tradesman, artificer, workman, or labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of his ordinary calling upon the Lord's Day or any part thereof (works of necessity and charity only excepted)."

It was proved or admitted that the appellant was a barber and hairdresser, and that he kept his shop open on Sunday, the 24th of September, 1899, and shaved several customers and cut the hair of others. No articles were bought or sold in the shop.

The magistrate convicted the appellant.

*Shearman*, for the appellant.—The persons named in the Act are placed in a descending scale of rank, so that if a barber is not a tradesman or artificer he is not within the terms of the Act at all, because workman and labourer imply someone of lower rank than the rank of a barber. The words "or other person whatsoever" are to be construed as applicable to persons *ejusdem generis* with the preceding words: see *Sandiman* v. *Breach*, 7 B. & C. 96. In *Reg.* v. *Silvester*, 33 L. J. M. C. 79, a farmer was held not to be a person to whom the Act applied, because farmers were a class of persons so well known that if it had been intended to include them they would have been specified among the persons to whom the Act applied. So in the case of barbers, if the Legislature had intended to prohibit them exercising their calling on Sunday they would have specifically named them. Barbers at the period when the Act was passed were a far more important class of persons than they are at the present time. They had been incorporated as a craft in the reign of Henry IV., and combined with shaving and hairdressing the practice of blood-letting. An Act was passed for their benefit in the reign of Henry VIII. enjoining surgeons against blood-letting and the "feat or craft of barbery or shaving." The word "tradesman" in the Act means a person who deals in goods by retail. "Artificer" is a person who works on raw materials.

*Dickens, Q.C.* (*W. Shakespeare* with him), for the respondent.—A barber is within all the terms used in the Act. He is a tradesman because he, in ordinary language, plies a trade, and he is both an artificer, workman, and a labourer, because he earns his living by the work of his hands: see *Phillips* v. *Innes*, 4 Cl. & Fin. 234.

CHANNELL, J.—The appeal must be allowed. All that it is necessary for us to decide is that a barber is not a tradesman, because the information only charged the appellant that he was a tradesman. We are, however, not satisfied to base our decision on that point only, because it has been suggested that a barber comes within the other terms used in the Act. I do not think that he does. The Act under which the proceedings were taken differs from the Scotch Act under which *Phillips* v. *Innes* was decided, for the Scotch Act begins by enacting that no ordinary labour or handicraft shall be carried on on Sunday. If that provision were in force in England, this case might be within it. But the English Act is not so general in its terms. It only relates to certain specified persons "or other person whatsoever." It has already been decided that the latter words are to be read *ejusdem generis* with the preceding words.

With regard to the word "tradesman" I am strongly of opinion, though that word is often used as distinguished from gentleman or professional man so as to include barber, yet that it does not bear that meaning in this Act, but means rather a person who carries on the trade of buying and selling goods. In that case a barber is not within it. "Artificer" means somebody who makes something, so that a barber is not within that term; nor is the appellant, whatever his assistant might be, a workman or labourer, for those terms imply someone who is employed by another. A barber therefore does not come within any of the persons specified in the Act. The fact that the business of a barber was at the time when the Act was passed a well-known one, and one of more importance than it is now, is an additional reason for holding that the Act was not intended to relate to barbers.

BUCKNILL, J.—Barbers at the date when the Act was passed were an important class of persons—quite as important as surgeons. They would not, therefore, be included under the general words. Nor is a barber included under the term "tradesman," because he does not carry on a business which consists of buying and selling, nor is he an "artificer," for he does not make things. Nor, again, is he included under the term "workman or labourer," because he is not in the employment of another.

*Appeal allowed.*

Solicitors for the appellant, *Maudes & Tunnicliffe*, for *Dallow & Dallow*, Wolverhampton.

Solicitors for the respondent, *Murr & Rusby*, for *Sharpe & Derby*, West Bromwich.

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 22.

SAVOY HOTEL CO. (*Appellants*) *v.* LONDON COUNTY COUNCIL (*Respondents*). (*a.*)

*Shop Hours Act*, 1892 (55 & 56 *Vict.* c. 62), *ss.* 9, 10—"*Shop*"—"*Public-house or refreshment-house*"—*Hotel*—"*Domestic servant*"—*Page-boy.*

*Any place of business having a public-house licence*

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

*is a shop within the meaning of the Shop Hours Act, 1892, notwithstanding that it is an establishment which would ordinarily be termed a hotel, and not a public-house.*

*A young person employed as a page and messenger boy in such an establishment held not to be wholly employed as a domestic servant within the meaning of the same statute.*

Case stated by a metropolitan police magistrate.

Upon the hearing at the Bow-street police-court on the 27th of February, 1899, of a summons upon complaint made on behalf of the respondents that the appellants during a certain week in January, 1899, at the Savoy Hotel and Restaurant, the Strand (being a shop within the meaning of the Shop Hours Act, 1892), in the parish of St. Martin-in-the-Fields, did unlawfully employ in or about the said shop one Arthur Knight (being a young person within the meaning of the said Act) for a longer period than seventy-four hours, including meal-times, whereby the appellants became liable to the penalty provided by the said Act; and further, that the appellants at the said Savoy Hotel and Restaurant did unlawfully fail to keep exhibited the notice required by section 4 of the said Act, the following facts were proved or admitted:

The appellants are the owners of the Savoy Hotel and Restaurant, which is licensed to be kept as an inn for the sale of intoxicating liquors under the Act 9 Geo. 4, c. 64, and the Acts amending the same.

The premises are structurally adapted for use as an inn or hotel for the reception of guests and travellers desirous of staying therein and for supplying refreshments to the public, and include a restaurant, grill-room, and dining-room in which meals and intoxicating liquors are supplied to members of the public, whether guests staying at the hotel or not. There is no bar or counter for the sale of intoxicating liquors, but intoxicating liquors are sold by retail by supplying them in the said restaurant, grill-room, and dining-room and to guests in their rooms. The business of the said restaurant is conducted in the same manner as that of other high-class restaurants in London, and refreshments are sold there to the public as at other restaurants. The excise licence is granted under the statute 43 & 44 Vict. c. 20, s. 43, sub-section 4.

Arthur Knight, a boy of fifteen years of age, was employed by the appellants at the Savoy Hotel as a page-boy in the general service thereof for eighty-nine hours per week or thereabouts instead of seventy-four hours. He slept in the hotel. The first thing in the morning he assisted in dusting the reception-rooms, but he was principally employed as a messenger taking up messages to and sending off telegrams and messages for persons staying at or using the hotel and restaurant.

There was no notice at the said hotel such as is required by the provisions of the said Acts to be exhibited in shops where young persons are employed.

On behalf of the appellants it was contended that whereas the word "shop" is defined by the Shop Hours Act, 1892, to include licensed public-houses and refreshment houses of any kind, the said Savoy Hotel was not a public-house nor a refreshment house within the meaning of the said statute, and that the said expressions "public-house" and "refreshment house" were only intended to apply to ordinary public-houses where intoxicating liquors were sold at a bar, and to refreshment houses licensed for the sale of wine and beer under 23 Vict. c. 27.

It was further contended that the page-boys employed in the said hotel were domestic servants and thereby exempt from the operation of the Act.

On behalf of the respondents it was contended that the Savoy Hotel or some part or parts thereof came within the definition of the word "shop" in the Shop Hours Act, 1892, and that the said page-boys, including the said Arthur Knight, were employed there within the meaning of the said Act.

The magistrate was of opinion that, regard being had to the nature of the business carried on as above stated at the Savoy Hotel, it was such a licensed public-house as to fall within the definition of the word shop in the said Act. And he was of opinion that Arthur Knight being so employed as above stated was not wholly employed as a domestic servant within the meaning of the said Act. He therefore convicted the appellants and inflicted a fine in respect of the offence charged in each summons.

The question for the opinion of the court was whether on the facts stated the decision was right.

Section 3 of the Shop Hours Act, 1892, prohibits the employment of a "young person" in or about a shop for a longer period than seventy-four hours, including meal times, in any one week.

Section 4 requires a notice referring to the provisions of the Act to be kept exhibited in a conspicuous place in the shop.

Section 9 provides that "unless the context otherwise requires, shop" means retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire, and includes licensed public-houses and refreshment houses of any kind. "Young person means a person under the age of eighteen years."

Section 10 provides that nothing in the Act shall apply to "any person wholly employed as a domestic servant."

*Avory*, for the appellants.—The conviction was wrong on two grounds. First, the Savoy Hotel is not a public-house or refreshment house within the meaning of the Act. The definition of "shop" must be read with due regard to the objects of the Act. "Shop" is to include "public-house" where necessary for the purposes of the Act. A house which is used mainly for selling liquor, although generally called a public-house, is to be a shop within the Act. But the Savoy Hotel is not a house of that description. Secondly, the boy was wholly employed as a domestic servant and is therefore within the exemption. A page-boy is in the same position as a waiter, who is a domestic servant and requires a licence under the revenue laws: *Spencer* v. *Sheerman*, 23 L. T. Rep. 873, 19 W. R. C. L. Dig. 87. He is not a shop assistant and the Act does not apply to him.

*Daldy*, for the respondents.—The conviction was right. The Shop Hours Act, 1892, ought to be liberally construed: *Collman* v. *Roberts*, 44 W. R. 445, [1896] 1 Q. B. 457. "Public-house" is defined to mean "an inn or tavern; in England especially, one which rarely accommodates lodgers and which has for its chief business the selling of beer and other liquors": Century Dictionary. Its primary sense is an inn, and it is used in that sense in the Act of 1892. The magistrate has found as a fact, on sufficient evidence, that the boy was not a domestic servant.

He also cited *London and Suburban Land and Building Co.* v. *Field*, 16 Ch. D. 645, 29 W. R. Dig. 66; *Coombs* v. *Cook*, Cab. & Ell. 75.

*Avory* replied.

CHANNELL, J.—This case is not altogether free from difficulty, but I have come to the conclusion that the appeal should be dismissed. The object of the statute is to restrict the number of the hours of employment in shops of young persons under eighteen years of age. The employment of young persons in factories had already been provided for by statute, and the

intention of the Act of 1892 was to extend similar provisions to different kinds of employment, the nature of the employment affected is to be gathered from the Act itself. The recital is not very important, but it shows that the object of the Act was to prevent the injury to the health of young persons employed in shops and warehouses caused by the length of the period of employment. After forbidding in section 3 the employment of young persons in or about a shop for more than seventy-four hours, including meal-times, in any one week, the Act goes on in section 9 to define the meaning of the word "shop." It commences by defining it as meaning "retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire," and this is the primary meaning that the word bears throughout the Act; the section then goes on to say, "and includes licensed public-houses and refreshment houses of any kind." The meaning of legislating in this way is that the Legislature intended to bring within the Act something that otherwise would not be within it, but would nevertheless be within the mischief against which the Act was intended to provide. Neither a licensed public-house nor a refreshment house comes within the ordinary meaning of the word "shop," but the Legislature were of opinion that there were some public-houses and refreshment houses as much within the mischief sought to be guarded against as any ordinary shop. That being so, we ought not to give any importance to the fact that the Act appears to apply to establishments which one would have thought there would be no intention to include within its scope, for we know that the result of an interpretation clause is frequently to bring incongruous things within the operation of a statute. There being then some licensed public-houses and refreshment houses to which the definition of "shop" was intended to apply because they were in the mischief of the Act, how far is that definition to be held to extend? The section in terms applies to licensed public-houses of any kind, and I think that every place of business having a public-house licence must be held to be within the Act; there is no greater hardship in making the Act apply to employment in the grandest hotel than there is in applying it to a public-house of an inferior description. I think, therefore, that we are bound so to interpret the Act as to make it include the Savoy Hotel; it is true that that establishment is not an ordinary public-house, but it has a public-house licence attached to it, and licensed public-houses of any kind are within the operation of the Act. It is entirely within the mischief of the Act, and I think that the learned chief magistrate was right in the conclusion at which he arrived.

On the second point, as to whether the boy was wholly employed as a domestic servant, the learned magistrate found that he was not; I think that there was evidence on which he could so find, and that his decision cannot be disturbed. In saying this I do not desire to intimate a doubt as to the correctness of his conclusion; indeed, I think that his decision upon this point also was right, and that, if the case comes (as I have already held it does) within the Act, it does not come within the exclusion.

BUCKNILL, J.—I agree upon both points, and will only add, as regards the first point, that the proper way to read section 9 is to read it as applying to licensed public-houses of any and every kind; we have no right to say that the Savoy Hotel, which is a public-house of a kind, is not within the Act.

*Appeal dismissed.*

Solicitors for the appellants, *Fladgate & Co.*

Solicitor for the respondents, *Blaxland.*

## Court of Appeal.

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) — Feb. 17.

MASON v. A. R. DEAN (LIMITED). (a.)

*Master and servant—Employment—Accident—Building being constructed by means of a scaffolding—Painting ceiling of theatre—Undertakers—Persons undertaking construction of part of building—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-sections* 1, 2.

*In an arbitration under the Workmen's Compensation Act it appeared that a firm of builders had undertaken to build a theatre, and that the building owners, under powers reserved to them in the contract, had placed a substantial portion of the work, including the fixing of a ceiling and the erection of a proscenium, in the hands of a firm of decorators. A workman in the employment of the decorators, while working on a scaffolding erected by the builders, and while engaged in painting the ceiling of the theatre (the building being over thirty feet in height), accidentally fell to the floor and was killed. In proceedings against the decorators,*

*Held, that the employment of the deceased was an employment to which the Act applied, and that the respondents were undertakers within the Act.*

Wood *v.* Walsh & Sons, 47 *W. R.* 504, [1899] 1 *Q. B.* 1009, *considered.*

Appeal from a decision of the judge of the Salford County Court on questions of law submitted to him by an arbitrator under the Workmen's Compensation Act, 1897.

The applicant was the widow of a painter, who met with his death by an accident while in the employment of the respondents, a firm of decorators.

A contract had been entered into by Moore & Sons, a firm of builders, for the construction of a theatre at Eccles, and for the erection of a scaffolding to be used in the construction. Under a power reserved in the contract the building owners let off the decorative work to the respondents. This decorative work included the providing and fixing of a moulded circular ceiling, a proscenium, and other substantial portions of the building.

The deceased was engaged in painting the ceiling, and was working on the scaffolding erected by the builders, when one of the planks gave way and he fell to the floor and was killed. The building exceeded thirty feet in height.

The arbitrator to whom the matter was referred held that the respondents were undertakers within the meaning of section 7 of the Workmen's Compensation Act, being engaged in the construction of a building exceeding thirty feet in height by means of a scaffolding, and that the action arose out of and in the course of an employment to which the Act applied, and he made an award in favour of the applicant for £300.

At the request of the respondents the arbitrator submitted the following questions of law for the decision of the county court judge: (1) Whether the respondents were undertakers in the construction of a building within the meaning of the Act; (2) whether the employment in the course of which the said personal injuries were caused to the deceased workman was employment to which the Act applies.

The county court judge reversed the decision of the arbitrator, on the ground that, though the respondents were undertakers engaged in the con-

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

struction of a building within the Act, yet the employment of the deceased in painting the ceiling of the theatre was not an employment to which the Act applied.

The applicant appealed.

*R. W. Harper*, for the applicant.—The learned county court judge thought he was bound by the decision of this court in *Wood* v. *Walsh & Sons*, 47 W. R. 504, [1899] 1 Q. B. 1009, to hold that painting the ceiling of the theatre was not an employment to which the Act applied. The decision in that case was that the mere painting of the outside of a house was neither construction nor repair. The present case is clearly a case of the construction of a building. The work which was undertaken by the respondents, and on which the applicant was engaged, was an essential part of the construction of a theatre.

*C. A. Russell, Q.C.*, and *T. F. Byrne*, for the respondents.—The real question in the case is, whether the respondents were undertakers within the meaning of the Act; and this question was not properly considered either by the arbitrator or by the county court judge. The Act says, in section 7, sub-section 2, that "undertakers" in the case of a building means the persons undertaking the construction, repair, or demolition. Here Moore & Sons were the persons who undertook the construction of the building. The respondents only undertook something subsidiary to the construction of the building.

A. L. SMITH, L.J.—In my opinion the respondents are liable in this case. The county court judge held that they were not, thinking himself bound by *Wood* v. *Walsh & Sons*. But that case, in which we held that painting the outside of a house is not an employment to which the Act applies, has nothing to do with this case. Here Moore & Sons, a firm of builders, undertook the building of a theatre. By the terms of the contract it was open to the building owners to give part of the work to other persons, and they put part of it in the hands of the respondents. While the respondents were doing this part of the work, the deceased, who was in their employment, met with his death. The question is, whether this employment was an employment to which the Act applies. It is important to observe that the building was not completed. The respondents were put on to do certain work which would help to bring it to completion. The contract of the respondents with the building owners shows that a work of construction had to be done by the respondents. The specified work includes the putting up of a ceiling, the erection of a proscenium, and the fixing the private boxes with columns. It is true that a good deal of the work specified in the contract is decoration pure and simple. But there is ample to show that the respondents had also to perform structural work. Section 7 of the Act says that the Act is to apply to "employment by the undertakers as hereinafter defined on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished." This building was over thirty feet in height, and it was being constructed by means of a scaffolding. In my opinion the employment of the deceased was an employment to which the Act applies. Then was he employed by undertakers as defined in the Act? Sub-section 2 of section 7 says that "undertakers" in the case of a building means the persons undertaking the construction, repair, or demolition. Ought that to be construed as meaning only the persons undertaking the construction of the whole of a building, or does it also include the persons undertaking the construction of a substantial part of a building? In my opinion a person who undertakes the construction of a substantial part of a building is an undertaker within the meaning of the Act. I think that on the other point the county court judge was wrong, and that the applicant is entitled to the compensation which has been awarded to her by the arbitrator.

COLLINS, L.J.—I am of the same opinion. I think the county court judge was under a misapprehension in considering himself bound by *Wood* v. *Walsh & Sons*. The arbitrator found that the work on which the respondents were engaged was a work of construction. I agree with that. The specification embraces work which must be described as construction rather than decoration. On that ground the decision of the county court judge cannot be supported.

But counsel for the respondents contend, as they are perfectly entitled to do, although there is no cross-appeal, that the county court judge was wrong on the other point—viz., in holding that the respondents were undertakers within the meaning of the Act. They argue that the Legislature meant by undertakers only persons who undertake the construction of a whole building, and not persons who undertake the construction of part of a building. Here the deceased man was engaged in painting. But in my opinion it is immaterial what particular work the man was doing. The question is whether his employers were undertakers. I do not wish to lay great stress on the fact that the word "persons" in the plural is used in the definition of "undertakers" in the case of a building, though not in the case of an engineering work. But in my opinion, on the natural construction of the words of the section, it is intended to include the case where more persons than one are engaged under separate contracts with the building owner in bringing about the construction of a building; and I think that the respondents in this case were undertakers within the Act.

ROMER, L.J.—I agree. I think that, where a building is being constructed by several undertakers, not jointly, but each doing a separate and substantial part of the construction, each and all of them fall within the definition of undertakers in section 7, sub-section 2. But then under section 1, only that undertaker is liable to pay compensation in whose employment the injured workman was at the time of the accident. That seems to me the only sensible construction of the Act.

*Appeal allowed.*

Solicitors for the applicant, *Arkcoll, Cockell, & Chadwick*, for *Alfred Bates*, Morecambe.

Solicitors for the respondents, *Lawson, Coppock, & Hart*, Manchester, for *Hargreave & Heaton*, Birmingham.

---

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 15.

STEWART v. RHODES. (a.)

*Practice—Leave to issue execution under R. S. C., ord. 42, r. 23—Charging order under R. S. C., ord. 46, r. 1—Death of judgment debtor—Liability of estate.*

*The effect of obtaining leave to issue execution against*

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*an executor under ord.* 42, *r.* 23, *is to dispense with the necessity of obtaining a judgment against the executor, but is not equivalent to obtaining a judgment against him. A charging order under ord.* 46, *r.* 1, *has only such effect as is provided by the Acts* 1 *&* 2 *Vict. c.* 110, *ss.* 14, 15, *and* 3 *&* 4 *Vict. c.* 82, *s.* 1. *Under these Acts a charging order can only be made against a person against whom a judgment has been obtained.*

*It follows, therefore, that a creditor who has obtained judgment against a debtor cannot, after the death of the debtor, obtain a charging order* nisi *against the executor of the deceased judgment debtor without first obtaining judgment against the executor.*

Finney *v.* Hinde, 27 *W. R.* 413, 4 *Q. B. D.* 102, *and* Haly *v.* Barry, 16 *W. R.* 654, *L. R.* 3 *Ch. App.* 452, *discussed.*

*Decision of* Stirling, J., ante, *p.* 233, *affirmed.*

This was an appeal from a decision of Stirling, J. (reported *ante*, p. 233).

The question involved was whether a charging order *nisi* made under ord. 42, r. 23, against a deceased judgment debtor was valid as against his executor. The facts may be shortly stated as follows:

The action was commenced in the Queen's Bench Division to recover a sum of £959 11s. 9d. due to the plaintiffs from the defendant Rhodes in respect of certain shares in the Lands Trust Co. (Limited) standing in his name. The defendant appeared, and on the 30th of January, 1899, an order was obtained giving leave to sign judgment under order 14.

On the 27th of March the defendant died.

On the 9th of June his will was proved by his executor, one Wilford.

On the 16th of June an action in Chancery for administration was commenced by a secured creditor of Rhodes. On the same day an order was made in Lunacy (Rhodes having been a person of unsound mind not so found by inquisition) to the effect that enough of a fund in court of £743 8s. 7d. New Consols standing to the credit of the defendant in connection with certain lunacy proceedings against him in his lifetime should be realized to pay the costs when taxed, the residue to be transferred to Wilford.

On the 17th of June a charging order *nisi* was made at chambers, to the effect that the plaintiffs should be at liberty to issue execution against Wilford, the executor of the deceased judgment debtor, under ord. 42, r. 23, and that unless sufficient cause were shown to the contrary on the 28th of June, the defendant's interest in the said sum of New Consols should, and that it in the meantime did, stand charged with the payment of the sum due on the judgment.

On the 22nd of June judgment for the administration of Rhodes's estate was pronounced in the Chancery action.

On the 26th of June the present action was transferred from the Queen's Bench Division to Stirling, J.

A preliminary objection was taken that there was no power under the statutes to make an order after the death of a debtor charging his interest in property with the judgment debt.

Stirling, J., allowed the objection.

The plaintiffs appealed.

*Jenkins, Q.C.*, and *Whinney*, for the appeal.—Under the old procedure a creditor who had obtained judgment could proceed against the executor of the deceased debtor by entering a suggestion or by *scire facias*. Now the proper course is to obtain leave to issue execution under ord. 42, r. 23. Leave has been obtained under this order, and the effect is to make the executor a defendant. *Haly* v. *Barry*, 16 W. R. 654, L. R. 3 Ch. App. 452, is in favour of this contention. There it was never suggested that because a judgment debtor was dead by no process could the judgment be put into execution. *Finney* v. *Hinde*, 27 W. R. 413, 4 Q. B. D. 102, seems to suggest that the remedies given to the creditor under 1 & 2 Vict. c. 110 were not meant to go further than the old remedy of arrest, but there is nothing in the language of the Act to bear out this contention.

They also referred to *Watts* v. *Jefferyes*, 3 Mac. & G. 422, and to *Brereton* v. *Edwards*, 37 W. R. 47, 21 Q. B. D. 226, 488.

*Harman*, for the executor.—The form of the order shows that this appeal must fail. The appellants are in fact seeking to amend their order in spite of the administration action. Ord. 46 provides that a charging order shall only operate under 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82, s. 1. But under these statutes the appellants must fail, as the person to give the charge is the judgment debtor, who is dead.

He referred to *Dixon* v. *Wrench*, 17 W. R. 591, L. R. 4 Ex. 154; *Gill* v. *Continental Union Gas Co.*, 21 W. R. 111, L. R. 7 Ex. 332; *Wallace* v. *M'Cann*, 4 Ir. Eq. 522.

*E. S. Ford* (*Upjohn, Q.C.*, with him), for the liquidator of the Lands Trust Co. (Limited).—*Haly* v. *Barry* is distinguishable from the present case, while *Finney* v. *Hinde* is a clear authority against the appellants. The plaintiffs ought to have made the executor a defendant under ord. 17. s. 4.

He referred to *In re Cave*, W. N. (1892), p. 142.

*Jenkins, Q.C.*, in reply, referred to *In re Shephard, Atkins* v. *Shephard*, 38 W. R. 133, 43 Ch. D. 131.

LINDLEY, M.R.—This is a small point of practice, but a very important one. In the first place it struck us all that no one had ever heard of a charging order of this sort before. These charging orders have been in operation ever since the beginning of the present reign, and nobody, except in one case to which I will refer presently, has ever obtained or, so far as I am aware, discussed the possibility of obtaining a charging order against an executor for a debt due from the deceased. I do not say that it cannot be done, but the right to a charging order is statutory, and we must look to the statutes that relate to it. Ord. 46, r. 1, makes that unmistakeable. It does not substitute any new method of getting a charging order, and it does not increase the number of cases in which a charging order can be got. It says: "An order charging stock or shares may be made by any Divisional Court or by a judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82, s. 1." Therefore we are referred by the order to those statutes, both for the proceedings for obtaining a charging order and the effect of it when obtained. Now let us look at those statutes. The important one is 1 & 2 Vict. c. 110, s. 14. [His lordship read the section, and continued:] Therefore it is a condition of the application of this Act and of obtaining a charging order, that you must have a person against whom a judgment has been entered, and the procedure shows that that person is the judgment debtor, who must be in a position to show cause why the charging order should not be made. In other words, he must be alive, and it was settled so long ago as *Finney* v. *Hinde* that if you had a charging order *nisi* against a dead man it was useless, and that you could not convert it into an order absolute. That is all that *Finney* v. *Hinde* really decided. That led to this possible state of things: that if a person, who had got a judgment against a deceased man, wanted to get a charging order against the executor he must get judgment against the executor and make him

judgment debtor, which could be done under the old practice. Then the executor being a judgment debtor the procedure under the Acts becomes applicable. Now, of course there are difficulties about that, and the real objection to this experiment is that an attempt has been made to obtain a charging order against an executor without making him a judgment debtor. The plaintiff says that he had done that which under the modern practice is equivalent to obtaining a judgment. Let us look at what has been done. The order relied on by the appellant as making this modern procedure equivalent to obtaining a judgment, is ord. 42, r. 23. If you have judgment against a deceased man you need not enter another judgment against his executors, but you can under that order obtain leave to issue execution. There are two views of the effect of that order. One view is that contended for by the appellants—that an order giving leave to issue execution is equivalent to a judgment. The other view is that ord. 42, r. 23, which gives leave to issue execution, dispenses with the judgment, and in my opinion the latter is the true view. The order does not say and does not mean that you are to be treated as if you had got a judgment, but that although you have no judgment you need not obtain one because you may issue execution without it. Now let us look at the difference. It is plain that leave to issue execution under ord. 42, r. 23, does not operate by way of merger against any cause of action; it does not convert the creditor into a specialty creditor; it has not the effect of a judgment. The true explanation of the rule is that you need not obtain a judgment because in ninety-nine cases out of a hundred there is no necessity for it and you may issue execution without. But if that in the true view this charging order is altogether wrong, because the person getting the order has not complied with the conditions imposed by 1 & 2 Vict. c. 110 and obtained judgment against the executor. But then it is said that the plaintiff having got judgment against the deceased man cannot get another judgment *de bonis testatoris* against the executor. Let us see what that comes to. If he cannot do that, it follows that he cannot get a charging order at all. But if so, why cannot he? The reason is that there used to be proceedings for reviving judgments against executors, *scire facias*, and so on, and there was no difficulty about it. If all that practice is abolished (we have not had time to look into that) what follows? It follows, not that the creditor has no remedy, but that he must bring an administration action. That is the modern practice, and that explains why, from the passing of 1 & 2 Vict. c. 110, nobody has ever heard of a charging order being obtained against an executor upon a judgment made against the testator.

The only case that throws any doubt on that, and which is to a certain extent inconsistent with it, is the case of *Haly* v. *Barry*. In that case a charging order had been obtained against the testator. The usual practice was followed and the executor was made a party, and Wood and Selwyn, L.JJ., said that was equivalent to obtaining a charging order. Whether that was equivalent to it under the old practice or not it is not necessary to consider, but be that as it may, the decision was that they would make the order absolute for what it was worth. They held that if a man had an advantage he was to have the benefit of it. There was no ground for it, except that put forward by the appellant, that you must stop a race between creditors. That is no ground, because you cannot do it simply because you are asked. I recognize that there are observations in the judgment or Wood, L.J., which make me doubt whether I am quite right in saying that you cannot do it even now if there is any method of getting judgment against the executor. I doubt whether there is now. I am not quite sure that you could when that practice about "suggestions" was in vogue.

However, the result is that this charging order is altogether wrong. Nobody ever saw such a thing before; it is an experiment which I hope will not be repeated. As to our general jurisdiction, we should not think of exercising it if we have it. The appeal will be dismissed with costs.

RIGBY, L.J.—I am of same opinion. Whether or not judgment can be obtained against an executor, it appears to me that it must be obtained before a charging order can be made against the estate in his hands. If it is possible that such a judgment may be obtained under the present practice, then a charging order may also be obtained. As it stands, I agree with Stirling, J., that on the construction of this order a charging order is obtained on the interest of the only person who can be pointed out as a judgment debtor, and therefore it is no use at all as against the executor.

VAUGHAN WILLIAMS, L.J.—I agree. It is quite clear that under the statute 1 & 2 Vict. c. 110, you must have a judgment debtor who can show cause against the making of the charging order. It is suggested here that you have got a judgment debtor, but that suggestion cannot be maintained because the person against whom the judgment was obtained is dead, and so far as his personal representative was concerned no judgment has been obtained against him at all.

Then it is said that although that is true, something has been obtained in this case which is so equivalent to a judgment against the executor that we ought to hold the requirements of the statute have been complied with, and it is said that that something consists in this order, which has been obtained under ord. 42, r. 23. I cannot agree that that is equivalent to a judgment against the executor. It is not a judgment against the executor in fact, and I cannot consider that the statute is satisfied by the obtaining of such an order. In fact I very much doubt whether, if you could proceed at all under the statute after the death of the judgment debtor without obtaining a judgment against the executor, this order under ord. 42, r. 23, would be necessary or useful. But all we have to deal with to-day is to say whether or not such an order under ord. 42, r. 23, does so satisfy the statute as to enable the judgment creditor to get a charging order. I am of opinion that it does not.

*Appeal dismissed.*

Solicitors, *Markby, Stewart, & Co.; May, Sykes, & Co.*

---

From Q. B. Div.
(A. L. Smith, Collins, and Vaughan Williams, L.JJ.) Jan. 22.

LANCASHIRE ASYLUMS BOARD v. MAYOR, &c., OF MANCHESTER. (a.)

*Local government—Expenses—Rates—Asylums board—Contributions from county and county boroughs—Apportionment—Rateable values—Assessable values—Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *s.* 33, *sub-section* 2—*Agricultural Rates Act,* 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 2, 3, 5, 9.

*By a local Act passed in* 1891 *it was enacted that the Lancashire Asylums Board, which was thereby constituted, should, for the purpose of raising the annual sum*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

*required for payment of the expenses incurred by them, obtain contributions from the county and the county boroughs in proportion to the respective rateable values, as ascertained under section* 33 *of the Local Government Act,* 1888, *of the county and the county boroughs.*

*Held, that, on the passing of the Agricultural Rates Act,* 1896, *the provisions of that Act did not make it the duty of the asylums board to divide the sum required by them in proportion to the assessable values of the county and the county boroughs as ascertained under that Act, but that it was still their duty to divide it in proportion to the rateable values as ascertained under section* 33 *of the Local Government Act.*

*Judgment of* Bruce *and* Ridley, JJ. (47 *W. R.* 361, [1899] 1 *Q. B.* 759), *reversed.*

Appeal, from the judgment of a Divisional Court (Bruce and Ridley, JJ.) upon a special case: reported 47 W. R. 361, [1899] 1 Q. B. 759.

The question was whether, during the continuance of the Agricultural Rates Act, 1896, the Lancashire Asylums Board ought to divide the amount yearly required to be raised for their purposes in proportion to the rateable values of the county and the county boroughs as ascertained by the Local Government Act, 1888, s. 33, or in proportion to the assessable values of the same as ascertained by the Agricultural Rates Act, 1896, and the regulations of the Local Government Board issued under that Act.

By the Lancashire County (Lunatic Asylums and others Powers) Act, 1891 (54 Vict. c. xx.), a board was constituted called the Lancashire Asylums Board, to which were transferred the lunatic asylums of that county and of certain county boroughs, including Manchester, and it was provided by section 23 that all expenses incurred by them in the execution of their duties should be paid out of a fund to be called "The Asylums Fund."

Section 24 dealt with the raising of this fund, and was as follows: "The board shall before the first day of March in every year estimate the total amount required to be raised by contributions for the ensuing year, and shall divide that amount between the county and the county boroughs in proportion to the respective rateable values (as ascertained under section 33 of the Local Government Act, 1888) of the county and the county boroughs, and shall add to the amount apportioned to the county boroughs the sum of £4,000, or such other sum as may from time to time be fixed by agreement or by arbitration in manner provided by this Act (in this Act referred to as 'the added sum'). The amount so apportioned, together with the added sum, shall be the aggregate amount required to be contributed by the county boroughs and shall be contributed by them respectively in proportion to their respective rateable values ascertained as aforesaid. The balance of the amount required to be raised by the board shall be contributed by the county council."

Section 33, sub-section 2, of the Local Government Act, 1888, enacts: "Where for the purpose of calculating any contribution or payment to be made under this Act it is necessary to ascertain the rateable value of both a county and a county borough, such rateable value shall be ascertained and fixed by a joint committee composed of representatives of all the councils concerned, and such committee shall for that purpose have all the powers and jurisdiction of quarter sessions, and of a committee of justices appointed under the County Rate Act, 1852, and the Acts amending the same."

From 1891 to the passing of the Agricultural Rates Act, 1896, the amounts required to be contributed were calculated upon the respective values of the county and county boroughs as ascertained in the manner prescribed by section 33, sub-section 2, of the Local Government Act, 1888, and according to the provisions of section 24 of the local Act; and the Lancashire Asylums Board, under section 26 of their Act, sent precepts to the county council and the borough councils for payment of the amount to be raised by each of them respectively.

Section 1 of the Agricultural Rates Act, 1896, enacts that "during the continuance of this Act the occupier of agricultural land in England shall be liable, in the case of every rate to which this Act applies, to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments."

The contributions of the county and county boroughs respectively were payable out of the county fund and borough funds respectively; and, in so far as they were payable out of rates, were payable out of the county rate and borough rates respectively, and the Agricultural Rates Act, 1896, applied to these rates.

Section 2 enacts that, in order to make up the deficiency due to the provisions of section 1 in the amount raised by the spending authorities, an annual grant shall be made from the local taxation account to each of such authorities. "Spending authorities" are defined by section 9 and the schedule to the Act, but they do not include the Lunatic Asylums Board.

In calculating the amount of the annual grant to be made under the Agricultural Rates Act, 1896, to the county council and to the councils of each of the county boroughs, who were respectively "spending authorities" within that Act, the deficiencies which would arise owing to the provisions of section 1 in the amount recoverable by each of such spending authorities by means of rates levied to meet precepts of the asylums board, were ascertained in the manner prescribed by that Act and the rules made by the Local Government Board thereunder, and the amounts of such deficiencies were included in calculating such annual grants, and the Corporation of Manchester received and was to receive annually during the continuance of the Agricultural Rates Act, 1896, a grant from the local taxation account in respect of the deficiency in the amount levied by rates in respect of the precepts of the asylums board.

By section 3 any spending authority requiring to raise from two or more parishes a sum by rate is, in determining the amount to be raised, to deduct the sum issuable to them in respect of the rate on account of their share in the annual grant, and to raise the net amount, after making such deduction, in proportion to the assessable value of those parishes, and such assessable value is to be the rateable value of each of the parishes reduced by an amount equal to one-half of the rateable value of the agricultural land in the parish.

Section 4 deals with the amount of the annual grant issuable as stated above, which amount is to be ascertained under section 4 and section 6 by returns made to the Local Government Board by the spending authorities of the sums received by them in the year next before the passing of the Act.

Section 5 deals with the preparation of valuation lists and the basis or standard for any county rate or borough rate, and provides that the value of agricultural land shall in each case be stated separately from that of other hereditaments, and that the total rateable value of the agricultural land shall be stated separately from the total rateable value of the other hereditaments in each parish.

By section 6, sub-section 3, the Local Government Board has power to make regulations for carrying out the Act.

By section 9, "rate" means a rate made during the continuance of this Act, the proceeds of which are

applicable to public local purposes and which is leviable on the basis of an assessment in respect to the yearly value of property, and includes any sum which, though obtained in the first instance by a precept, certificate, or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of a rate as before defined.

By regulations issued by the Local Government Board under the Act it was ordered, by way of carrying into effect the provisions contained in section 5 of the Act, that the valuation list was to be made in a particular form shown in the schedule, with a separate column showing the rateable value of the agricultural land, if any, contained in any hereditament, and that the lists were to be in this form instead of in the form provided by the Union Assessment Committee Act, 1862, for every rate to be made thereafter. As to the county rates, it was ordered by article 17 that county councils and other councils whose duty it was to make for the purposes of any rate a basis or standard of valuation which would not contain particulars of separately-rated hereditaments, but only the total rateable value of each parish should cause a basis or standard of valuation to be prepared in the form set out in Schedule Z. It was further ordered that, notwithstanding anything contained in the County Rates Act, 1852, or in any other Act, from the 31st of March, 1897, the values of the several parishes as shown in column 5 of such basis, or standard, or valuation, "shall during the continuance of the Act be the basis, standard, or valuation for the levying of the county rate or any other rate leviable by the council according to the assessable value of the several parishes on which the same is levied, unless or until the council shall make a new basis, standard, or valuation in manner provided by law." The heading of column 5 of Schedule Z was "Assessable value of the township, being one-half the amount in column 3 added to the amount in column 4." The heading of column 3 was "Net annual value of agricultural land in the township"; that of column 4 was "Net value of the buildings and other hereditaments not being agricultural land in the township."

Upon the Agricultural Rates Act, 1896, coming into operation a joint committee of the county of Lancaster, formed as required by section 33, sub-section 2, of the Local Government Act, 1888, prepared a basis or standard for county rates in accordance with article 17 and Schedule Z of the regulations under the Act.

The amounts required by the precepts sent by the asylums board to the county council and to the councils of each of the county boroughs had since the Agricultural Rates Act, 1896, came into operation been calculated upon the values ascertained as regards agricultural land upon its assessable value, being one-half of its rateable value, and upon other land and buildings at their rateable value as calculated at the time when the Act of 1896 came into operation.

The asylums board estimated the amount to be raised by contributions for the ensuing year, and divided that amount between the county council and the county boroughs in proportion to the respective values thereof as above stated with the addition of the sum required by section 24 of the local Act.

The council of the city of Manchester paid to the treasurer of the asylums board the amount which the council would have had to pay if the total amount had been divided between the county council and the county boroughs in proportion to the respective rateable values thereof as calculated at the time when the Act of 1896 came into operation.

The asylums board brought an action to recover the balance—£357 9s. 5d.—alleged to be due.

The questions for the opinion of the court were whether the asylums board, in dividing the total amount required by it to be raised by contributions during the continuance of the Agricultural Rates Act, 1896, was to divide that amount between the county and county boroughs in proportion (1) to their respective assessable values under the Act of 1896, or (2) according to their rateable values as calculated before the Act.

The Divisional Court were of opinion that the asylums board ought to divide the estimated amount between the county and the county boroughs in proportion to their respective assessable values as ascertained under the Agricultural Rates Act.

The Corporation of Manchester appealed.

*Macmorran, Q.C.*, and *Ryde*, for the appellants.

*Cripps, Q.C.*, and *R. Cunningham Glen*, for the respondents.

*Cur. adv. vult.*

Jan. 22.—A. L. SMITH, L.J., read the following judgment of the court: The question which has arisen between the Lancashire Asylums Board and the Corporation of Manchester is whether the asylums board, under section 24 of a local Act called the Lancashire County (Lunatic Asylums and Other Powers) Act, 1891, is to divide between the county of Lancaster and the county boroughs of that county, the contributions which the asylums board annually requires in order to defray the expenses of the county lunatics, in proportion to the "rateable values" of the county and county boroughs, as was the case prior to the passing of the Agricultural Rates Act of 1896, or in proportion to the "assessable values" of the county and county boroughs to be found in the later Act. The Corporation of Manchester asserts that the question of the division of the contributions to be made between the county and the county boroughs is not touched by the Agricultural Rates Act, 1896, though the method of rating the county and county boroughs is thereby altered. The asylums board on the other hand asserts that what was once "rateable value" is now no more, and that, as regards the division which the board is to make, "assessable value" has taken the place of "rateable value," so long as the Agricultural Rates Act of 1896 is in existence. The point is one which makes a considerable difference to the Corporation of Manchester—and indeed to the other county boroughs in Lancashire—as regards the amount it can be annually called upon to contribute towards the expenses necessary for maintaining the county lunatics. Prior to the Agricultural Rates Act, 1896, matters stood thus. By the County Rate Act, 1852, ss. 2, 6, and 21, justices in counties were to prepare a basis or standard for fair and equal county rates, rateably and equally according to the full and fair annual value of the property within their respective limits, and were to order and direct a fair and equal county rate according to such basis or standard. By section 33, sub-section 2, of the Local Government Act, 1888—which is the Act which created certain boroughs county boroughs (of which Manchester is one), and which established county councils and joint committees of counties and county boroughs—it was enacted, "Where, for the purpose of calculating any contribution or payment to be made under this Act, it is necessary to ascertain the rateable value of both a county and a county borough, such rateable value shall be ascertained and fixed by a joint committee composed of representatives of all the councils concerned, and such committee shall for that purpose have all the powers and jurisdiction of quarter sessions and of a committee of justices appointed under the County Rate Act, 1852, and the Acts amending the

same." The object, I apprehend, of appointing this joint committee was that it might see that the rateable values of the county and county boroughs were fairly adjusted. In the year 1891 the county of Lancashire obtained special legislation by means of a local Act, entitled the Lancashire County (Lunatic Asylums and Other Powers) Act, 1891, whereby a Lunatic Asylums Board for the County Palatine of Lancaster was created, which board was to provide asylum accommodation and to carry out other matters as a local authority under the Lunacy Act, 1890. By section 34 of the local Act it is enacted that, for the purposes of that Act, the rateable value of the county and of the county boroughs shall be their rateable value as ascertained and fixed for the time being by the joint committee appointed by section 33 of the Act of 1888. By section 23 of the local Act all expenses incurred by the asylums board in the execution of its duties are to be paid out of a fund called the Asylums Fund, and any deficiency in that fund is to be raised by contributions to be made by the county and county boroughs in accordance with the provisions of the Act. By section 24 of the local Act it is enacted that the board shall before the first day of March in every year estimate the total amount required to be raised by contributions for the ensuing year, and shall divide that amount between the county and county boroughs in proportion to the respective rateable values as ascertained under section 33 of the Local Government Act, 1888. By section 26 of the local Act it is enacted that, for the purpose of obtaining payment of the sums to be contributed by the county and the county boroughs respectively, the chairman of the board shall before the 1st day of March in every year send to the county council and and the council of each county borough a precept for payment of the amount to be contributed by the county or county borough as the case may be. Although I have had to refer to many sections in different Acts, down to this point it is perfectly plain that the division which the asylums board has to make of the contributions which it requires from the county and county boroughs was to be in proportion to their respective rateable values. This division and the sending of the precepts was the only thing the asylums board had to do as regards the money to be obtained from the county and county boroughs under the local Act of 1891. The board was in no way concerned in rating or levying a rate either upon the county or county borough. Has, then, this division been altered by the Agricultural Rates Act, 1896, which was an Act to last for five years from the 31st of March, 1897, from which date the Act was to come into operation? This Act is an Act by which the occupiers of agricultural land are for five years to be exempted from the payment of half the rates which they would otherwise have had to pay upon such lands, and it is the rating of agricultural land, in my opinion, which is dealt with by this Act. If the division of the contributions by the asylums board between the county and county boroughs is to be made in proportion to the "assessable values" mentioned in the Agricultural Rates Act, 1896, and not in proportion to the "rateable values" as prescribed by section 24 of the local Act of 1891, this would operate much to the detriment of the county boroughs.

The question, therefore, is, What is the division the asylums board has now to make between the county and the county boroughs? Is it the same as under the local Act of 1891, and before the passing of the Agricultural Rates Act, 1896—*i.e.*, in proportion to the "rateable values" of county and county boroughs; or in proportion to the "assessable values" as found in the Agricultural Rates Act, 1896, so that the words "rateable values" in section 24 of the local Act of 1891 are now to be read differently from what they would have been undoubtedly read when the Act of 1891 was passed and for five years afterwards? It will be observed, when considering the scope of the Agricultural Rates Act, 1896, which is a general Act, that nowhere in it can be found any express repeal of any part in the local Act of 1891, and, what is more, nowhere in the Agricultural Rates Act, 1896, is the local Act of 1891 so much as mentioned. The local Act is left precisely where it was at the time it was passed, and for the best of all reasons, as it appears to me; for the local Act of 1891 in no way embraces either the rating or levying of rates either in a county or county boroughs by the asylums board, with which the Agricultural Rates Act, 1896, irrespective of the asylums board, now deals. The learned judges in the Queen's Bench Division felt this difficulty in their way, for they say: "It is true the precise position and duties of the Lancashire Asylums Board are not dealt with by the Agricultural Rates Act, 1896"—I say not so much as mentioned or dealt with at all—"but we cannot, therefore, exclude it from an Act of so general intention." The general intention of the Agricultural Rates Act, 1896, is to take off from occupiers of agricultural lands one-half of their rates for a period of five years; but how does this alter the division the asylums board is to make, when the division by the asylums board is not dealt with by the Agricultural Rates Act, 1896, from first to last? The Agricultural Rates Act, 1896, is intituled as being an Act to amend the law with respect to the rating of the occupiers of agricultural land in England and for other purposes connected therewith. By section 1 it exempts the occupier of agricultural land from paying the whole rate, as he theretofore had done, and limits his liability to half of the rate, and it enacts that the deficiency thereby created is for five years to be made up by the Commissioners of Inland Revenue. It is clear, and indeed it is admitted by counsel for the asylums board, that section 3 of the Agricultural Rates Act, 1896, has no reference to this case, and I might pass it by; but I think I should point out that the section only deals with the levying of the rate by persons entitled to do so, that is, by the spending authority, which the asylums board is not, and it has nothing to do with the division of contributions required by the asylums board. Sub-section 2 of section 3 is only for the purposes of section 3, and therefore admittedly does not apply. But this is how it is argued for the asylums board. It is said that section 5 of the Agricultural Rates Act, 1896, enacts that in every valuation list and the basis and standard of any county rate the value of agricultural land shall be stated separately from that of any building or other hereditament, and that the total rateable value of agricultural land in each parish shall be stated separately from the total rateable value of the buildings and other hereditaments, and that, by section 6, sub-section 3, of this Act, the Local Government Board, for the purpose of ascertaining the deficiency and for the separation of value of agricultural land from buildings and other hereditaments, and generally for carrying into effect this Act, is to make regulations, and that these regulations, coupled with section 5, alter the division of contributions which the asylums board is to still make under section 24 of the local Act of 1891, and that the division by the asylums board is now to be made upon the "assessable value," and not upon the "rateable value" under that section. How section 5, which applies to the rating of agricultual lands separately from buildings and other hereditaments, can be held to touch the division the asylums board is to make I

do not see, and the regulations are for the levying of the rates and not for the division of contributions. Article 17 of the regulations and the form in Schedule Z when read show this to be so. Column 2 in Schedule Z deals with the net annual value of each parish according to the basis, standard, or valuation in force at the passing of the Act of 1896—*i.e.*, rateable value beyond a doubt—and columns 3 and 4 deal with net rateable value divided between agricultural land and buildings and other hereditaments not being agricultural land. And by column 5 "assessable value" of a parish is one-half of the amount of agricultural land added to the amount of the other hereditaments other than land. These provisions were necessary to carry out the scheme of exonerating the occupier of agricultural land from paying the whole of the rate based upon the rateable value of his land, which before the Agricultural Rates Act of 1896 he had to pay, that being the object of the Act; and in my judgment neither section 5 nor the regulations under the Act of 1896 have anything to do with the division the asylums board has to make under section 24 of the local Act of 1891. There is a well-known rule which has application to this case, which is that a subsequent general Act does not affect a prior special Act by implication. That this is the law cannot be doubted, and the cases upon the subject will be found collected in the third edition of Maxwell on the Interpretation of Statutes, at pp. 242-3, and I need not refer to them. Applying this rule to the present case, how does the general Act of 1896 affect the special legislation of 1891? Surely, it does not do so at all. For the reasons above, I am of opinion that the "rateable values" upon which the asylums board were to make the division for contributions under section 24 of the local Act of 1891 have not been touched by the general Act of 1896, and that the first question put to us must be answered in the negative, and the second in the affirmative, and that this appeal must be allowed.

*Appeal allowed.*

Solicitors for the plaintiffs, *Ridsdale & Son*, for *F. C. Hulton*, Preston.

Solicitors for the defendants, *Austin & Austin*, for *W. H. Talbot*, Manchester.

---

## High Court of Justice.

Chan. Div. Kekewich, J. } Feb. 20; March 6, 7, 8, 20.

DALY v. EDWARDES.
WARR & CO. v. EDWARDES. (*a*.)

*Landlord and tenant—Lease—Lease of theatre—Covenant not to assign—Grant of right to supply refreshments—Breach—Forfeiture.*

*A lessee of a theatre covenanted not to assign or part with the premises, or any estate or interest therein, for all or any part of the term thereby granted. The lessee subsequently granted to a third person the free and exclusive licence and right to use the refreshment rooms and bars in the said theatre.*

*Held, that the lessee had not assigned or parted with the premises or any estate or interest therein, and that consequently there was no forfeiture.*

Action for declaration that re-entry by the defendant under the lease was unauthorized.

On the 8th of February, 1894, the defendant George Edwardes granted a lease of certain premises in Cranbourn-street, now known as Daly's Theatre, to the plaintiff Augustin Daly for a term of twenty years from the 25th of December, 1893, at a yearly rent of £5,500, and the said Daly covenanted with Edwardes not at any time during the term thereby granted to assign, demise, or otherwise part with the indenture or any estate or interest therein for all or any part of the said term without the license of the lessor, it being the intention that the lessee should be at liberty at all times to produce and perform by himself and company or his licensees any first-class comedy, drama, or opera without the necessity of applying to the lessor for his consent in that behalf, but that such licensees should not be at liberty to assign, underlet, demise, or otherwise part with their term without the license of the lessor first had and obtained. There was also a proviso for re-entry on breach of any of the covenants by the underlessee therein contained.

By an indenture dated the 15th of April, 1898, the plaintiff Daly, in consideration of £1,400 and a weekly rent of £15, granted to Frank Warr & Co. (Limited) "the free and exclusive license and right to the use of all the refreshment rooms, bars, smoke rooms, wine cellars, and offices" in the said theatre, together with free right of access thereto and the sole and exclusive privilege of advertising therein, "to hold the premises" for the term of fifteen and three-quarter years. And the said indenture contained a power for "the landlord" to determine the term on non-payment of rent, and also power to discharge any servants of the said "tenants" for misconduct. And the landlord covenanted that the tenants should peaceably and quietly "hold, occupy, and enjoy the hereditaments and premises without any lawful let, suit, trouble, eviction, or disturbance by the landlord or any other person." No license or consent was ever obtained from the said Edwardes prior to the granting of such last mentioned indenture.

By an agreement dated the 15th of May, 1894, between Daly of the one part and Edwardes of the other part, it was agreed that Edwardes should produce and mount the plays, and provide the back of the house at his own expense, and that Daly should provide the theatre, pay rent and taxes, and be generally responsible for the front of the house. The said Daly was to pay 65 per cent. of the gross takings to the said Edwardes, and the remaining 35 per cent. was to be retained by Daly. The staff and officials supplied by each of them to be under his sole control; and each of them was to bear in certain shares the expenses of advertising and of the orchestra.

On the 4th of September, 1898, Edwardes re-entered and took possession of the theatre and premises on the ground that the contract with Warr & Co. was a breach of the covenant not to assign as aforesaid.

On the 6th of September, 1898, the plaintiff Daly issued his writ in this action, and claimed a declaration that the re-entry by the defendant Edwardes was not authorized by the underlease, that a partnership was subsisting between the plaintiff Daly and the defendant Edwardes, and that if such re-entry was authorized it was inconsistent with Edwardes' duty as a partner.

On the 14th of September, 1898, Frank Warr & Co. also brought an action against Daly and Edwardes claiming against Edwardes a declaration that they were entitled to the exclusive right of supplying refreshments in the said theatre, or in the alternative damages against Daly. This last action, however, stood over pending an appeal in the former action.

On the 7th of June, 1899, the plaintiff Daly died, and the two actions were revived in the name of his administrator

(*a*.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

*Warrington, Q.C., Eldon Bankes, L. S. Bristowe,* and *Newton Crane,* for the plaintiff Daly, referred to *Taylor* v. *Caldwell,* 11 W. R. 726, 3 B. & S. 826; *London and North-Western Railway* v. *Buckmaster,* 24 W. R. 16, L. R. 10 Q. B. 70, 444; *Rendell* v. *Roman,* 9 Times L. R. 192; *Peebles* v. *Crosthwaite,* 13 Times L. R. 198; *Hill* v. *Tupper,* 11 W. R. 784, 2 H. & C. 121; *Kerrison* v. *Smith,* [1897] 2 Q. B. 445, 46 W. R. Dig. 36; *Wells* v. *Kingston-upon-Hull,* 23 W. R. 562, L. R. 10 C. P. 402; *Smith* v. *Lambeth, &c.,* 31 W. R. 31, 10 Q. B. D. 327; *Reg.* v. *Morrish,* 11 W. R. 960, 32 L. J. M. C. 245.

*Warmington, Q.C., P. O. Lawrence, Q.C., G. Cave,* and *Herman Cohen,* for defendant Edwardes, referred to *Lyon* v. *Knowles,* 11 W. R. 266, 3 B. & S. 556; *Dingley* v. *Sales,* 1 M. & Sel. 297; *Greenslade* v. *Tapscott,* C. M. & R. 55; *Selby* v. *Greaves,* 16 W. R. 1127, L. R. 3 C. P. 594; *Duxbury* v. *Sandiford,* 80 L. T. Rep. 552, 47 W. R. Dig. 97; *Varly* v. *Coppard,* 20 W. R. 972, L. R. 7 C. P. 505; *Webber* v. *Lee,* 30 W. R. 866, 9 Q. B. D. 315; *Reg.* v. *St. Martin-in-the-Fields,* 3 Q. B. 204; *Lancashire and Cheshire Telephone Co.* v. *Manchester Overseers,* 33 W. R. 203, 14 Q. B. D. 267; *Holywell Union* v. *Halkyn,* [1895] A. C. 117, 43 W. R. Dig. 131; *Taylor* v. *Pendleton Overseers,* 35 W. R. 762, 19 Q. B. D. 288.

*Swinfen Eady, Q.C.,* and *J. R. Brooke,* for Warr & Co.

KEKEWICH, J.—There is no substantial question about the facts, and the difficulties arise on the construction of the two instruments of the 8th of February, 1894, and the 15th of April, 1898. Clause 10 of the former bristles with difficulties. It falls naturally into two sections, and though it is necessary to consider both in order to construe the first, on which the main question turns, it is convenient to treat them separately, as the second is in form a proviso or limitation on the first, which runs as follows: "Not at any time during the term hereby granted to assign, demise, or otherwise part with this indenture or any estate or interest therein for all or any part of the said term to any person or persons whomsoever without the license of the lessor first had and obtained." The question is whether this covenant has been broken so as to bring into operation the proviso for re-entry. In order to construe such a covenant regard must be had to the circumstances, and the one thing to bear in mind is that it was the lease of a theatre and intended to be used for no other purpose. It is conceded that the phrase "this indenture" means the demised premises. And, reading the covenant thus, the lessee is distinctly prohibited from assigning or demising the premises as a whole, neither of which he has done. But it is argued that he has parted with some estate or interest therein. I take it that a man who parts with premises does not retain them. If, therefore, the effect of the agreement with Warr & Co. is that Daly, while retaining possession of the theatre as a whole, yielded to them possession as against himself of the part used by them so that he could not be said to have retained it, it would, I think, follow that he parted with an interest in the premises. But if he retained possession of the whole theatre, including the parts used by Warr & Co., then in my judgment he has not parted with an interest in the theatre, though he has given some rights over a portion of it. In this connection many authorities have been referred to, some dealing with "exclusive possession," and some with "rateable occupation." But I shrink from authorities which turn on the use of the word "exclusive," and the authorities on "rateable occupation" are of doubtful application to any other subject. Of these, however, I may mention in passing *Reg.* v. *St. Martin-in-the-Fields,* since it has special interest here, as being concerned with a private box in a theatre, but the decision turned upon the construction of a rating Act of Parliament. Taking, therefore, so much of clause 10 as has already been quoted, I have to determine, without the assistance of any particular decision, whether Daly has parted with any interest in the theatre. But clause 10 has a second sub-division or section, which runs thus: "It being the intention that the lessee shall be at liberty at all times to produce and perform by himself and company, or by his licensees, any first-class comedy, drama, or opera, without the necessity of applying to the lessor or his assigns for his consent in that behalf, but that such licensees shall not be at liberty to assign, &c." The gist of this section was in the provision that he shall be at liberty to produce and perform by his licensees, who, however, were not to assign, &c. It would seem from this that it was intended that the theatre should be used for the production of first-class plays, and that so long as that was done the lessor cared not whether it was done by Daly or by others claiming under him in the first degree. If he had demised or licensed to others for this purpose, he would not thereby have broken his covenant, even though he had parted with the theatre for the whole term. This is, to my mind, the clear effect of the proviso, whether standing alone or construed with the preceding section. The second section is useful as indicating the intention of the parties that the theatre was to be used for the performance of first-class plays, and that so long as that was secured Daly was to be under no personal obligation to do it.

Before passing to the consideration of the other instrument, it is convenient here to notice the agreement between Edwardes and Daly of the 15th of May, 1894. Some argument turned on the partnership thereby constituted. I probably misunderstood Mr. Warrington's argument on this point, for I deemed him to be contending for a partnership in the theatre which seemed to me inconsistent with the facts. If he was contending, as I suppose he was, for a partnership in the particular business of producing a play, I have, as at present advised, nothing to say against it. By the agreement of the 15th of April, 1898, Daly granted to Warr & Co. an exclusive license to supply refreshments. I am not disposed to attribute importance to the phrase "exclusive license." The force of the word "exclusive" lies in the assurance to Warr & Co. that they and no other persons should have the right of supplying refreshments. It does not in any way control the relation between Daly and Warr & Co. The former granted to the latter a license, and that is, I think, the substance of the instrument. A man may grant to another the right to do such and such things, in which case the grant may operate by way of covenant or licence. Here Daly does not grant the theatre or any part of it, but grants the free and exclusive license and right to use certain rooms together with certain privileges which are obviously all intended to enable Warr & Co. to exercise their trade of refreshment contractors. The legal phrase "to hold the premises" is not technically apt to such a grant, but it is often used, and one must not attach too much weight to it. Nor does the use of the words "landlord" and "tenants" make the instrument a demise if otherwise it ought not to be so construed. In many other respects the language of the agreement contemplates a tenancy, and there is even a covenant for quiet enjoyment in a form appropriate to a lease of land. Nevertheless, I cannot think that this was the intention of the parties. This agreement merely enables refreshments to be supplied without the lessee undertaking the obligation to supply them. It is in

substance a contract by Daly that Warr & Co. shall have the privilege of supplying refreshments; and I note as an illustration of this the provision which gives Daly full power to discharge any servant of the tenants for misconduct. It is necessary now shortly to advert to the proved facts. The construction of the written instrument cannot be varied by the usage of the parties, but such usage may have operated as a breach of the covenant apart from the written instrument, and it was argued that it had in fact done this. Subject to one remark the proved facts seem to show that Daly did not part with any portion of the theatre or any interest therein. It may be that he could not have gone behind the bars when the theatre was open, or in any other way have interfered with Warr & Co. But except that they were at liberty to carry on their business of refreshment contractors, I think that Daly retained possession of the whole theatre, and full control over it. Those who came to the bars during the performance owed their privilege of admission to payment to Daly, and were under no obligation to Warr & Co., who, on the other hand, could not exclude them. But it is said that when the theatre was closed the bars were locked, and Daly's servants could not enter. I have no doubt that this, to some extent, was true. But this was done to prevent pilfering—that is, to protect Warr & Co., and not to exclude Daly; and I think it would be going too far to say that this made Daly part with any interest in the premises. Except for that and the privilege granted to Warr & Co., I think Daly retained possession of the whole theatre throughout; and I will make a declaration adverse to forfeiture conformable to my judgment, and add any consequential relief, including an inquiry as to damages.

Solicitors, *John C. Button & Co.; Slark, Edwards, & Co.; W. H. Herbert.*

---

Chan. Div.
Cozens-Hardy, J. } March 24.

*In re* Day and Night Advertising Co.
Upward *v.* Day and Night Advertising Co. (*a.*)

*Practice—Sales by the court—Debenture-holders' action—Property forming debenture-holders' security in jeopardy—Motion for judgment on admissions in pleadings—R.S.C., ord.* 51, *r.* 1b.

*The court—on motion for judgment on admissions in the pleadings in a debenture-holders' action, in which the plaintiff sued on behalf of himself and all other debenture-holders, and the debenture-holders were entitled to a charge on the property of the company—directed a sale of the property of the company under ord.* 51, *r.* 1b, *upon proof of the insolvency of the company and the jeopardy of the property comprising the debenture-holders' security, although the principal moneys secured by the debentures were not due, no interest thereon being in arrear for six months, and no resolution having been passed, or order made, for the winding up of the company.*

*In such a case the admitted allegations of the statement of claim should be verified by affidavit.*

This was a motion for judgment on admissions in pleadings in a debenture-holders' action (in which the plaintiff sued on behalf of himself and all other debenture-holders) asking, with the consent of the company, for the usual judgment and sale.

The company had been formed to develop certain patents.

The principal moneys were not due according to the tenour of the debentures, which provided therefor, in the event of interest being in arrear for six months, or a resolution passed, or an order made, for winding up; none of which events were alleged to have happened.

A receiver had been appointed in the action on the 2nd of January, 1900, on evidence that the property charged by the debentures was in jeopardy, the company being threatened with distress for rent, and being unable to meet its liabilities.

The claim stated that all the shares had been issued and fully paid, and that the receiver had realized all the moneys available and thereout discharged the arrears of rent and other liabilities, and had only £2 left in his hands to meet rent due in a few days' time and instalments of fees for keeping the patents on foot.

The company by their defence admitted the allegations in the statement of claim.

*Hon. E. C. Macnaghten, Q.C.*, and *H. T. Methold* appeared for all parties.

Cozens-Hardy, J.—I feel no difficulty as to giving you judgment, but can I direct a sale? The statement of claim is not strictly evidence. If an affidavit is filed verifying the allegations material for showing the necessity for a sale—namely, the insolvency of the company and the jeopardy to the property from inability to keep up the patents, I will direct a sale, and let the minutes be prefaced with a statement of my approval in the words of ord. 51, r. 1*b*.

Solicitors, *Withers & Withers.*

---

Chan. Div.
Buckley, J. } Feb. 8-10, 12, 15.

Welsbach Incandescent Gas Light Co. *v.* Incandescent (Sunlight Patent) Gas Lighting Co. (*a.*)

*Patent—Utility—What sufficient to support patent.*

*Utility in patent law does not mean either abstract utility, or comparative or competitive utility, or commercial utility, but an invention better in some respect, but not necessarily in every respect, than the preceding knowledge of the trade as to a particular fabric.*

*An invention is patentable which offers the public a useful choice.*

*A very small amount of utility is sufficient to support a patent.*

Action.

This was an action for an injunction, damages, and other relief in respect of infringement by the defendants of the plaintiff's patent, granted in 1886, for an improvement in an illuminant appliance for gas-burners.

In 1885 Welsbach took out his original patent for incandescent lighting, by which he claimed the manufacture of an illuminant appliance for gas and other burners, consisting of a cap or hood made of fabric impregnated with the soluble salts of what are called rare earths, such as zirconium, lanthanum, and yttrium. In 1886 application was made in his behalf for a further patent, upon which the above action was brought. This patent was for certain substances other than those mentioned in the patent of 1885 which could be advantageously employed in producing the illuminant appliances the subject of the patent of 1885. The claim made was substantially for the use

(*a.*) Reported by R. A. Daniell, Esq., Barrister-at-Law.

(*a.*) Reported by J. F. Waley, Esq., Barrister-at-Law.

of thorium oxide alone, or in admixture with the oxides of certain other rare earths as the means of obtaining hoods which had a particular character—such as rigidity, flexibility, or durability.

The defendants denied that there was any utility in the invention so claimed, and in support of their contention alleged the inferior illuminating power of a mantle prepared according to prescription No. 1 of 1886 to a mantle treated according to the specification of 1885. On the other hand, it was pointed out that the patent of 1886 did not claim to be an improvement on the patent of 1885, but to give a useful choice, and that it offered more advantages other than brilliancy—namely, rigidity, flexibility, or durability.

The case is only reported so far as it deals with the above-mentioned defence — viz., non-utility of the invention sought to be protected by the plaintiffs.

*Moulton, Q.C., T. Terrell, Q.C., Roger Wallace, Q.C.,* and *Walter*, for the plaintiffs.

*Bousfield, Q.C.,* and *W. Neill*, for the defendants.

BUCKLEY, J., after stating the nature of the relief sought, and considering the subject-matter of the above patents, and the construction of the specifications, continued as follows: Now, utility in patent law does not, as I understand it, mean either abstract utility, or comparative or competitive utility, or commercial utility. It was described by Grove, J., in *Young* v. *Rosenthal*, 1 Rep. Pat. Cas. 34, as meaning an invention better than the preceding knowledge of the trade as to a particular fabric. I adopt this definition if the word "better" be understood as meaning better in some respects, and not necessarily better in every respect; so that, for instance, an article which is good, though not so good as that previously known, but which can be produced more cheaply by another process, is better in that it is better in point of cost, although not so good in point of quality. So here I conceive that a mantle constructed according to prescription No. 1 of thorium pure, according to the knowledge of 1886, and which gave only three candles, or pure in fact according to the knowledge of to-day, and which gives only 1·3 candles, although it is worse as an illuminating appliance than the mantle of 1885, which gave 4 or 4·5 candles, was nevertheless better, if it possessed in a greater degree the qualities of rigidity, durability, or stability. I may illustrate this by saying that in point of fact subsequent knowledge has shown that it was useful, because by the subsequent discovery that a small percentage of cerium will increase its luminosity, this step which was taken in 1886 has led to the possibility of making subsequently in 1893 a mantle which is not only durable and stable, but possesses also high illuminating power. Again, I may take another test of utility—namely, that an invention is useful for the purposes of the patent law when the public are thereby enabled to do something which they could not do before, or to do in a more advantageous manner something which they could do before, or, to express it in another way, that an invention is patentable which offers the public a useful choice. Now, the patent of 1886 offers the public an opportunity of making with thorium an appliance which, up to that date, it had been suggested could be made only with zeroonium, lanthanum, or yttrium, and whether the thoria mantle gave a higher or lower illuminating light, it may well have been, as we now know that it was, useful to give the public the choice of using that rare earth instead of some of the rare earths mentioned in the specification of 1885. The amount of these rare earths which is to be found on the surface of the globe is in respect of some of them limited to but small quantities. Until the importance of thoria was known, I believe that it was supposed to exist only in extraordinarily small quantities, and that it is only recently that, after explorations all over the world, there has been found at last a large bed of monosite sand which contains thorium. A very small amount of utility is sufficient to support a patent, and a suggestion to the public of this other rare earth as a means to an end gives, I think, utility to the patent for the purposes of the patent law. Further, the question is not to my mind a question of improvement upon the patent of 1885. At the date when application was made for the patent of 1886, the public knew nothing of the patent of 1885, and the question is not whether the patent of 1886 enables the public to make an illuminating appliance better than that which they could make under the patent of 1885, but whether it gives to the public a useful choice of another substance to be used in making an illuminating appliance. The defence of non-utility, in my opinion, therefore fails.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Faithfull & Owen.*

Solicitors for the defendants, *Michael Abrahams, Sons, & Co.*

---

Q. B. Div.
(Channell and Bucknill, JJ.) Feb. 8.

VARLEY v. WHIPP. (*a.*)

*Sale of goods—Contract for sale by description—Implied condition—Acceptance—Passing of property—Sale of Goods Act,* 1893 (56 & 57 *Vict. c.* 71), *ss.* 13, 17, 35.

*Where a specific article is sold by description without having been seen by the buyer, there is an implied condition, under section* 13 *of the Sale of Goods Act,* 1893, *that the goods shall correspond with the description, and the vendor cannot make the property pass by delivering something which does not correspond with the description.*

Appeal by the defendant from a decision of his Honour Judge Cadman, sitting at Huddersfield.

In the action the plaintiff sued to recover £21, the price of a machine sold by him to the defendant. The contract was made in June, 1899, in the course of a conversation between the parties. The plaintiff stated that he had a self-binder reaping machine, which had been used one season and had only cut fifty or sixty acres. The defendant agreed to purchase the machine on the plaintiff's word for £21, saying that if the plaintiff's description was correct the machine was practically new. It was arranged that the machine, which was at Upton, and which the defendant had not seen, should be sent to him at Beverley, he paying the carriage, and it was consigned "carriage forward" from Huddersfield to him. The plaintiff's statement as to the amount which the machine had been used was in fact untrue, but there was no suggestion of fraud on his part.

The machine arrived at Beverley about the 2nd of July, and on the same day the defendant wrote to the plaintiff a letter in the following terms: "I have had a look at the 'self-binder' you sent me, but it is not what I expected. It is a very old one and has been mended, and you told me that it had only cut fifty acres and was practically new. I think you must never have seen it. It will be no use to me as I don't care about old things, especially machinery;

(*a.*) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

but I shall be at Huddersfield this week on Thursday and Friday night, if not before, and shall be staying at Carlton House, New North-road, where I shall be pleased to see you."

The defendant subsequently returned the machine to the plaintiff on the 14th of August.

The county court judge gave judgment for the plaintiff on the ground that the letter of the 2nd of July was not a rejection of the machine, and that the defendant had retained it an unreasonable time before returning it.

*W. O. Danckwerts, Q.C.*, for the defendant (appellant).—The 13th section of the Sale of Goods Act provides that on a contract for sale by description there is an implied condition that the goods should correspond with the description. By the 34th and two following sections the buyer is to have a reasonable opportunity of inspecting the goods, and is deemed to have accepted them when he intimates to the seller that he has done so, or when, after the lapse of a reasonable time, he retains the goods without intimating that he has rejected them, and where the goods are delivered to the buyer and he refuses to accept them, having the right to do so, he is not bound to return them to the seller. There was no acceptance of the goods in the present case, as they did not correspond to the description, and the defendant, having intimated that he would not accept the machine, was under no obligation to return it.

He referred to *Azemar* v. *Casella*, 15 W. R. 998, L. R. 2 C. P. 677, and *Grimoldby* v. *Wells*, 23 W. R. 524, L. R. 10 C. P. 391.

*C. C. Scott*, for the respondent.—This was a sale of a specific machine; the property passed and the defendant's only remedy was for breach of warranty. The letter of the 2nd of July was not a rejection, and under section 35 of the Sale of Goods Act the defendant must be held to have accepted the goods because he retained the machine an unreasonable time. This was a sale of specific goods under the definition in section 62, and it makes no difference whether the buyer saw them or not. The machine was identified and agreed upon, and the property passed when it was put on the train; therefore, under section 11 (c), the only remedy is for breach of warranty. Section 13 does not apply to this case, as the thing is specific, and the section can only apply to cases of unascertained goods.

CHANNELL, J., said: I am of opinion that this appeal must be allowed. I think the case turns on rather a fine point—viz., whether certain words that were used were a part of the description of the thing sold or whether they were a mere collateral warranty. If the property in this machine had passed at any time prior to the date of the first letter, then nothing that the purchaser could do would divert the property from him; he would only have his cause of action for breach of warranty because it was not a new machine and had cut more than it was asserted to have cut. If you can decide whether or not the property had finally passed to the buyer, you will get a solution of the question. Did it pass or not? The thing in question had never been seen by the buyer, it was described to him by the seller. It was not the property of the seller at the time it was described by him to the buyer, and he described where it was, at Upton, and he said that it was a self-binder, that it was nearly new, and had cut about fifty or sixty acres. How much of that was a description and identification of the thing sold and how much was a mere collateral warranty? We have had the illustration of the sale of a horse in a stall in a stable which had not been seen, and it is agreed that if a man said "I will sell you the horse in the end stall in my stable," and there was no horse in the stall, there would be no contract, and if there was a cow in the stall it would not pass the property in the cow. If a man says "I will sell you a four-year-old horse in the end stall in my stable," and there is not one there, but there is another horse, does the property pass more than if it had been a cow? I do not think it does. The question is rather a fine one as to whether or not the description is part of the identification or merely a collateral warranty. Would the 13th section of the Sale of Goods Act, which is only a correct statement of the previous law as to passing of property, apply to such a case, and what is the meaning of a sale of goods by description? I cannot help thinking that the section must apply to all cases where the purchaser has not seen the goods, and must rely upon the description given to him by the vendor, and although the usual application would be to wholly unascertained goods it does not follow that it does not apply to cases where, in some sense, you may say that the goods are specific. I think it applies to such a case as the present where the purchaser buys by reason of the description given to him by the vendor, and that there is an implied condition—not a warranty, which is a different thing—that the goods shall correspond with the description. If that is so, and if that is the nature of the contract which was made when the parties met at Huddersfield, the property in the machine at Upton has not passed. The rules about property passing are extremely vague. The 17th section says: "When there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."

(2) "For the purpose of ascertaining the intention of the parties regard should be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

It is difficult to imagine a code more vague than that, but I believe it correctly represents the state of the authorities and the law at the time of the passing of the Act; but that does not give us a very great deal of light as to whether the property in this thing passed. Nor does any part of the 18th section apply. The only part which could apply would be clause 1, which has to do with an unconditional contract for the sale of specific goods, which leaves us in the same difficulty as before. That being so, the property not having passed at the time of the contract, when did it pass, if at all? It is suggested that it passed at the time of putting it on the rail. The vendor cannot make the property pass by putting on the rail something which does not correspond with the description and does not fulfil the conditions. So that if it was a sale by description and there was an implied condition that the thing should be equal to the description, then the property would not pass by putting something not equal to the description on the rail. The earliest time at which it could pass was when it was accepted by the buyer. In this case it is clear on the letters that it was never accepted at all. The buyer told the vendor that he did not accept the machine, but he did not say he finally rejected it, he let the matter stand over. I think the property in these circumstances never passed, and, it having been held as a fact that the machine did not correspond with the description given of it, the appeal must be allowed and judgment given for the defendant.

BUCKNILL, J.—The county court judge found that this was a sale by description. I think that was right. The contract made between the parties was that the vendor would sell a certain second-hand reaping machine, which was stated to be nearly new,

and to have cut only fifty or sixty acres. Was that statement made by the vendor to the buyer a mere collateral warranty or was it such a description that it became the essence of the bargain without which the buyer would not have purchased? It was, in my opinion, a sale by description under the 13th section of the Sale of Goods Act. Having bought these goods by description the buyer had an opportunity of accepting or rejecting them, and by a letter of the 2nd of July he expressed a decided intention of not accepting the machine. I should be prepared to say that the proper construction of that letter was that he rejected it, but it is not important to decide that. The county court judge has found that for an unreasonable time he omitted to reject. I think that is wrong, and that this being a sale by description, and the machine not corresponding with the description, the appeal must be allowed.

*Judgment for the defendant.*

Solicitors for the appellent, *Rowcliffes, Rawle, & Co.*, for *Ramsden, Sykes, & Ramsden*, Huddersfield.

Solicitors for the respondent, *Van Sandau*, for *C. H. Marshall*, Huddersfield.

---

Q. B. Div.
(Channell and Bucknill, JJ.) Feb. 2.

LOGSDON (*Appellant*) *v.* TROTTER (*Respondent*). (*a.*)

*Common lodging-house—Charitable institution—House containing cubicles—Persons congregated together—Danger of spread of disease—Necessity for registration and inspection—Common Lodging Houses Act*, 1851 (14 & 15 *Vict. c.* 28), *s.* 7.

*The respondent kept a house (containing,* inter alia, 128 *single-bedded cubicles) for the reception of male lodgers of the poorer class, each inmate being accommodated with the use of a single-bedded cubicle to sleep in and the use of certain common rooms, at a charge of from* 6*d.* to 8*d. a night. Drunken or disorderly persons, or persons suspected to be of the criminal class or verminous, were excluded; but, with these exceptions, the house was open to any male who paid the above charge. The house was not carried on by the respondent for profit, and efforts were made by him to find situations for any inmates and to befriend them in sickness. The majority of the usual inmates were of the class that frequented common lodging-houses, but some were of a better class.*

*Held, that the house was a common lodging-house within the meaning of the Common Lodging Houses Acts,* 1851 *and* 1853, *and that the respondent had been guilty of the offence of keeping a common lodging-house without having his name registered as the keeper thereof.*

Logsdon *v.* Booth, ante, *p.* 266, [1900] 1 *Q. B.* 401, *discussed.*

Appeal by case stated from decision of a Metropolitan police magistrate.

An information was laid by the appellant on behalf of the London County Council against the respondent charging him with keeping a house as a common lodging-house which had not been inspected and approved by the local authority and registered under the Common Lodging Houses Act, 1851.

The house in question was known as the Victoria Home, Whitechapel-road, and was one of three homes, the property of a body of trustees, one of whom was the respondent. A considerable part of the sum required for the erection of the building and the purchase of the site was subscribed by friends of the institution as a gift. The house was intended to afford lodging accommodation for respectable men of the poorer class, and a charge of 6d. to 8d. a night was made, for which each inmate was allowed the use of a single-bedded cubicle to sleep in. The house contained 128 single-bedded cubicles or bedrooms, and there were other rooms used by the inmates in common. Men only were admitted, but drunken or disorderly persons, or persons suspected to be of the criminal class or verminous subjects, were excluded. The majority of the usual inmates were of the class that frequented common lodging-houses.

The magistrate (whose decision was given before the decision of the Court of Queen's Bench in *Logsdon* v. *Booth*, *ante*, p. 266, [1900] 1 Q. B. 401) dismissed the information on the ground that as Victoria Home was an institution not carried on for the purpose of making a profit, but solely for the object of assisting the poor, and as the facts were in his judgment indistinguishable from the case of *Booth* v. *Ferret*, 38 W. R. 718, 25 Q. B. D. 87, the home was not a common lodging-house within the meaning of the Common Lodging Houses Acts, 1851 and 1853.

The informant on behalf of the county council appealed, and the question was whether the character of the institution distinguished it from a Salvation Army shelter, which, in the case of *Logsdon* v. *Booth*, was held to be a common lodging-house.

*Jelf, Q.C.*, and *Ryde*, for the appellant, submitted that the case was governed by *Logsdon* v. *Booth*.

*Daldy*, for the respondent, submitted that the object with which the Victoria Home was started being to provide accommodation for a better class of the very poor than the Salvation Army shelters gather in, rendered it a different class to that of the common lodging or "doss"-house, with which by the decision of the court in *Logsdon* v. *Booth*, the Salvation Army shelters were now to be included for the purposes of the Common Lodging Houses Acts. At the Victoria Home a somewhat higher charge was made than was charged at the Salvation shelters; the inmates had not the use of a common kitchen, food being supplied to them, and thus the risk and danger arising from the introduction of unsound food was avoided. Moreover, in *Langdon* v. *Broadbent*, 37 L. T. Rep. 434, a common lodging-house was defined as a house where the inmates inhabited—*i.e.*, slept in—one common room, whereas, although some of the rooms in the home were used in common yet each inmate had separate sleeping accommodation.

*Cur. adv. vult.*

CHANNELL, J.—I confess this is to me a case of some difficulty; but in deciding it we have the advantage of the opinion recently expressed on the question by a specially-constituted Divisional Court who were called upon to decide in the case of *Logsdon* v. *Booth* whether one of the Salvation Army shelters was, within the meaning of the Act, a common lodging-house. I was at first struck by the similarity between that case and the present, and we might have decided this appeal offhand by saying that it was covered by *Logsdon* v. *Booth*, and nothing more. But I felt that if the court were merely to say that the facts in this case were so like those in the other that no distinction could be drawn, it would be starting upon a process which might ultimately result in a decision being given that some thing was a common lodging-house which no one, using ordinary language, would so describe. No doubt the facts of this case bring it very near the line which the court indicated in *Logsdon* v. *Booth*, and it is necessary, therefore, to carefully examine *Logsdon* v.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

*Booth* to see whether the present case—which certainly goes one step beyond the facts there found—crosses that line or not. Four things have been mentioned in the cases cited as tests to decide what is a common lodging-house. The first of these was the object for which the house was being carried on. That test was applied in the case of *Booth* v. *Ferret*, where it was held that the term did not include a house not carried on for profit, but solely for assisting the poorer classes of the population. That test was disposed of once and for all by the decision of the Divisional Court in *Logsdon* v. *Booth*, and we need not discuss that test further. Another of the tests was whether the house was intended for the use of a low class of persons—of persons who were likely to be dirty and diseased. No doubt that is an element which must be taken into consideration when deciding if a lodging-house is a common lodging-house within the meaning of the Acts passed to insure proper sanitary precautions being enforced. But the cases show that although it is an important element in the question it is not a conclusive test. It is an element that exists in the case we are considering. The special case states that efforts are made by the respondents to raise the inmates out of that class and that some of those who frequented this home were drawn from a better status of society. Nevertheless, the case states as a fact that though a certain number of the lodgers were of a better class than the ordinary "dosser class," yet the majority were of that class which usually frequented common lodging-houses. It is so found in the case and we must therefore accept it, that those who frequented the Victoria Home were men of what is known as the "dosser class." But a third test suggested was whether or not the house was open to all comers. That was the point which was mainly discussed in *Langdon* v. *Broadbent*, 37 L. T. Rep. 434, and was referred to by the Lord Chief Justice in *Logsdon* v. *Booth*. If the decision of the court in *Langdon* v. *Broadbent* went the length of saying that every lodging-house that was open to all comers was thereby rendered a common lodging-house—unless for some reason it ought not to be included in that class—then that decision was merely negatived by the decision given in *Logsdon* v. *Booth*, since the Lord Chief Justice said that the keeper of a common lodging-house might refuse to receive persons on various grounds. But if the decision was interpreted to mean, in a wider sense, that a common lodging-house was a house open to all comers, so that no one could be refused, however dirty, diseased, or verminous he might be, then the fact that the house was so open to all comers would no doubt be an essential element in deciding whether a particular house escaped from the mischief of the Act. I do not think the wider view can be maintained; and therefore it seems clear that the present case comes within the definition, for although men who were drunk and disorderly or suspected of being criminals or verminous were refused admittance, yet, with such exceptions, all men were admitted who were able to pay the price asked. The fourth and last test which was suggested by the authorities cited was whether those who frequented the house could be said to "inhabit a common room"; and it was said—I suppose rightly—that in this sense "inhabited" must be taken as equivalent to "slept in one common room." It was said that a common lodging-house could be defined as a "place where persons not previously known to each other inhabited a common room," in the sense that they slept there; and the opinion of the law officers of the Crown, given shortly after the Act was passed, was referred to. The law officers did, in fact, describe a common lodging-house as a house where for short periods persons, strangers to one another, were allowed to inhabit a common room, and I suppose we must take that as being a proper description. Whether to "inhabit" a common room must necessarily be restricted to sleeping in a common bedroom is not necessary here to decide, and if it were I do not think that the mere fact that the common room was divided off by curtains or match-board partitions for the sake of decency rather than with the object of preventing infection would affect the decision one way or the other. Suffice it to say that for a house to be a common lodging-house within the purview of the Act it must be a house where persons of the poorer class are so congregated together as thereby to create a risk of the spread of disease. In the present case it is found that the living-rooms were used in common, and that the sleeping accommodation was not entirely separate, and, therefore, as those who used it were substantially of the class who frequent common "doss-houses," this home comes, in my judgment, under the provisions of the Act. The difficulty in the case arose because this institution was designed to help a superior class of the very poor, and there is nothing to show that the regulations for cleanliness were not enforced, and the home as well managed, as if the Act had been enforced with regard to it.

BUCKNILL, J., gave judgment to the same effect.

*Appeal allowed.*

Solicitor for the appellant, *W. A. Blaxland.*

Solicitors for the respondent, *Fowler Perks & Co.*

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 30.

LLANDUDNO URBAN DISTRICT COUNCIL v. HUGHES. (a.)

*Markets—Tolls—Selling potatoes in the street—Penalty—Licensed hawker—Exemption—Hawkers Act*, 1888 (51 & 52 *Vict. c.* 33), *s.* 3 (3)—*Markets and Fairs Clauses Act*, 1847 (10 *Vict. c.* 14), *s.* 13.

*By section* 3, *sub-section* 3, *of the Hawkers Act*, 1888, *a person is not required to take out a hawker's licence to sell in the street fish, fruit, victuals, or coals.*

*By section* 13 *of the Markets and Fairs Clauses Act*, 1847, *a penalty is imposed on "every person other than a licensed hawker" who exposes for sale in the street any produce in respect of which a toll is leviable by the market authority of that district.*

*Held, that, if such a vendor has taken out a hawker's licence, he is to be deemed a licensed hawker, and comes within the benefit given to that class by section* 13 *of the Markets and Fairs Clauses Act*, 1847.

Case stated by justices sitting in petty sessions at Llandudno in the county of Carnarvon.

An information was preferred by the appellants against the respondent under section 13 of the Markets and Fairs Act, 1847, for having within the limits of the appellants' district, and after a market place was there opened for public use, unlawfully exposed for sale in a street, and not in his own dwelling-place or shop, certain articles—to wit, potatoes—in respect of which tolls were and are authorized to be taken in the market.

It appeared from the case that the respondent was a person who had followed the trade of selling and hawking potatoes, vegetables, and fruits within the appellants' district for many years without holding a hawker's licence; but in consequence of a notice published by the appellants in July, 1899, and before

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the alleged offence, he took out a hawker's licence, and had paid tolls on the potatoes at the market place before he proceeded to expose them for sale elsewhere.

The justices dismissed the information.

Section 13 of the Markets and Fairs Act, 1847, enacts that "after the market place is open for public use every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings."

By section 3 (3) of the Hawkers Act, 1888, a hawker's licence is not required to be taken out by a person selling fish, fruit, vegetables, or coals.

*H. E. Lloyd*, for the appellants.—Potatoes are vegetables, in respect of the sale of which the Llandudno Urban District Council are authorized to take toll at the market-place, which they opened for public use, and inasmuch as by section 3 (3) of the Hawkers Act, 1888, it was unnecessary for the respondent to first obtain a hawker's licence before selling potatoes or any victuals, he could not make himself one by taking out a licence, and therefore he is not a person exempted from the penalty imposed on sellers other than hawkers outside the market by section 13 of the Markets and Fairs Act, 1847. Moreover, since he was not trading as a hawker at the time of the sale, for he was offering for sale articles (potatoes) which could be hawked without a hawker's licence, the payment of tolls did not bring him within the exemption he claimed to come under. *Woolwich Local Board* v. *Gardiner*, 44 W. R. 46, [1895] 2 Q. B. 497, and *Openshaw* v. *Oakeley*, 60 L. T. Rep. 929, 37 W. R. Dig. 83, are authorities upon which the justices should have convicted the respondent.

*A. E. Griffith*, for the respondent.—The respondent having obtained a hawker's licence has brought himself within the exemption in section 13 of the Act of 1847, and the general provisions of that Act do not apply to him.

CHANNELL, J.—The justices held in this case that the respondent having in fact a hawker's licence was within the exemption in favour of licensed hawkers expressly reserved to that class of traders by section 13 of the Markets and Fairs Act, 1847, under which the present proceedings were instituted. It was contended by the appellants that he was not a hawker although he had taken out a hawker's licence, because, by section 3 (3) of the Hawkers Act, 1888, no licence was needed to sell either potatoes or other vegetables or fruit. I think, however, that a man who applies for and has granted to him a hawker's licence must be regarded as a licensed hawker, and as such within the exemption given to that class of traders by any statute, unless it is clearly shewn that for some reason or other that is not so. We were pressed with the case of *Woolwich Local Board* v. *Gardiner*, but in that case Gardiner was a person holding a pedlar's licence, who by virtue of the Pedlars Act, 1871, was deemed to be a licensed hawker, but who was in fact found to be acting not as a pedlar, but as a hawker, and, quite rightly, the court held that he did not come within the exemption. But that case is distinguishable from this, for there the man was actually doing something that was a breach of his licence, whereas in the case we are considering Hughes did what it was lawful for him to do under the Act. Having a hawker's licence, and trading within it, he was, in my judgment, entitled to the benefit given to hawkers by the 13th section of the Markets and Fairs Act.

BUCKNILL, J.—I concur.

Solicitors for the appellants, *Belfrage & Co.*, for *Chamberlain & Johnson*, Llandudno.

Solicitors for the respondents, *Hughes & Co.*, for *W. J. Corbett*, Llandudno.

---

Q. B. Div.
(Lord Russell of Killowen, C.J., and Bigham and Darling, JJ.) — Dec. 21.

ARMSTRONG v. LONDON COUNTY COUNCIL. (*a*.)

*Metropolis—Street—Laying out new street—Carriage-drive for blocks of flats forming a quadrangle with garden in centre—*Cul de sac *for carriage traffic—Requisite sanction of county council—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 7.

*The appellant was summoned upon an information charging him with having commenced to form and lay out a street for carriage traffic or foot traffic without having first obtained the sanction of the local authority pursuant to the 7th section of the London Building Act*, 1894.

*The appellant began to form the road in part straight, intending to build blocks of residential flats on each side of that straight part and facing into it, and the other part of the road ran into and formed the boundary of a square, round which again it was intended to build a continuous line of houses facing into the square. The length of the entire road would be 600ft., and about 40ft. in width. The road was to be formed and sewered as an ordinary street, although gullies used for draining a courtyard would also be required. The road was to be entered by gates, and no part of it was to be dedicated to the public, but was intended to be used only as a private road.*

*Held, that the road in question was a "street" within the meaning of section 7 of the London Building Act*, 1894, *and that the justices were right in convicting the appellant.*

*Held, also, that the question whether a place was a "street" within the meaning of the section was one largely of fact, and the decision in each case must depend on its particular circumstances.*

Wood (Appellant) *v.* The London County Council (Respondents), 44 *W. R.* 144, 64 *L. J. M. C.* 276, *overruled.*

Appeal by case stated from the decision of magistrates convicting the appellant upon an information charging him with having commenced to form and lay out a street for carriage traffic without the sanction of the London County Council pursuant to section 7 of the London Building Act, 1894.

The material facts stated in the case are referred to at length in the judgment of the court.

*Macmorran, Q.C.*, and *R. Cunningham Glen*, for the appellant.—The magistrates were wrong, because that part of the courtyard and the straight piece leading into it, which appears as a road for carriage and foot traffic on the plan, is not a "street" within the meaning of that term in the 7th section of the London Building Act, 1894. It is a private roadway merely for the use of those persons who are tenants of the houses intended to be erected. The roadway was not a street laid out for foot or carriage traffic, and the Act not applying to the laying out of this private drive, the appellant was not required to obtain the sanction of the London County Council. We rely on *Wood* v. *London County Council*, 44 W. R.

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

144, 64 L. J. M. C. 276, and *London County Council* v. *Davis*, 43 W. R. 574, 64 L. J. M. C. 212. As for the case of *Reg.* v. *Fulford*, 12 W. R. 715, 33 L. J. M. C. 122 relied on by the respondents, it is really not an authority in this case. The question of what was a "street" for the purposes of a building line was raised there on indictment, and the point was reserved for the Court of Crown Cases.

*Horace Avory* and *Daldy*, for the respondents.—The question whether a carriage-drive running round a courtyard is a street is mainly a question of fact. [Lord RUSSELL, C.J.—Would you say that if the plans for New-court, Carey-street, were plans for a proposed new building, the council could refuse to sanction the laying out of the drive round the courtyard on the ground that the builder was intending to form and lay out a new street? Is it not a question of degree in each case?] The question whether the proposed carriage-drive is a street must depend on the character of the buildings adjoining, the neighbourhood, and the particular circumstances in each case. It is a question of fact for the magistrates to decide. Here they have found this was a "street," and unless it can be shown there is no reasonable ground upon which their finding of fact can be upheld, the appeal must fail. The case indeed is covered by the decision in *Daw* v. *London County Council*, 62 L. T. Rep. 937, 38 W. R. Dig. 130. We rely also on the judgments of Erle, C.J., and Blackburn, J., in *Reg.* v. *Fullford* as showing that the carriage-drive which the appellant proposed to form clearly comes within the wide definition of a "street."

*Cur. adv. vult.*

Dec. 21.—Lord RUSSELL OF KILLOWEN, C.J.—This appeal raises the question whether the carriage-way proposed to be formed by the appellant would, when formed, be a street within the meaning of section 7 of the London Building Act, 1894, and the magistrate found that it would. The facts are as follows: The appellant owns some 3a. 3r. 39p. of land adjoining a public carriage-way called the Grove. The Grove communicates by a carriage-way 15ft. wide with the Highgate-road. No public right of way exists over the land of the appellant, and the only access from any public way is from the Grove. There is a private right of way for foot passengers through a gateway 3ft. in width in the boundary fence at the back of the land on to a public footpath in Parliament-hill. The appellant had originally applied to the respondents for their sanction to form and lay out a street for carriage traffic on the site in question. It was intended that the street should run from the Grove through the site to, and to communicate with, the footway referred to upon Parliament-hill. As a carriage-way it would have been a *cul de sac*. It was intended to be open and without gate or barrier at the Grove end. The respondents refused their sanction because the proposed street would not afford direct communication between two streets formed and laid out for carriage traffic. Section 9 (4) of the Act of 1894 gave to the respondents the right to refuse their sanction in such a case. The appellants then proceeded with the plan now in question without seeking the sanction of the respondents. That plan is described as follows in the case stated by the magistrates, paragraphs 3, 4, and 5: "(3) It is proposed by the appellant to remove certain old buildings shown on the plan, and to lay out the said piece of land and erect new buildings thereon in the manner shown upon the plan annexed to this case marked A—that is to say, the appellant proposes to erect twenty new buildings or blocks of flats, each block containing eight flats, of which sixteen blocks will be erected in a quadrangular form with an ornamental garden in the centre of the quadrangle formed by such blocks. The approach to the said buildings will be by means of a carriage-way from the Grove running round the said garden, and upon each side of such carriage-way between the Grove and the said garden will be erected two or more of the said blocks. Each of the said blocks will have a separate entrance from the said carriage-way. The said approach from the Grove and also the carriage-way around the said ornamental garden will be 40ft. in width, and such approach and carriage-way will be of a total length of 600ft. (4) The drainage plans for the said buildings had been submitted by the appellant to the said vestry of St. Pancras, upon which were shown the levels of a sewer it was proposed to construct running along and round the said carriage-way with the intended levels of the connecting drains from each of the said buildings. The said plan also showed the position of the manholes and gullies, similar to street gullies, which it was intended to construct in connection with the sewer, and the mode in which it was intended to connect the said sewer with the sewer belonging to the said vestry in the Highgate-road; and also showed that the said carriage-way would be formed and sewered in all respects in the way in which a carriage-way of an ordinary street would be formed and sewered. It was admitted, however, that gullies similar to those shown on the said plan would be required for draining a stable-yard or any other yard. (5) The appellant does not propose to dedicate any right of way to the use of the public over the said piece of land, but intends to erect gates at the entrance to the said approach and to keep a porter at such entrance to open such gates when necessary to allow persons going to or from any of the said flats to pass, so that the public will not be entitled to enter the said approach. There will be no entrance or exit to or from the said flats into the said public park called Parliament-hill, and the said carriage-way will be for the use only of the tenants of the flats in the said proposed new buildings and the tradesmen and others visiting them on business or pleasure with or without carriages; but the appellant is not under any covenant to maintain the said gates or the said porter." It is to be noted that it is not stated that the appellant is under any legal obligation to erect or to maintain the gates, or to keep the porter mentioned in paragraph 5. It is to be further noted that, if, without the respondents' sanction, the appellant can now do what is proposed, the objects intended to be secured by section 9 will be defeated. Where sanction, as in this case, has been withheld under section 9 all the owner would have to do, if the appellant is right, would be to resort to such a plan as the present, and thus reach practically the same end by a different route.

It seems desirable before considering the sections of the Act which apply to this particular case to notice the general scope of the Act. It involves a large measure of interference with the rights of private owners; they cannot do what they like with their property. They cannot make or even widen streets except in conformity with the provisions of the Act. They must observe certain lines of building frontage. They must have a certain specified space at the rear of the domestic buildings they erect. The buildings constructed must be built in conformity with certain detailed requirements as to height, thickness of walls, openings, &c. It is clear that this legislation materially interferes with the action of owners in the use and disposition of their property, and it must be assumed that this has been permitted by the Legislature for reasons of public policy affecting the health, safety, and convenience of the public. The question in this

case turns upon the true construction of section 7, which provides that before any person can commence to form or lay out any street, whether for carriage traffic or for foot traffic, he must obtain the sanction of the respondents. Would the way which the appellant has commenced to lay out and form be, when formed, a "street" within the meaning of that section? Unless the context otherwise requires, the interpretation section (section 5) shows the wide meaning to be given to the word "street." It means and includes highway, road, bridge, lane, mews, footway, square, court, alley, passage whether a thoroughfare or not, and also a part of any of these. No description can be wider. Why, then, is the contemplated way not a street? It is not the less a street because, after proceeding straight for a certain distance, it is continued inside or around the proposed square, for "square" is expressly mentioned in the interpretation section. It was admitted in argument, and it seems clear, that it is not less a street because it is intended to be used as a private way, for the interpretation section in no way so limits street. If so, it is not less a street because the traffic for which it is intended is limited to what may be called private traffic to and from the houses to be built along its course. Indeed, it is clear from the wording of the interpretation section (section 5; 3, 5) that the traffic there mentioned includes both public and private traffic, for there is no trace of any intended limitation to the former of these. No doubt the controlling word in the 5th section is "street." It does not follow that everything enumerated in the interpretation clause is a street for all purposes and in all circumstances within the meaning of the Act. For example, the drive to a private house is not a street, nor an approach by a courtyard to one or two blocks of buildings or houses: see section 8. Nor is a bridge a street unless it is, or may be, a link in or continuation of a street. There is involved in the idea of street the presence of houses or buildings more or less continuous and in greater or less proximity to one another along it: see *Reg.* v. *Fullford*. But this description is not complete or exhaustive for the purposes of the Act in question. Section 8 (which it is not easy to construe) would seem to treat as the commencement of a street, amongst other things, the mere forming of the foundations of a house in such a manner and position that it might become one of three or more houses abutting on or erected beside land on which a street might thereafter be laid out. But the facts of this case present no difficulty. Taking the broad description of what a street is as expressed in the judgment in *Reg.* v. *Fullford* we think that what the appellant here began to lay out was a street even within that description. I have already dealt with the contention that because it was intended for private and not for general public traffic the way or road in question was not a street. What remains? The appellant began to lay out and form a road, in part straight, intending to build houses or blocks of buildings on each side of that straight part and facing into it, which road ran into a square and formed a boundary of such square, round which again it was intended to build a continuous line of houses facing into the square, the length of the entire road being 600ft. We are clearly of opinion that, in these circumstances, the appellant had commenced to form and lay out a street within the meaning of section 7, and as he did so without having obtained the sanction of the respondents he committed the offence of which he has been convicted. We think that the magistrates would have decided wrongly had they decided differently. The appeal will, therefore, be dismissed with costs. We have examined, but do not think it necessary to refer to, the cases cited during the argument. Each case depends on its particular circumstances. It is, indeed, worth noting that the question of street or no street is uniformly treated in these cases as largely a question of fact. The decisions, except in the case of *Wood* v. *London County Council*, upheld the views taken by the magistrates, and, in our opinion, that case was wrongly decided.

*Appeal dismissed.*

Solicitors for the appellant, *Newman, Paynter, & Co.*

Solicitor for the respondents, *W. A. Blaxland.*

## Court of Appeal.

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) March 10.

FENN v. MILLER. (a.)

*Master and servant—Compensation for injury by accident —"On or in or about" a factory—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.

*A workman was employed to fetch water in a water-cart from a brook to a steam-engine in a shed connected with a mortar mill for mixing mortar for use in the construction of a building. While he was conducting the horse and cart along a public road from the brook to the engine, the horse ran away and the cart went over him. The place where the accident happened was at least* 110 *yards distant from the engine.*

*Held, that, though the engine was a "factory" within section* 7 *of the Workmen's Compensation Act,* 1897, *there was no evidence that the workman was, at the time of the accident, employed "about" a factory within the meaning of sub-section* 1 *of that section, and that, therefore, compensation was not payable.*

Appeal from an award of compensation by the judge of the Bow County Court under the Workmen's Compensation Act of 1897.

The appellant was a builder who was building houses at Chingford.

The respondent was a builder's labourer in the employment of the appellant, and he claimed compensation under the Act for personal injury sustained by him.

The appellant had two steam-engines in sheds used for mixing mortar in two mortar mills for the purposes of the buildings.

The respondent was employed to drive or conduct a water-cart and horse to a brook to fetch water from there to the engines and mortar mills.

On the day of the accident the respondent was returning from the brook along a public road with the horse and cart, when the horse ran away and knocked him down, and the cart went over him, thus occasioning the injuries for which he claimed compensation. The place where the accident happened was stated to be from 110 to 160 yards distant from the nearest engine.

The county court judge held that at the time of the accident the respondent was employed "about" the engine, which was itself a factory within section 7 of the Act of 1897, and he made an award in his favour for 15s. a week.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

*Rawlinson, Q.C.*, and *P. Rose-Innes*, for the appellant.—It is admitted that the steam-engines were factories within the meaning of section 7 of the Workmen's Compensation Act, 1897: *McNicholas* v. *Dawson*, 47 W. R. 500, [1899] 1 Q. B. 773. The respondent, however, was not employed at the time of the accident "on or in or about" a factory. The county court judge held that he was employed "about" the factory. There was no evidence to support that finding. "About" means in close propinquity or in physical contiguity to the factory: *Powell* v. *Brown*, 47 W. R. 145, [1899] 1 Q. B. 157. In that case the accident happened in a street next the factory while the workman was engaged in loading timber on to a cart at the usual loading place. That was clearly an employment about the factory. In *Lowth* v. *Ibbotson*, 47 W. R. 506, [1899] 1 Q. B. 1003, the accident happened a mile and a-half from the factory, and it was held not to be "about" the factory. A distance of 110 yards from the factory cannot be said to be in close propinquity to the factory. There was a distinction between employment about the business of the factory and employment about the factory itself. The county court judge was therefore wrong.

*Holness* v. *Mackay*, 47 W. R. 531, [1899] 2 Q. B. 319, was also referred to.

*Ruegg, Q.C.*, and *W. M. Thompson*, for the respondent.—It is a question of fact in each case whether the employment at the time of the accident is "about" a factory. Where can the court say that, as a matter of law, the line is to be drawn? Is 100 yards, or fifty yards, or ten yards the limit? The court cannot lay down any limit as a matter of law. The question must be one of fact in each case, and the court cannot interfere with the finding of the county court judge in such a case. The court has never yet done so in any case. [A. L. SMITH, L.J., referred to *Chambers* v. *Whitehaven Harbour Commissioners*, 47 W. R. 533, [1899] 2 Q. B. 133.]

A. L. SMITH, L.J.—I must say that in this case I do not think that the county court judge arrived at a right conclusion of fact. That, however, is not the question we have to determine, and I feel a difficulty which I will state presently in dealing with this case. There were two steam-engines in sheds connected with mortar mills for mixing mortar for use on certain buildings which were being erected. The respondent was employed to take a water-cart to and from a brook for the purpose of bringing water to the engines and mortar mills. While on his way back from the brook with water, the horse attached to the water-cart ran away and knocked him down, thus occasioning the injuries for which compensation is claimed. The spot where the accident occurred was at least 110 yards away from the nearest of the two engines. The question we have to determine is whether there is evidence upon which the county court judge was justified in coming to the conclusion that, at the time when the accident occurred, the respondent was employed "on or in or about a factory" within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act, 1897. In the first place it is quite clear, upon the authority of *McNicholas* v. *Dawson*, that the engine is a "factory" within the Act. Therefore the only question is whether there was evidence that the respondent at the time of the accident was employed on or in or about the engine. If I h d myself been the judge of fact in the case I should have come to a different conclusion from that arrived at by the county court judge. He held, as I understand, that the word "about" was an elastic word, and that he was entitled to say that a spot 110 yards distant from the engine was "about" the engine—that is to say, in close propinquity thereto, as I expressed its meaning in *Powell* v. *Brown*, or physically contiguous thereto, as my brother Collins expressed it in the same case. However, the county court judge has so found, and the difficulty I feel is in saying that there is no evidence to justify his finding. In *Powell* v. *Brown* a cart belonging to the owners of a factory was standing in a street close to the factory entrance, where carts were usually loaded from the factory. A workman was employed on the cart loading timber on it when he was injured. We undoubtedly held that the word "about" in section 7 is an enlarging word, covering more than is included in the preceding words "on or in," and we held that it means a close propinquity or physically contiguous to the factory. In *Chambers* v. *Whitehaven Harbour Commissioners* I said that the meaning of employment on or in or about a railway, factory, &c., is that "at the time of the accident the workman must be employed about one of those specified localities; the locality of the accident must be within the purview of the section." In the case of *Lowth* v. *Ibbotson* a carter in the employment of a miller, whose mill was a factory within the Act, met with an accident while delivering sacks of flour from his employer's cart a mile and a-half from the mill. The county court judge found as a fact that the employment at the time of the accident was not "about" the factory, and we came to the conclusion that he was right and declined to interfere with his finding. In both *Powell* v. *Brown* and *Lowth* v. *Ibbotson* I said, and I think my brethren agreed with me, that the question whether the employment in any particular case is "about" a factory is a question of fact to be determined by the tribunal before which the claim comes. I see no reason to depart from what I then said. In neither of those cases did this court interfere with the finding of the county court judge. The difficulty, as I have already said, is in saying that there was no evidence upon which the county court judge could say that 110 yards from the factory was "about" the factory. However, though I feel considerable difficulty, as my brethren have come to the conclusion that there was no evidence to justify the finding of the county court judge, I will not differ from the conclusion at which they have arrived.

COLLINS, L.J.—I agree with my lord that in each case it is a question of fact for the county court judge whether the employment at the time of the accident was "on or in or about" a factory, and this court cannot interfere with his finding of fact where there is evidence to support it. But under the Workmen's Compensation Act, just as under any other Act, a county court judge cannot find a fact without any evidence to support his finding or without a proper direction to himself upon the question. If the case were one that could be tried with a jury, the judge would have to give them a direction as to what does or does not constitute employment "about" a factory. He could not simply tell them that it was a question of fact for them to determine, and then leave it to them to say whether in the particular case the employment was about a factory without giving them some direction as to the meaning of the word. Under the Act of 1897, the question of fact being for the judge, he must direct himself upon the point. It is not easy, and I shall certainly not attempt, to define exactly what is the meaning of the word "about" as used in section 7, sub-section 1, of the Act. Still, I think that a judge can give some assistance to a jury by giving some illustrations of what would or would not be employment about a factory, or by giving extreme cases which would obviously fall on one side or the

other of a line which has to be drawn. It is quite possible to point out limits on the one side or the other which ought to be observed and avoided. In my opinion the word "about" is a geographical expression, and denotes physical contiguity. It is not enough to establish that the workman is at the time of the accident about the business of his employers. There is the broad distinction to be observed between a man being about the factory and about the business of the factory. A factory presumably involves the carrying on of some business. Take the case of a factory where some article of commerce is produced. The article has to be manufactured and then distributed over the country. The factory owner would presumably have to get coals for the purposes of the manufacture. I do not think that the man who was engaged in distributing his master's goods or the carter who was engaged in carting the coals to his master's factory from the railway station, though employed about the business of the factory, could be said to be employed in physical contiguity to the factory. The jury would have to disabuse their minds of the idea that, because the workman was employed about the business, he was therefore employed about the factory. On the other hand, a case obviously within the line is where a factory involves the use, for the main purposes of the factory, of an area of land outside the physical factory itself. I should say that in such a case the piece of land would properly be described as about the factory. It not difficult to give illustrations. Take the case of *Powell* v. *Brown*. The cart upon which the workman was employed was outside the physical limits of the factory, but he was receiving timber from the factory, and we held that the county court judge was right in deciding that the employment was about the factory. It is easy to put cases which fall inside or outside of the line, and with a proper direction upon the point it would be for the jury, assuming a jury was the tribunal to decide these claims, to say in each case on which side of the line the case fell. As I have already said, I draw a clear distinction between employment about the business, which involves no physical contiguity with the factory, and such a physical contiguity with the factory as a jury may say is necessary for the purposes of the business carried on in the factory.

Applying these considerations to the present case, I do not think that the facts bring it within the rule above-mentioned as to physical contiguity. It may therefore well be said that there was no evidence upon which any jury could reasonably find that the employment of the respondent at the time of the accident was "about" the factory. Consequently there was no evidence upon which the county court judge could so find. The appeal must therefore be allowed.

ROMER, L.J.—I am of the same opinion. It seems to me to be clear that when the Act speaks of employment "on or in or about" a factory, it is speaking of a place. It is not necessary, or indeed advisable, to attempt to lay down general rules and propositions as to when a workman can or cannot be properly said to be on or in or about a factory, or a building, or whatever it may be. I will not attempt to do so. I will, however, go as far as this: I think that a workman, who at the time of the accident is only employed in driving or conducting a cart carrying materials necessary for the business of the factory to or from the factory, and who is not in obvious proximity to the factory, is not employed on or in or about the factory. Upon the facts in this present case it is clear that the respondent was in no true sense at the time of the accident employed on or in or about his master's factory. I agree with my brother Collins that there is no evidence that the respondent was so employed. If there had been a jury here, assuming, of course, such a mode of trial possible, I think that the judge ought to have ruled that there was no evidence to go to them that the respondent was so employed. That being so, there was no evidence upon which the county court judge could so find.

*Appeal allowed.*

Solicitors for the appellant, *Ponsford & Devenish.*

Solicitors for the respondent, *Buchanan & Hurd.*

---

From Prob. Div. & Adm. Div. (Lindley, M.R., and Vaughan Williams and Romer, L.JJ.) — Jan. 25, 26.

MOHAN v. BROUGHTON. (*a.*)

*Letters of administration — Proceedings to revoke — Previous administration action — Res judicata — Acquiescence.*

*In* 1892 *letters of administration to an estate were granted to the defendant in the present action as the cousin and one of the next-of-kin of the intestate, and on the 27th of December,* 1892, *the defendant commenced Chancery proceedings for the administration of the estate. The present plaintiff made a claim in these proceedings to be entitled as one of the next-of-kin to a share in the distribution of the estate. This claim was disallowed by the chief clerk, and the plaintiff took no further steps in the proceedings. On the 21st of April,* 1896, *a final order for distribution of the estate was made in the Chancery action, and all further proceedings therein were stayed. On the 7th of June,* 1898, *the plaintiff commenced the present action to revoke the letters of administration granted in* 1892 *and to obtain a grant in her own favour.*

*Held, that, as the only object of the present action was to recover the property which had been distributed, the court would not assist the plaintiff in her attempt to obtain a grant which would be useless to her, seeing that she could institute proceedings in Chancery even though the letters of administration had not been revoked.*

*Held, also, that, though the matter was not* res judicata *against the plaintiff by reason of the Chancery proceedings, she had been guilty of such delay and acquiescence as to disentitle her to maintain an action against those who had received the estate by virtue of those proceedings.*

This was an appeal by the plaintiff from a decision of Barnes, J., dismissing an action brought by her to obtain the revocation of letters of administration granted to the defendant.

The facts were as follow:

One H. T. Coghlan died on the 24th of November, 1892, a widower without issue and intestate, leaving a considerable estate. On the 24th of December, 1892, letters of administration were granted to Sir H. D. Broughton as cousin of the deceased and one of his next-of-kin.

On the 27th of December, 1892, an originating summons was taken out by the said Sir H. D. Broughton in the Chancery Division against A. D. Broughton, Laura Maule, and Fanny Maria Hardresse Lawson, for the purpose of administering the estate of the deceased.

On the 23rd of January, 1893, inquiries and accounts in the said Chancery action were directed, one of such inquiries being as to who were the next-

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

of-kin of the said deceased. Advertisements for the next-of-kin were ordered, and were duly advertised.

On the 10th of March, 1893, a claim was made by Sir A. C. Weldon to be one of the next-of-kin, and to exclude the plaintiffs and defendants in the said Chancery action on the ground that one Emma Broughton, who was the mother of the deceased, and whom they claimed to be their aunt, was illegitimate, having, as was alleged, been born prior to the marriage of her parents, Sir Thos. Broughton and Mary Wickes.

Various other claims were put forward, but all, including Sir A. C. Weldon's, were disallowed, and on the 30th of November, 1893, the chief clerk certified that the said plaintiff and defendants were the only next-of-kin of the deceased living at his death.

On the 21st of December, 1893, the chief clerk gave his certificate as to the estate and debts of the deceased's estate.

On the 18th of May, 1894, the plaintiff in the present action took out a summons in the said Chancery action for liberty to prefer a claim in the action as the first cousin of the intestate.

In an affidavit sworn in support of this application she set out certain facts which she alleged showed that she was a first cousin once removed of the deceased, and stated that her attention was first called to the matter by certain correspondence which appeared in the Dublin papers in March and April, 1893; and that, although at that time she was not aware whether or not she was of kin to the deceased, about a month before making her affidavit she discovered she was of kin to him and that she had since then vigorously prosecuted and was continuing inquiries and searches.

This summons came on before the chief clerk on the 1st of June, 1894, when the same was adjourned for a week to enable the applicant to bring in complete evidence, and on the 8th of June, 1894, at the adjourned hearing the chief clerk pointed out that the affidavit filed in support of the application only made out the applicant to be a first cousin once removed, and that, as first cousins had proved their relationship, the applicant could not, even if she established her pedigree, rank in the distribution of the estate; and he made no order, but allowed the applicant six days in which to decide whether she should take her application to the judge.

The applicant did not proceed further with the matter and took no further steps in connection with the deceased's estate until the present action.

Previously to the said application, under an order of the 26th of February, 1894, in the Chancery action three-fourths of the deceased's estate had been distributed among the plaintiff and defendants to that action, and under a further order of the 11th of December, 1894, the remaining one-fourth was dealt with in the same way.

On the 21st of April, 1896, a final order was made in the Chancery action directing payment of a small balance in court to the plaintiff in the action, and all further proceedings were stayed.

On the 7th of June, 1898, the plaintiff issued the writ in the present action. She claimed a grant of letters of administration to the deceased's estate to herself as a first cousin once removed of the deceased, and revocation of the grant of letters of administration to Sir H. D. Broughton on the ground that Emma Broughton, through whom he claimed relationship, was illegitimate.

On the 30th of June, 1898, Sir H. D. Broughton took out a summons to show cause why the action should not be dismissed on the ground, first, that the issue had already been adjudicated upon in the Chancery Division, and, secondly, that the action was vexatious.

On the hearing of this summons it was ordered, by consent, that all questions between the parties (other than the question of the relationship of the plaintiff and Sir H. D. Broughton to the deceased) should be tried before Barnes, J.

The case was accordingly tried on the 26th of February, 1899, and on the 15th of May Barnes, J., delivered judgment. He held that the matter was not *res judicata*, but dismissed the action on the ground that the plaintiff had practically acquiesced in the Chancery proceedings and had been guilty of such *laches* as to disentitle her to maintain an action against those who had received the estate; and that as the only object of the present action was to assist the plaintiff to recover funds which had been distributed by order of the Chancery Division, the court would not assist her to obtain a grant which would be useless to her.

The plaintiff appealed.

Sir H. D. Broughton died after the hearing, and the action was continued against his executors, who were respondents to the appeal.

*Bosanquet, Q.C., Bennett Calvert,* and *Lister Drummond,* for the appellant, referred to *David* v. *Frowd,* 1 Myl. & K. 200; *Sawyer* v. *Birchmore,* 1 Keen 391, 825, 2 Myl. & Cr. 611.

*Bargrave Deane, Q.C.,* and *Barnard,* for the respondents, were not called on.

LINDLEY, M.R.—I do not think the appellant has made out any sufficient ground for our interference. This is an application to revoke letters of administration granted to one of the next-of-kin, or a person who called himself one of the next-of-kin, of a person who died some years ago. The court does not revoke letters of administration as a matter of course. Grounds must be shown for it. The application or the citation by this lady was met by a summons summarily to stay the proceedings on the ground of *res judicata* and vexation. By consent that was modified, and every question of substance was agreed to be tried on the assumption that she was what she was—one of the nearest of kin; and upon that assumption Barnes, J., has investigated all the facts and has found that it is not a proper case in which to revoke the letters of administration. Now, what is it that this lady is driving at? She does not want to revoke the letters of administration for nothing. Of course she has an object. She says that under an administration action which was commenced some few years ago the estate of the intestate has been distributed amongst the wrong persons. She does not quarrel, of course, with the ordinary routine work done by the administrator—I mean the payment of debts, funeral and testamentary expenses. Her object is not to overhaul all that; but after administration had been granted there was an administration order made, and under that order the estate has been distributed, debts have been paid, and so on, and the net residue or surplus has been distributed and has been distributed to somebody who, she says, is not entitled. Therefore, she wants this for the purpose of asserting her right. In other words, she wants to what is commonly called "follow the assets" into the hands of the persons who have got them. I do not myself see any difficulty in her doing that by instituting an action in the Chancery Division. I hope that I shall not be supposed to advise her to do so. It appears to me that her case there would be almost if not utterly hopeless; but still theoretically she could do that, although the letters of administration had not been revoked. Now, if that is so—and

that is the view which Barnes, J., has taken, because he says in substance, having looked into the matter, "You cannot succeed in getting what you want, and inasmuch as you will not succeed in getting what you want we will not revoke the letters of administration"—I think that he was perfectly justified. I do not say that this action is frivolous or vexatious. Still less do I think that technically there is anything like *res judicata*. What has been determined against her is that she is not a cousin. That is all. What relation the parties in the administration action have has not been finally adjudicated upon in such a way as to bind her. That I can see. That is Barnes, J.'s, view. He says in substance, "I do not think it is *res judicata*, but you knew perfectly well what difficulty there was, and you allowed the estate to be administered taking no proper steps to prevent it, and I cannot upset that." I think that he was quite right, and that the appeal ought to be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I agree.

ROMER, L.J.—I agree.

*Appeal dismissed.*

Solicitors, *W. W. Gabriel; Witham, Roskell, Munster, & Weld.*

---

## High Court of Justice.

Chan. Div. Stirling, J. } July 13; Jan. 17; Feb. 8.

*In re* PRICE.
TOMLIN *v.* LATTER. (*a.*)

*Will—International law—Construction—Power of appointment in English will—Execution of power by will of French domiciled alien—Domicil—Wills Act* (1 *Vict. c.* 26), *ss.* 9, 10, 27—*Lord Kingsdown's Act* (*Domicil*) (24 *&* 25 *Vict. c.* 114)—*Naturalization Act*, 1870 (33 *Vict. c.* 14).

*M. F., the wife of a French subject domiciled in France, was the donee under an English will of a power of appointment of a fund of £2,000. By her holograph French will she declared that she bequeathed to her husband everything which she possessed or might possess, and declared that the will should be considered in England the same as in France. She had no other property but the fund in question. The will had been admitted to probate and letters of administration had been granted with the will annexed.*

*Held, that it was competent for her to exercise the power of appointment by such a will as was recognized by the Probate Division; that, as the law of France did not recognize the mode of disposition by appointment, and a French court would consider and apply the English rules of law applicable to the construction of such a will for the purpose of carrying out the intention of the testatrix, such rules were to be applied here, with the result that there was a valid execution of the power.*

D'Huart *v.* Harkness, 13 W. R. 513, 34 *Beav.* 324, *followed.*

In re Kirwan's Trusts, 32 *W. R.* 581, 25 *Ch. D.* 373, *and* Hummel *v.* Hummel, 46 *W. R.* 507, [1898] 1 *Ch.* 642, *considered.*

Dame Elizabeth Price by her will dated the 28th of March, 1876, bequeathed a sum of £2,000 to trustees upon trusts for investment and payment of the income to a lady described as "Maria (the daughter of my late cousin, Mary Ann Draper, deceased), now the wife of M. Adolphe Gay," during her life for her separate use without power of anticipation. The will then proceeded: "And from and after her decease to pay and transfer the last-mentioned sum of £2,000 in such manner as she the said Maria Gay shall by her last will appoint, and in default of such appointment then to such person or persons as would at the time of her decease be the next-of-kin of the said Maria Gay in case she had died intestate and without being married."

The testatrix died on the 18th of March, 1878. At the date of the will Maria Gay was the wife of Adolphe Gay, a French subject domiciled in France.

M. Gay died on the 12th of October, 1882; and on the 8th of October, 1886, Madame Gay married M. Forfillier, also a French subject domiciled in France.

Madame Forfillier on the 2nd of June, 1887, made a holograph will in the French language, of which the following is a translation: "I, the undersigned, declare that I bequeath to my dear husband A. D. Forfillier everything which I possess at the present moment and which I hereafter may possess. I appoint him guardian of my dear daughter Marie A. O. Gay, being well persuaded that I confide her to the heart and to the enlightened tenderness of a father, and I am equally certain that she will continue to bear towards him the affection, gratitude, and devotedness of a daughter. And I thank and bless my dear husband for all the happiness which he has given to us and for all the good which he has never ceased to do us. And I declare that this will annuls all the others, as I have informed Mr. A. Willett, Solicitor, Bromley, Kent, and that it shall thus be considered in England the same as in France (*il sera ainsi consideré en Angleterre comme en France*). And I repeat that I leave everything which I possess at the present moment and which I may come to possess afterwards to my dear husband because I know his great disinterestedness and am convinced that he is more capable than anyone else to safeguard the interests of my dear daughter."

She also made a holograph codicil to this will on the 21st of September, 1893, but it is unnecessary to state its terms.

Madame F. died on the 16th of February, 1898, and on the 3rd of October, 1898, letters of administration with the will and codicil annexed were granted by the Probate Division to the defendant Latter as the attorney of M. Forfillier. The present summons was taken out by the trustees of Lady Price's will to have it determined who was entitled to the fund of £2,000, and came before the court on the 13th of July, when, after some argument, it was adjourned in order that the French law bearing on the subject might be examined. On the 17th of January it again came before the court.

*A. à B. Terrell*, for the trustees of the will of Lady Price, stated the facts.

*J. F. Waggett*, for M. Forfillier as appointee, and for Madame C., the daughter of Madame F., on whose behalf M. Forfillier claimed the fund.—The will was a good one in French law and is a valid execution of the power of appointment, Madame F. having no other property other than the fund in question. It is clear that the Wills Act only applies to a British subject: *Bremer* v. *Freeman*, 5 W. R. 618, 10 Moo. P. C. C. 306; *In re Baroness von Buseck*, 30 W. R. 140, 6 P. D. 211; *Bloxam* v. *Favre*, 31 W. R. 610, 8 P. D. 101, and 32 W. R. 673, 9 P. D. 130. Where a will of a domiciled alien purports to exercise a power, the court has granted probate for the purposes of the Chancery Division *In re Hallyburton*, L. R.

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

1 P. & D. 90, 14 W. R. P. Dig. 24; *In re Huber*, [1896] P. 209, 45 W. R. Dig. 128; and *D'Huart* v. *Harkness*, 13 W. R. 513, 34 Beav. 324. Lady Price said "by will," in her will, and I submit Madame F. made a good will, which was the natural one for her to make. Cases independent of the Wills Act show that where a married woman has no other property to which a general disposition in her will could refer, then such a disposition is construed as an execution of a power: *Shelford* v. *Acland*, 5 W. R. 170, 23 Beav. 10, distinguishable from *Evans* v. *Evans*, 5 W. R. 169, 23 Beav. 1. Other cases where there is no special or other power, and where there is no other property, are *Attorney-General* v. *Williamson*, 14 W. R. 910, L. R. 2 Eq. 816, and *In re Milner*, 47 W. R. 369, [1899] 1 Ch. 563; and (with respect to real estate) *Curteis* v. *Kenrick*, 9 Sim. 443, and *Churchill* v. *Dibben*, 9 Sim. 447*n*. Lady Price knew that Madame Gay (later Madame F.) was married and had a child, and she restricted the fund to her as against any husband; "without being married" only excludes the husband, and means "not having a husband," so that even if the French will is no execution of the power, Madame C. will take the fund as next-of-kin. This is a case of a will, not one of settlement like *Stoddart* v. *Saville*, 42 W. R. 361, [1894] 1 Ch. 480.

*C. E. Bovill*, for certain of the next-of-kin.—The French will of Madame F. does not execute the power of appointment. I rely on section 10 of the Wills Act. [*Waggett*.—If you take aid of section 10, you must let me call section 27 in aid.] Where a person, being a British subject, takes the benefit of Lord Kingsdown's Act, and makes a will in accordance with his domicil for the time being, that will is not a good exercise of a power of appointment unless it complies with section 10 of the Wills Act. If, as the appointee must contend, section 10 is confined to English wills, then, the will here being a foreign one, *Hummel* v. *Hummel*, 46 W. R. 507, [1898] 1 Ch. 642, is wrongly decided. [*In re Kirwan's Trusts*, 32 W. R. 581, 25 Ch. D. 373, referred to.] "Without being married" must mean "never having been married": *Dalrymple* v. *Hall*, 29 W. R. 421, 16 Ch. D. 715; *In re Sergeant*, 32 W. R. 987, 26 Ch. D. 575.

*Waggett* in reply.

*Cur. adv. vult.*

STIRLING, J., after stating the facts, said: Madame Forfillier was at the time of her death a French subject by virtue of the Naturalization Act, 1870, s. 10, sub-section 1. She was also domiciled in France. Under the will of Lady Price the fund is to be paid and transferred in such manner as Madame F. "shall by her last will appoint." The first question arises as to the meaning of the word "will" which there occurs, whether it means any testamentary instrument recognized by the law of England as a will or a will executed in accordance with the law of England. Now, there are three authorities which I am asked to consider. In *D'Huart* v. *Harkness*, 34 Beav. 324, the precise point arose for decision. [His lordship having read from the facts in that case and the judgment at pp. 327-8, continued:] In that case, which comes as near to the present case as one case can come to another, Lord Romilly held that there was a valid execution of the power. In the case of *In re Kirwan's Trusts*, it appears to have been decided by Kay, J., that a testamentary instrument which had been executed in a manner not allowed by English law by a person domiciled in France, but which had been admitted to probate under Lord Kingsdown's Act (24 & 25 Vict. c. 114), was not a valid exercise of a power of appointment by will, because section 10 of the Wills Act provides "no appointment by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required." [His lordship read from the facts in that case, and pointed out that they were totally different from those in the present case, because the power there was of a different kind, and because there probate was given by virtue of Lord Kingsdown's Act to the will and codicil, though the latter was unattested.] Unfortunately *D'Huart* v. *Harkness* was not cited in *In re Kirwan's Trusts*, but both decisions were considered by Kekewich, J., in *Hummel* v. *Hummel*, 46 W. R. 507, [1898] 1 Ch. 642. [His lordship read the head-note.] There the will was not admitted to probate, so that the question was not the same as here, but Kekewich, J., did consider whether or no, supposing the will could be proved, it would be a good execution of the power, and it appears from his judgment that he was of opinion that those two cases were not inconsistent, inasmuch as the will dealt with in *In re Kirwan's Trusts* was only valid by reason of the Act 24 & 25 Vict. c. 114, while in *D'Huart* v. *Harkness* it was good according to the law of the testator's domicil. Now, Lord Kingsdown's Act applies only to the wills of British subjects, and inasmuch as Madame F. was a French subject, that statute can have no application to the present case. Therefore I have to consider the authorities, and according to the view taken by Kekewich J., it seems to me that I ought to follow *D'Huart* v. *Harkness* in the present case. But I go further than that, for I also think that on principle *D'Huart* v. *Harkness* was well decided. The general rule is that, as stated by Mr. Dicey (Conflict of Laws, p. 685), "any will of moveables which is valid according to the law of the testator's domicil at the time of his death is valid" in England. It follows that the provisions of an English statute prescribing formalities with reference to wills do not apply to the wills of persons not domiciled in England. In *Bremer* v. *Freeman* (10 Moo. P. C. 306) it appears to have been contended that the provisions of section 20 of the Wills Act as to the revocation of wills applied to the wills of persons domiciled abroad. Lord Wensleydale in delivering the judgment of the court said (at p. 359) that for reasons referred to by him it was unnecessary to consider the point, but added, "their lordships, however, do not wish to intimate any doubt that the law of the domicil at the time of the death is the governing law (Story's Conflict of Laws, s. 473), nor any that the statute cited" (*i.e.*, the Wills Act) "applies only to wills of those persons who continue to have an English domicil and are consequently regulated by English law." Section 9 of the Wills Act prescribes that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned." Notwithstanding this language it is the practice of the Probate Division, on the principle just stated, to admit to probate the wills of persons domiciled abroad although executed otherwise than is prescribed by the Act. The present case affords an instance of this being done. I fail to see why the provisions of section 10 of the Wills Act should apply to the will of Madame F. any more than those of section 9. There is indeed a series of cases which seem to establish an exception to the rule which I have stated—viz., that a will purporting to be made in execution of a power is valid if it satisfies the requirements of the instrument creating the power, although it would be invalid according to the law of the domicil of the testator at the time of his death: *cf. In the Goods of Alexander*, 8 W. R. 451, 29 L. J. P. & M. 93; *In the Goods of Hallyburton*; *In the Goods of Huber*. These cases, however, do not lay down that

a power to appoint by will (without any special formalities) conferred on a person domiciled abroad cannot be executed by a will valid by the law of the domicil of the donee of the power at the time of his death, and consequently do not appear to me to affect the decision of the present case. I am not prepared to deal with *In re Kirwan's Trusts*, in which the facts were very different, but it seems to me that it was reconcilable with the principles on which I arrive at my present decision. If the provisions of the Wills Act did not apply, then section 10 did not apply, so that the will was not valid by reason of that section. The instrument, however, was valid under Lord Kingsdown's Act, but that statute does not deal with powers at all. I am not sure that Kay, J., there meant to decide anything not in accordance with the basis of my decision here. In my opinion, therefore, it was competent for Madame F. to exercise the power conferred on her by Lady Price's will by such a will as has been recognized by the Probate Division; it remains to be considered whether she has done so, and this question is one of construction. In general a will is to be construed according to the law of the domicil of the testator; but this is "a canon of interpretation which should not be adhered to where there is any reason from the nature of the will or otherwise to suppose that the testator wrote it with reference to the law of some other country" (Dicey's Conflict of Laws, p. 695). The law of France is stated in the evidence to be that this will is a complete testamentary disposition of the whole of the property which the testatrix might have at her death, or which she might by law dispose of; that the mode of disposition by appointment is not practised in France; and that if a French court had to consider the effect of the will in this respect, it would inquire into and apply the English law bearing on the point, and would also take cognizance of and give effect to the fact (which is established) that the testatrix had no interest in any property in England except that which was subject to the power of appointment. It is said that the law of England applicable to the case is the law as it existed before the Wills Act, and that as there is no reference to the power or the property the will is not a good execution of the power. I do not think that on this particular will I am called upon to take this view, for I can decide the case on another ground. The testatrix says, "I declare that this will annuls all others . . . and that it shall thus be considered in England as well as in France." I think that amounts to a declaration by the testatrix that she meant the will to operate as her last will in England as well as in France, and to have full operation as an English will as well as a French; she has indicated on the face of the will that she wrote it with reference to the law of England as well as of France. To give effect to that intention I think that I am entitled to apply the rules of construction which would, by English law, be applied to a will expressed in the same terms and of the same date as that annexed to the letters of administration, including the rule of construction introduced by section 27 of the Wills Act. In my opinion, therefore, M. Forfillier is entitled to the fund.

Solicitors, *J. L. Tomlin & Son; Van Sandau & Co.*, for *Willett & Latter*, Bromley.

---

Chan. Div. }
Kekewich, J. } **March 23.**

*In re* WELLBORNE. (*a.*)

*Solicitor—Costs of trustee—Taxation—Application by* cestui que trust*—Twelve months after payment—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 39, 41.

*The power of the court to make an order for taxation of a trustee's bill of costs under section* 39 *of the Solicitors Act*, 1843, *is purely discretionary, and is not controlled by section* 41. *Such a bill may therefore be ordered to be taxed though paid more than twelve calendar months before the application by the* cestui que trust.

This was a motion on behalf of Messrs. Wellborne & Son, solicitors, to discharge an order for taxation.

An application was made in chambers under section 39 of the Solicitors Act, 1843, by one of two beneficiaries under a will for an order for taxation of a bill of costs which had been paid by the trustees of the will to their solicitors more than twelve calendar months before the application. His lordship in chambers looked into the bill, and deeming some of the items to be extravagant, in the exercise of his discretion, made an order for taxation as against the solicitors.

A motion was now made to the court on behalf of the solicitors to discharge the order on the ground that after the lapse of twelve months it was not competent for the court to make an order for taxation under section 39 at the instance of the *cestui que trust*.

*F. Stallard*, for the motion, argued that the application was out of time, and ought to have been made within twelve calendar months after payment of the bill.

He referred to Cordery on Solicitors (3rd ed.), p. 328; *In re Chowne*, 52 L. T. Rep. 75, 33 W. R. Dig. 63; *In re Downes*, 5 Beav. 425; *In re Jackson*, 37 W. R. 282, 40 Ch. D. 495; *In re Massey*, 8 Beav. 458; *In re Boycott*, 34 W. R. 26, 29 Ch. D. 571; *In re Neate*, 10 Beav. 181; *In re Sutton & Elliott*, 11 Q. B. D. 377.

*Warrington, Q.C.*, and *Clare*, for the *cestui que trust*, argued that section 41 applied only to taxations under sections 37 and 38, and that section 39 gave the court an absolute discretion and was not controlled by section 41 as to the time within which the application was to be made.

They referred to *In re Drake*, 22 Beav. 438.

*Stallard* replied.

KEKEWICH, J.—This is not the case of a client coming to the court after payment for taxation of the bill. It is the case of a *cestui que trust* coming to tax a bill which the trustees have passed and paid, and the question is whether the *cestui que trust* ought to be charged with the full amount which the trustees have paid to the solicitors; and it is obvious that any question as to the power of the court to order taxation may be a matter of great importance, and one affecting a great number of other cases. A solicitor who is acting for trustees acts wisely if he never accepts payment without taxation. Section 39 of the Solicitors Act, 1843, provides expressly for taxation at the instance of a *cestui que trust*, and on reading that section independently of section 41, it is to be observed that there is a large discretion vested in the court—large by reason of the wording of the Act itself, and also by reason of the decision of the Court of Appeal in *In re Chowne*. The court is not to inquire whether there are gross overcharges amounting to

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

fraud, but has to consider, having regard to all the circumstances of the case, whether it should submit the bill to taxation. Words occur in that section which occur nowhere else in the Act—namely, that the bill may be referred on the application of a person interested in the property out of which the trustee "may have paid or be entitled to pay such bill." According to the section standing alone it is immaterial that the bill has been paid; the court has a discretion, and that, on the face of it, is right. Trusts may extend over many years, and great injustice might be done if a solicitor, by simply obtaining payment of his bill from the trustee, could avoid liability to taxation by the *cestui que trust*, out of whose fund the bill was paid, and who may have known nothing about the matter, or through disability or otherwise may not have been in a position to call for an account. Solicitors might in that case charge far too much, without any opportunity being given to those interested to tax their bills. The purport and intent of section 39 is that bills of costs which have been paid by trustees and executors are liable to taxation at the absolute discretion of the court. That seems to me to obviate what would be a great evil, and to offer an inducement to solicitors to get their bills taxed, which is very desirable both for their own sake and that of their client. Now, the question is whether that section is applicable in the present case. The bill was paid more than twelve months before the application for taxation was made, and, therefore, if section 41 applies, the bill has gone beyond taxation. Now, is section 39 controlled by section 41? Does section 41 apply to such a case? The 41st section refers to the payment of "any such bill as aforesaid," and provides that the application to tax must be made within twelve calendar months after payment. It has been decided that "any such bill as aforesaid" means any bill referred to in the Act, particularly bills referred to in the 37th section. But the proviso in section 41 as to the application being made within twelve months is in direct contradiction to section 39, which uses the word "paid" without any limitation and contains no suggestion that the application is to be made within twelve months after payment. If, therefore, section 41 is to be connected with section 39, it must be read as a proviso to the latter section. But to my mind it is an easier and more correct way of reading the Act to treat sections 37 and 38 as the substantial and governing part of the Act, to read sections 39 and 40 as being parenthetical, and to read section 41 as referring to sections 37 and 38, and to read "any such bills as aforesaid" as bills taxable under those sections, and not to the exceptional taxation provided by section 39. That is the only way of treating the Act as a whole and of avoiding the contradiction or inconsistency of the proviso in section 41 with the large discretion given by section 39. Before turning to the authorities I will refer to Mr. Cordery's valuable work on the Law relating to Solicitors. At p. 328 of the third edition the learned author states: "But it has frequently been held that no taxation can be ordered under section 39 more than twelve months after payment, which is a provision imported from section 41; and the sounder view seems to be that special circumstances must be shown even where the application is made within twelve months after payment." With all respect to a gentleman whose book has been of great assistance to me, I cannot agree with Mr. Cordery's proposition that section 41 should be imported into section 39. That does not seem to me a reasonable construction of the Act. Then as to the authorities, Mr. Stallard relied on the case of *In re Downes*, 5 Beav. 425. In that case Lord Langdale, M.R., at p. 429, says: "I think that in this court the bill cannot be ordered to be taxed as against the solicitor himself if twelve months have elapsed after payment." If that is correct as to sections 39 and 41, I should be bound; but the contrast between sections 39 and 41 was not present to the mind of the judge in that case, and it is not, therefore, an authority on the particular point. On the other hand there is the decision of Lord Romilly, M.R., in *In re Drake*, 22 Beav. 438, in which at p. 442 he says: "By the 41st section the court is precluded from ordering taxation after payment except under 'special circumstances'; but that exception does not apply to cases under the 39th section, called the third party clause, in which no mention is made of special circumstances." He implies therefore that the twelve months' limit has nothing to do with the case. He then says at p. 443: "I think that taxation is almost a matter of course, assuming that items of overcharge are proved, and it is not necessary that the overcharges should be such as to amount to fraud." The case of *In re Chowne* points to the same conclusion. There the question was left open because it was not necessary to decide it, but Fry, L.J., says: "I think that rule does not apply, for section 39 applies whether the executor 'may have paid or be entitled to pay the bill,'" and he says that in contrast to section 41 in such a manner that I must conclude that he meant that non-payment was of no great importance. There is another case not exactly in point, *In re Sutton & Elliott*, 11 Q. B. D. 377, in which, at p. 379, Fry, L.J., says: "It appears to me that the words 'any such bill' in section 41 refer back to that part of section 37, where the subject of a bill of costs at all is first introduced, and that the expression any such bill in section 41 means any 'bill of such fees, charges, and disbursements,' that is to say, that where it comes within section 37, the rule of twelve months after payment applies. That case does not decide the question here raised, but points out the close connection of sections 41 and 37, and assists me largely in coming to the conclusion that the intervening sections, or some of them, are parenthetical. The only case against that conclusion is *In re Downes*, which I have already commented on. The point is novel, and not covered by authority, and I am of opinion, therefore, that section 39 is not overruled by section 41. In the exercise of my discretion I think this is a proper case for taxation, notwithstanding payment more than twelve months before the application, and therefore the motion must be refused, with costs.

Solicitors, *Wellborne & Son; Chester & Co.*

---

Q. B. Div.
(Channell and Bucknill, JJ.) } Jan. 20; Feb. 15.

Farnham Flint, Gravel, and Sand Co. (*Appellants*) v. Farnham Union (*Respondents*). (*a.*)

*Rating—Appeal from quarter sessions—Gravel pit—Method of rating when partially exhausted.*

*A company were, at the time of the making of a rate, in rateable occupation of three and a-half acres of land for the purpose of extracting gravel therefrom, which they worked at the rate of two acres per annum. At the date of the rate the gravel from two and a-half acres had been extracted, and the land was used for storage purposes only. The gravel in the remaining acre was in process of being extracted when the rate was made.*

(*a.*) Reported by P. B. Durnford, Esq., Barrister-at-Law.

*On appeal to quarter sessions, it was held that the annual value of the land in the company's occupation at the time of the making of the rate ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let to a tenant for one year, regard being had to the value of the gravel in the unexhausted acre of land, added to the value of the exhausted two and a-half acres for storage purposes.*

*Held* (per Channell, J.), *that, though at the time when the rate was made the company was only working gravel in one acre, they must be rated for three and a-half acres on the gravel pit value of at least two acres, inasmuch as they were working—both during the preceding year and up to and at the date of the rate—at the rate of two acres per annum. If the two and a-half acres were to be treated separately and rated at storage value only, the remaining acre should be rated at double the rate imposed, because the company was working it at the date of the rate at the rate of getting two acres of gravel per annum.*

Bucknill, J., dissentiente, *held that, as the two and a-half acres were valueless at the time of making the rate for the purpose for which they were acquired, they could only be assessed at the actual value of their occupation at the time of making the rate in question.*

Special case stated by the quarter sessions for the county of Surrey upon an appeal against the decision of special sessions confirming a rate, in which rate the appellants were rated as the occupiers of a certain gravel pit.

The appellants carried on business as gravel and sand merchants, and for the purposes of their business they from time to time entered into agreements with the owners of land for the purchase of gravel therein. By these agreements full right of entry upon such land was given for the purpose of digging for and carrying the gravel away. Having dug and removed the gravel the appellants level the ground, replace the top sod, and restore the land to the owner.

For some time prior to the making of the rate appealed against the appellants had been in the habit of entering into such agreements with the Rev. John Martyr Ward in respect of certain portions of a field or enclosure of land belonging to him, and known as Ward's Pit, each plot of land containing gravel being the subject of a separate agreement. Upon an agreement being entered into between the parties the extent of land to which such agreement related was marked out by stumps, and the exclusive occupation of the land so marked out was handed over to the appellants. The land from which the gravel was actually being extracted was constantly shifting as the work progressed, and when the gravel in any portion of the land was exhausted such portion of the land was used as a store for gravel not yet sold and removed. Upon the expiration of the period allowed by any agreement the portion of the land from which gravel had been dug was levelled with the rest of the land and restored to the owner.

The appellants purchased gravel from John Martyr Ward on the following dates and in the following quantities—viz.: On the 14th of May, 1897, one acre; on the 24th of June, 1897, one acre and a-half; on the 15th of April, 1898, one acre; on the 14th of November, 1898, one acre; on the 21st of March, 1899, one acre. At the date of the rate the appellants were in rateable occupation of three and a-half acres of land. In two and a-half of these (being the lands referred to in the agreements of the 24th of June, 1897, and the 15th of April, 1898) the gravel was exhausted. The two and a-half acres, however, continued to be in the occupation of the appellants, and were used by them for the purpose of storing gravel already dug. In the remaining acre (being the land comprised in the agreement of the 14th of November, 1898) the gravel was in process of being got.

The appellants were rated in respect of the land at £420 gross estimated rental and £400 rateable value.

The appellants contended that they were rateable in respect of the land in their occupation at the date of the rate appealed against. That the value of such occupation, so far as the unexhausted land was concerned, was to be ascertained from the consideration paid by the appellants for the occupation of such land under the agreement relating thereto in force at the date of the rate, including as part of such consideration the cost of making good the land occupied thereunder on the expiration of the term. That the value of such occupation, so far as the exhausted land was concerned, was to be ascertained upon the basis of what such land would let for occupation as storing ground in connection with the other lands occupied by the appellants. That if the value of the appellants' occupation was not to be so ascertained, it was to be ascertained from the value of the gravel in the unexhausted land then in their occupation, added to the values of so much of the exhausted lands as was used by them for storage purposes.

The respondents contended that the proper way to ascertain the rateable value of the land was to ascertain the output of gravel dug during the year immediately preceding the making of the rate appealed against, from so much of Ward's Pit as had been in their occupation at any time during such year and to assess the rateable value of the gravel-pit at a sum based upon the total royalty which (having regard to the market value of gravel during the year in the neighbourhood) the appellants would have paid to the owners of the land if, instead of buying the gravel, they had agreed to dig and work the gravel on payment of a royalty on each yard of gravel dug, which method of payment was admittedly frequently adopted in the neighbourhood, and that this method of calculating the rateable value was correct in law.

Alternatively, the respondents contended that the appellants were in occupation of more than two acres of land; that having regard to the burden of the covenant to level the surface of the ground and replace the surface soil after removing the gravel (which work it was found would cost about £40 an acre), the appellants had paid or agreed to pay about £220 per acre for the right to occupy the land for one year with liberty to dig the gravel therein; that the sum of £220 was equivalent to an annual rent for the land paid by a tenant who had liberty to dig gravel therein; that the appellants as occupiers of the land must be rated at the full annual value thereof during the whole period of their occupation, although during a part of that period a portion of the land was available only for the purpose of storing gravel; that the decision of the Queen's Bench in *Reg.* v. *Whaddon*, 23 W. R. 653, L. R. 10 Q. B. 230, showed that the appellants should be rated during the whole of their occupation of the land under the written agreements at the value thereof as enhanced by the right to dig gravel thereon, and that if the principle of valuation here stated was correct in law the assessment appealed against was supported in fact.

The quarter sessions held that the first contention of the respondents was wrong in law, but that if it were permissible to adopt that method of calculation, the assessment appealed against would be correct. They further held that the second contention of the respondents was wrong in law, and that the annual value of the land in the appellants' occ[illegible] date of the making of the rate ought t[illegible] the amount of rent or royalty at [illegible]

could then be reasonably expected to be let to a tenant for one year, regard being had to the value of the gravel in the unexhausted acre of land added to the value of the exhausted two and a-half acres of land for storage purposes, and on this principle they found as a fact that the amount at which the land could reasonably be expected to be so let was £252, and they accordingly fixed the gross estimated rental of the said lands at £252, and the rateable value thereof at £240, and allowed the appeal, and ordered the assessment of the appellants' land on the rate to be reduced accordingly. The question for the opinion of the court was whether or not the quarter sessions were right in their determination.

*Marshall, Q.C.* (*Ryde* with him), for the Farnham Union, referred to the cases of *Reg.* v. *Whaddon*; *Reg.* v. *Everist*, 10 Q. B. 178; *Reg.* v. *Abney Park Cemetery Co.*, 21 W. R. 847, L. R. 8 Q. B. 515; *Hoyle* v. *Oldham Union*, [1894] 2 Q. B. 372.

*Cunningham Glen*, for the respondents.

*Cur. adv. vult.*

Feb. 15.—THE COURT differed, and the following judgment was read by

BUCKNILL, J.—The question for our decision is whether the court of quarter sessions for the county of Surrey has rated the Farnham Flint, Gravel, and Sand Co. in a rate for the relief of the poor on a principle which can be upheld in law. The material facts may be shortly stated: The Farnham Flint, &c., Co., whose business is that of gravel and sand merchants, entered into three agreements, amongst others, with the owner of a bed of gravel, which were dated the 24th of June, 1897, the 15th of April and the 14th of November, 1898, respectively, by which they bought of him the gravel in these separate plots of ground, which were marked out for the purpose. The purchasers had a certain time in which to remove the gravel, level the ground, replace the top soil, and restore the plots to their owners.

There is, in my opinion, no statement in the case to justify this court treating the land comprised in these three agreements as forming one continuous area.

By the agreement of the 24th of June, 1897, the gravel in one acre and a-half was sold to the company, the price being £150, and the period of possession one year and a-half, but in the other two agreements the plots of land were one acre each, and the price for each £150, the period of possession being one year from the date of the respective agreements.

The poor rate, which is the subject of this appeal, was made on the 8th of December, 1898.

At that time the company was in rateable occupation of the three plots, but in November they had exhausted all the gravel from the acre and a-half which they bought on the 24th of June, 1897, and on the 1st of September they had exhausted all the gravel which they bought on the 15th of April, 1898. Those two and a-half acres were at the time of making the rate used as storage places for gravel in connection with other lands occupied by the company. The gravel bought by the company on the 14th of November, 1898, was being worked by them on the 8th of December, 1898. On these facts, the court of quarter sessions held that the annual value of the three and a-half acres at the time of the making of the rate ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let on a yearly tenancy, regard being had to the value of the gravel in the unexhausted acre added to the value of the two and a-half acres which were exhausted of gravel, but were used for storage purposes only, and on that principle the court found that the amount at which the three and a-half acres would in fact be so let was £252, at which sum they fixed the gross estimated rental, and assessed the rateable value at £240. On the part of the guardians of the Farnham Union it was argued that the rateable value should be assessed either on the output of gravel during the year preceding the making of the rate from so much of the respective plots of land as was in the occupation of the company at any time during that year, based upon a royalty measured by the market value of the gravel; or, secondly, that as at the time of making the rate the company were and had been working gravel at the rate of at least two acres a year, they must be rated at the full annual value of such two acres.

In support of the first contention *Reg.* v. *Abney Park Cemetery Co.* was cited, and of the second *Reg.* v. *Whaddon*. It is necessary, therefore, to look at the facts of those cases. The head-note to the report in the Law Reports expressed very concisely the material facts of the first of these cases thus: "The appellants were a company that purchased lands and laid them out as a cemetery. They received fees for interments and conveyed plots of ground to be used as graves. In one year (1869) £2,333 was received by the company as purchase-money for such plots of ground. Each plot was conveyed by indenture purporting to grant it in fee simple upon trust that the grantee might use it as a place of burial, subject to the regulations of the company, and, subject to such trusts, in trust for the company as part of their property. The defendants were rated as the occupiers of the lands, and upon the principle that the sum of £2,333 was to be treated as part of the annual value of the occupation of the lands by the appellants in that year."

The Court of Queen's Bench held that the rate was rightly made, and that in that particular case as the sale by the cemetery company of plots of ground for burial purposes was the mode, or one of the modes, in which they earned their annual income from year to year, the receipts by them in the year preceding the making of the rate was the best basis for ascertaining the rateable value of the next. The court pointed out that the case was anomalous. I think that an alleged *dictum* of Blackburn, J., when delivering his judgment has been misunderstood, if, indeed, it has not been misreported in the report of the case in the Law Reports, where he appears to have expressed himself thus: "The Parish Assessment Act has enacted that the basis for ascertaining the rateable value shall be the rent at which the property might reasonably be expected to let from year to year. It might be more equitable if the statute had provided that the basis should be the rent which a tenant for a term of years would pay for the property to be rated, but the Legislature has decided otherwise, and has taken as a basis the rent which a tenant from year to year would give during the year preceding the time of making the rate." I have looked at the report of this case in the *Law Journal* and in the *Law Times*, but in neither do I find the expression that "the Legislature has taken as a basis the rent which a tenant from year to year would give during the year preceding the time of making the rate"; nor do I think that learned judge intended to lay down any such general rule, but that all he meant to say was that in that particular case, which was anomalous, and perhaps in other exceptional cases, the rent which a tenant would give during the preceding year might be the only proper basis for ascertaining the existing annual value for rating purposes, and more particularly so if by that means valuable property can be prevented escaping being rated at all, though it by no means follows that there may not be cases "which the existing law cannot reach without being strained in a manner in

which we ought not to strain it": see per Cockburn, C.J., in *Reg.* v. *Whaddon*, L. R. 10 Q. B., at p. 241. In order to arrive at the rateable value of a hereditament, that which is legitimate and necessary in one case may be neither legitimate or necessary in another.

In *Reg.* v. *Abney Park Cemetery Co.* it must be taken, I think, that the cemetery company was still in occupation of sufficient ground to be able to sell during the year for which the rate was made as many grave spaces as would produce an amount equal to the sales of the year preceding it, but in the case before us the whole of the two plots consisting of two and a-half acres had been at the time of making the rate entirely exhausted of gravel-producing power and were useless to the occupiers except as storage places for gravel produced from other land occupied by them. I think, therefore, that the first of these contentions fails. I now pass to the case of *Reg.* v. *Whaddon*, known as the coprolite case, and I think that the facts of that case are very unlike the present. There the occupier was in possession of ten acres of coprolite-producing land at least during each year, but he used no more during any one quarter for the purpose of getting coprolites than three and a-half acres, the other six and a-half acres lying unproductive, having been exhausted of coprolites. The rate in that case was made quarterly, and it was contended that the rateable value ought to be taken on the value only of the then profitable portion of the ten acres, notwithstanding that owing to the occupation continually shifting a complete ten acres would be profitably worked during the concurrent year. But the majority of the court held that the proper measure was the net annual value of the hereditament—that is, of ten acres, and not only of the three and a-half, and that the case could not be distinguished "from an ordinary agricultural farm in which the net annual value is the same, although one part of the farm may lie fallow or be a source of expense at one period and of profit at another, notwithstanding which the rate must be made upon the farm in respect of its net annual value": per Mellor, J., at p. 244. But between the case of an ordinary agricultural farm and the present there is surely a great difference, for whilst the farmer pays rent for the user of the land which he occupies, in this case the occupier of the land paid for the right to dispose of the *corpus*, being the gravel in the ground which he had purchased from the owner out and out, and which he had entirely removed from two of the three plots at the time of the making of the rate. So long as there was any gravel in these three plots of land it may be that the rateable value would be unaffected; I offer no opinion on that point, but so soon as any one or more of them were exhausted of the gravel that had been in them, and they were incapable of beneficial occupation except as storage places for gravel, I am of opinion that they could only be rated upon their actual existing value at the time when the rate was made—in other words, it is not the past, nor the prospective, but the actual value of the hereditament that is to be taken as the basis of assessment; or, as Blackburn, J., said in *Staley* v. *Overseers of Castleton*, 12 W. R. 911, 33 L. J. M. C. 178, "The Legislature intended the rate should be made upon the rent which might reasonably be expected from a tenant who took the property from year to year, *rebus sic stantibus*." Here it is stated in the case as a fact that at the date of the rate being made, in two and a-half of the said three and a-half acres, being the plots of land referred to in the agreements of the 24th of June, 1897, and the 15th of April, 1898, the gravel was exhausted, and the land was used for the purpose of storing gravel already dug, and it is not denied that for such user they have been properly assessed, nor, as I understood the argument, is it contended that if it was only a question of the assessment on the remaining one acre, the quarter sessions has proceeded on a wrong principle.

In my judgment the present case is more like a brickfield or a mine, both of which are, whilst being worked, approaching the period of final exhaustion. So long as they are being worked as brickfields or mines and there is nothing to show that the profits of the coming year may not be as good as the profits of the past year, then that year may be taken as the basis of the next, if no better can be found; but where the brickfield or the mine has been worked out and exhausted, as in the case of these two and a-half acres, and can therefore be no longer worked for the sole purpose for which they were acquired, I cannot agree to the proposition that their rateable value remains unaffected simply because they are still occupied under the terms of the respective contracts made with the owner of the land. In this connection *Rex* v. *Bedworth*, 8 East, 387, seems an authority in point. There a colliery was rated at an annual value of £200. By lease the tenant paid a rent of £200 a year at least, and in all events, whatsoever the state of the mine might be and whether any coal was gotten or not. Before the lease expired all the coal was exhausted and the mine ceased to be worked, and it was held that although the rent was still payable, yet, with respect to the parish, the occupier was only rateable for the concurrent annual value during the period for which the rate was made, and that when the thing occupied ceased to afford any such concurrent value, the subject-matter of the rating was gone: see per Ellenborough, C.J., at p. 388. I think the court of quarter sessions has proceeded in this case on the same principle—that is to say, that the two and a-half acres were valueless for the purpose for which they were acquired, and that they could only be assessed at the actual value of their occupation at the time of the making of the rate in question.

For these reasons I am of opinion, although I say so with much misgiving, being in disagreement with my brother Channell, that this appeal should be dismissed.

CHANNELL, J.—This was a special case stated by the quarter sessions for Surrey on an appeal to them against a rate made on the appellants in respect of their occupation of a gravel-pit. The appellants were rated at £420 gross and £400 rateable value, and they appealed to quarter sessions on the ground mainly that they were over-assessed. The quarter sessions allowed the appeal, and reduced the rate to £252 gross and £240 rateable value subject to this special case. The question for us is whether the quarter sessions proceeded on the right principle. The appellants were, at the date when the rate was made, in actual occupation of three and a-half acres of land, but the gravel in two and a-half acres had, prior to the making of the rate (but within a year before), been exhausted by the appellants' working, and there was gravel remaining only under one acre out of the three and a-half which they occupied. The quarter sessions have treated the properties in the appellants' occupation separately, and have rated the one acre at what may be called gravel-pit value, and the two and a-half acres at its value only for purposes of storing gravel already dug, for which purpose it was in fact being used at the date of the rate. We have to consider whether the quarter sessions were right to take the plots separately, and also whether if that is right, they proceeded on the right principle in arriving at the gravel-pit value for rating purposes of the one acre. The appellants take the land from the landowner from time to time in small plots, usually

of one acre at a time. They buy the gravel under the plot, or rather so much of the gravel under it as they can get in a limited time (usually a year), pay a lump sum (usually £175) for the gravel, and also pay for levelling the land at the end of the year or other period for which they take the plot, which levelling costs about £40 per acre. They also pay some sums for costs. Under one agreement, that of June, 1897, they paid less than under the other agreements, apparently because the bed of gravel in that plot was either less deep, or not so good in quality, as the gravel under the other plots. They have no contract with the landowner whereby he is bound to sell them gravel under other land when the plots they hold are exhausted, but in fact he has other land adjoining under which there is gravel, and he had, prior to the rate in question, been in the habit of making successive agreements with them, and he has continued to do so since the rate. Now, as a general rule, property is rated at its existing value at the time of the making of the rate. You have to find what the hypothetical tenant from year to year might be expected to give for the hereditament in its state at that time. If therefore the gravel had, prior to this rate, been taken from the two and a-half acres in some way other than by the user of the land in respect of which the rate has to be imposed, I think the quarter sessions here would have been right in rating the two and a-half acres at storage value only; the case would then be the same as that of buildings on a property being burnt down shortly before the rate, and the rate then would be on the value of the land without the buildings. But I am of opinion that where the rateable user itself carries the diminution of value the rule is not quite so simple. The rule then is, I think, that any partial exhaustion of the subject-matter, so long as the special user continues, in no way affects the rateable value, and that it is only when the special user ceases, by reason of the complete exhaustion of the subject-matter, or otherwise, that the rateable value is affected. It then, of course, ceases altogether. The cases which throw most light on the mode of rating such properties are *Reg.* v. *Westbrook* and *Reg.* v. *Everist*, reported together in 10 Q. B. 178, and *Reg.* v. *Abney Park Cemetery Co.* and *Reg.* v. *Whaddon*. The rating of such properties without allowing for a renewal fund is somewhat anomalous, but it is clearly established by *Reg.* v. *Westbrook* that they are to be so rated, and indeed it is obvious that any allowance to keep the property in a state to command the rent would in these cases absorb the whole rateable value arising from the special use of the property. If the exhaustion of the material by the working in respect of which the rate is imposed is to be taken into account in the same way as an alteration in the value of the property caused in another way, the rateable value of the hereditament must vary from day to day and be continually diminishing. That I think cannot be. The value of the hereditament for rating purposes depends, not on the quantity of the material, in this case gravel, remaining on the property to be worked, but on the amount of the profitable working which is going on at the time of the rate. In these cases it is all-important to remember that the value for rating purposes depends on the value of the occupation and not on the value of the *corpus* of the property occupied. The latter in these cases is constantly diminishing but the former is or may be constant, until at last it ceases altogether by the exhaustion of the *corpus*. To rate such properties you first have to find the amount or rate of working, and then find how much a hypothetical tenant from year to year would give by the year for the right to work at that rate. It may be that there is not enough gravel remaining for anyone to work for a whole year, but that is quite immaterial. The problem is to find the value for a year of that enjoyment of the property which the occupier is in fact having at the date of the rate, irrespective of the question whether that enjoyment by the occupier can or cannot continue for a year. The case nearest to this (and I think completely in point) is *Reg.* v. *Whaddon*, a case as to coprolites. There the appellants were in occupation of ten acres of land, of which three and a-half were at the date of the rate being actually worked for coprolites, and six and a-half acres, though still in their occupation, had been exhausted. So far the facts are the same as in the present case, but in that case the occupier had a contract with the landowner, whereby he was entitled to have other land as required from time to time in substitution for that he had worked out, so that he was continuously in the occupation of ten acres, though of a different ten acres, and in each year he worked out ten acres, though he had only three and a-half acres in working at one time. He also contracted to pay the landowner a dead rent of £1,000 per annum, which was a little less in fact than his average payment for royalties on the ten acres worked. It was there held by the majority of the court that the appellants were rateable for the whole ten acres at coprolite value, and not merely for three and a-half acres at coprolite value and for the remainder at storage value. The argument of counsel for the appellants there was precisely that of the appellants' counsel here, and their view was adopted and developed by the dissenting judge, Cockburn, C.J., but it was not adopted by Mellor, Lush, and Archibald, JJ., who formed the majority. I think this case is an authority in point in the present, and that it is not distinguishable by reason of the two points of difference in the facts which I have mentioned. The dead rent cannot, I think, affect the question. It goes only to assist in arriving at the figures of the annual value, but it cannot affect the principle. In the judgment of the majority the fact that the appellants' occupation was a continuous one was of course referred to, but the judges did not rely on the fact that the appellants had a contract for the future digging, nor would that fact really be an element in the value of the occupation for rating purposes. The value for rating purposes of a hereditament does not depend upon the length of tenure of the actual occupying tenant. A man is rated the same whether his lease has many years or only a few days to run. The hypothetical tenant is not to be assumed to take for the next year after the rate the rights which the actual tenant has for that next year, but he is assumed to take as tenant from year to year the occupation (together, of course, with the rights of user of the land which the occupation carries with it) which the actual tenant has at the date of the rate, whether that occupation or those rights are to continue for a year or for more or less than a year. If any particular year is to be taken for the hypothetical tenancy, it is, in cases of this class, the year preceding the rate and not the year after. In *Reg.* v. *Abney Park Cemetery Co.*, L. R. 8 Q. B., at p. 519, Blackburn, J., is reported as saying, "The Legislature has taken as a basis the rent which a tenant from year to year would give during the year preceding the time of making the rate." If that *dictum* is correct, it is conclusive of the present case. In the same *Abney Park* case, Blackburn, J., at p. 520 of the Law Reports, repeats almost the same proposition: "No injustice will be done if the company are rated in every year according to the value which a hypothetical tenant would give for the occupation in the preceding

year, and according to this rule the company's receipts in one year will govern the rateable value of the cemetery in the next." My brother Bucknill has drawn my attention to the fact that these two passages are omitted in the report of the *Abney Park case* in the *Law Journal*, 42 L. J. M. C. 125, and also in a report in the *Law Times*. The reports throughout vary very much in language. They are obviously condensed reports, and each reporter has purposely omitted some of the actual language used by the learned judge, and each has reported some part of that which was omitted by the other, but in substance the reports agree, and the reasoning of the judges appears the same in each report. Of course it may be said that the principle of taking the value in a past year was only applied in the cemetery case because there was no reason why the receipts from burials in the next year should not be as large as in the preceding year. But would not the same rule be applied to the last year before the cemetery became full—that is, when it is not quite full, but when it was known that it would be full before the next year was ended? I think it would. The cemetery would still be rated at its former annual value until it was full, and then it would cease to be rated at all. It would not be rated at half the annual value in the last year because there was room for only six months' burials any more than a man would be rated at half the annual value of his house because he had only a six months' term remaining of his lease. It seems to me that where the overseers or assessment committee have to rate a property in respect of a beneficial use which is being made of it, which use is self-destructive, what they have to do is this: They must ascertain what amount of use the actual tenant has been making, and continues to make, of the property, and then ascertain what a tenant would give for liberty to make that amount of use of the property from year to year, independently of the question whether there is or is not enough of the property remaining for the tenant to be able to go on making that use for a whole year. Thus in the case of a gravel-pit they must find at what rate per annum the tenant is digging, and then find the annual value of his right to dig at that rate. The reason why it is necessary in cases of this class of property to look at the past user rather than at the capabilities for the future seems to be this: In all ordinary properties anything which happens to the property to destroy its value in the future, such as the burning down of a house, will, as soon as it happens, also destroy the value of the user in the present. Therefore we can take the future value as a measure of the present. But in the case of the class of property under consideration the destruction of future value is caused by the present user itself—that is, by the very thing of which we have to find the value, and consequently, to find that present value we cannot look to the future, when the destruction caused by it will have taken place. Applying this in the present case, and going back as far as the facts stated in the special case enable us to do, we find that on the 24th of June, 1897, the appellants acquired the right to dig, and, as I understand them, began to dig gravel under an acre and a-half, which they completely dug out in March, 1898. On the 15th of April, 1898, they acquired the like right under one acre, which they completely dug out by the 1st of September. On the 14th of November, 1898, they acquired another acre, which they were digging on the 8th of December, 1898, when the rate was made. When they completely dug out that acre does not appear (nor, of course, could it be known when the rate was made), but as they took another plot on the 21st of March, 1899, it was probably shortly before that.

The subsequent taking is only material to show now that which might at the time have been shown by direct evidence—viz., that at the date of the rate, the 8th of December, the appellants were digging as before and had not begun to dig slower than the average rate at which they had been digging. That average rate appears to me to be about the rate of two acres per annum, rather more if anything, as they exhausted the acre taken the 15th of April, 1898, in four months and a-half. I think, therefore, that just as in *Reg.* v. *Whaddon* the appellants were rated at coprolite value on ten acres (though at the date of the rate six and a-half acres had already been exhausted and only three and a-half of the ten acres then in their occupation still contained coprolites), because they were working out the three and a-half acres at the rate of ten acres per annum, so here the appellants, though at the date of the rate they were only working gravel in one acre, must be rated for three and a-half acres on the gravel-pit value of at least two acres, inasmuch as they were working both during the preceding year, and up to and at the date of the rate, so far as appears, at the rate of two acres per annum. In this case there seems no reason for not taking the sums paid by the appellants as a measure of what the hypothetical tenant would be likely to pay, and in fact the quarter sessions did so, as I understand they assessed the gravel-pit value at £220 per acre, being the £175, the £40 costs of restoring, and the £5 costs. If, therefore, the appellants ought to have been rated for their occupation on the footing that they were working at the date of the rate as they had been previously, at the rate of two acres of gravel per annum, the original rating at £420 gross was not excessive, and although the calculations which I have made from the figures in the special case are probably not quite accurate, and the data in the special case are probably not sufficient to enable us, if we had to do so, to fix exactly the proper amount at which the appellants should be rated, it is enough for me to say that the facts stated in the special case show no ground for reducing the rate. I have dealt with the case so far as I think it ought to be dealt with, as one occupation of the three and a-half acres. But I think that even if the exhausted two and a-half acres in the two earlier lettings are to be treated separately and rated at storage value only, the remaining acre should be rated at approximately double the sum at which the quarter sessions have rated it, because I think the appellants were working it at the date of the rate at the rate of getting two acres of gravel per annum, and I do not think we are excluded from considering that question by reason of the quarter sessions having found the value in part. They only so found subject to the case, and that states the facts with a view to our deciding it. I put the case thus: If a man pays £100 for the privilege of taking all the gravel out of a plot of land in a year, and he digs uniformly throughout the year, I should say that the gross value of his occupation during the year is £100, and that it is so all through the year, though he exhausts the land by digging the last load of gravel on the last day of the year. I think that must be admitted. I think also that if he does not dig uniformly, but digs out all the gravel in the first six months, continuing to occupy during the second six months, the gross annual value, during the second six months, as well as during the first, is still £100, but if not, and if, as the quarter sessions have held, the value during the second six months is *nil* (or storage value only, which, for the purposes of the argument, is the same thing), then it follows that the value of the first six months' occupation is the whole £100 which he pays—that is to say, that the annual valu[illegible] t six months is £200

per annum. In either way, therefore, the quarter sessions seem to me wrong. They appear to me to have given the appellants the benefit of the exhaustion of the three and a-half acres by reason of their speed in working, and not to have given the parish in the rating of the one acre the corresponding benefit arising from the same speed of working. The parish is by their mode of rating robbed of half the rateable value of the occupation. I think the passage in the judgment of Mellor, J., in *Reg.* v. *Whaddon* at the bottom of p. 244 is applicable here: "The appellants cannot by an ingenious arrangement of the mode of working deprive the parish of the benefit of rating them in respect of a whole year's occupation." I base my judgment on the authority of *Reg.* v. *Whaddon*, which I think in point and binding on us, but I entirely agree with the reasoning of the majority of the court in that case and have endeavoured somewhat to amplify and explain it.

I think, therefore, that the proper order to be made is to allow with costs the appeal to us, quash the order of the quarter sessions, and, making the order which the quarter sessions should have made, dismiss with costs the appeal to quarter sessions against the rate, but as the court is equally divided I am of opinion that the appeal fails, and consequently the order which has to be made is that the appeal be dismissed—under the circumstances it will be dismissed without costs, and leave to appeal if necessary is given.

*Appeal dismissed.*

Solicitors, *Johnson, Weatherall, & Sons*, for *Potter & Crundwell*, Farnham; *Jackson*, Farnham.

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 19.

ASSESSMENT COMMITTEE OF NEWPORT UNION v. YSTRADYFODWG AND PONTYPRIDD SEWERAGE BOARD. (*a.*)

*Poor law — Rating—Sewage carrier — Sewage carrier partly above, partly below ground—Liability to be rated.*

*The respondents were the governing body of a united drainage district, and they constructed a sewage carrier for conveying the sewage of the district to the sea. The total length of the sewage carrier was about 17¼ miles, of which some 2½ miles passed through or over land situated in the parish of R., which land was previous to the construction of the sewage carrier, and still remained so, rated for the relief of the poor.*

*The appellants were the assessment committee of the said parish of R., and they assessed the respondents in respect of the whole of that portion of the sewage carrier which passed through or over land in the parish of R.*

*The quarter sessions court held that such portion only of the sewage carrier in the parish of R. as was carried on concrete arches was rateable, but that those parts of it which were laid either below the natural surface of the land or on an embankment covered and grassed over were ordinary underground sewers, and came within the exception of rating applicable thereto.*

*Held, on appeal, that as there had been some interference with the surface of the ground, and as it was impossible to dissever those parts of the sewage carrier which were above from those parts below the natural surface of the ground, the whole of the carrier that passed through or over the land of the appellants was a rateable subject, and liable to be rated accordingly.*

Case stated by the quarter sessions of Monmouth on an appeal by the sewerage board (the respondents in this court) against an assessment to a poor rate made for the parish of Rumney in the appellants' union.

The facts were as follows: The respondents were the governing body of a united drainage district consisting of part of the urban district of Ystradyfodwg and the urban district of Pontypridd constituted by a provisional order of the Local Government Board, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act, 1885, for the purpose of carrying into effect a system of drainage for the above-mentioned urban districts. Pursuant to the powers vested in them by the provisional order, the respondents designed and constructed and have since always maintained a sewage carrier for the use of the two districts, and have erected, made, maintained, and worked such works, machinery, and plant as were required for conveying the sewage of the districts to the sea. The total length of the sewage carrier was about 17¼ miles, whereof nearly 2½ miles passed through or over land in the parish of Rumney, which land (excepting such part as formed part of the foreshore of the Bristol Channel) was, previously to the construction of the sewage carrier, and still continued to be, rated to the poor rate. The construction of the sewage carrier within the parish of Rumney was as follows: 182 yards of iron pipes carried on concrete arches above the surface of the ground, 1,021 yards of pipes laid below the surface and ordinary level of the ground, 1,890 yards carried below the surface of the ground but covered by an artificial embankment of varying height which rises above the level of the adjacent lands, and 1,246 yards of pipes (hereinafter called the outfall) passing partly over and partly beneath the surface of the foreshore of the Bristol Channel. In connection with the outfall, certain works have been erected by the respondents. The respondents were assessed to the rate appealed against in respect of that portion of the sewage carrier, with the outfall and appurtenances thereof, which is situate in the parish of Rumney, at £800 gross estimated rental and £700 rateable value. It was proved before the quarter sessions that, as far as the parish of Rumney is concerned, the sewage carrier conveys the sewage from distant towns, places, or houses through the parish, and that there is no connection to or with the sewage carrier from any lands, houses or buildings in the parish. It was also proved that the embankment varied in height from 18in. to 6ft. above the ground through which it passed; that it was covered throughout by a mound of earth which was grassed over except where a footpath runs over the top of the mound and where manholes are placed; that it was not separated by any fence from the adjoining land, and that cattle had full access upon and across it throughout its entire length. It was also proved that the land upon which the embankment lies was previously to the formation of such embankment assessed to the poor rate, and that the land remained so assessed, no change having been made by reason of the making of the embankment in such assessment.

The quarter sessions held that such portions of the sewage carrier as lay under the surface of the ground or in the embankment were not liable to be rated, but that the gross estimated rental of the other portions of the carrier in the parish of Rumney was £145 (of which £40 was the gross estimated rental of the outfall and works in connection therewith),

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

and that the rateable value was £105. The quarter sessions accordingly allowed the appeal subject to the present case.

*Bosanquet, Q.C.*, and *Morton Brown*, for the assessment committee.—The quarter sessions were wrong in reducing the rate, because this sewage carrier and the works form one entire and extensive drainage system. They are totally distinct in character from an ordinary underground sewer, and as such do not come within the exemption from rateability: *Leicester Corporation* v. *Barrow-on-Soar Union*, 63 L. J. M. C. 176.

*Cripps, Q.C.*, *Boyle, Q.C.*, and *Ram, Q.C.*, for the respondents.—The court of quarter sessions were right in amending the rate: *London County Council* v. *West Ham Overseers*, 42 W. R. 330, [1893] A. C. 562.

CHANNELL, J.—On the whole I think this appeal should be allowed. The subject is one of some difficulty, and the facts are not altogether clear. The judgment of Lord Herschell in the *London County Council* v. *West Ham Overseers*, [1893] A. C. 579, *et seq.*, however, helps us to decide the question, and shows that the exception with regard to sewers is quite anomalous. Here all we have to decide is whether or not the construction in this case comes within that exception. It is necessary therefore first to consider the nature of the exception, and secondly to ascertain whether the facts of this case bring it within it. In *Leicester Corporation* v. *Barrow-on-Soar Union*, Wright, J., spoke of this exception as one made by the Legislature in favour of "ordinary underground sewers" or "simple sewers" and it seems to me, so far as one can gather from the language of Lord Herschell in the case before referred to, that where the surface remained rateable just as it was before the sewer was constructed, and the value of the surface for occupation was not thereby affected, it might very well be that such a sewer might be one that was not rateable. Here there is no finding of fact that the structure did not interfere with the former occupation of the surface of the land and from the nature of the thing, it could not be that the structure, though grassed over, did not interfere at all with its occupation, and did not at all lower its rateable value, though there might be various reasons why the rating had not been altered. It must therefore be taken that there had been some interference with the surface; and that is one of the tests in the authorities cited as to whether a particular construction comes within or without the exception. I am not prepared to hold on the facts before me that this is an "ordinary underground sewer" which comes within the exception. Further, the construction was one continuous structure; at one part of its course it consisted of iron pipes on concrete arches, at other parts it consisted of a mound grassed over. That part of it on concrete arches was so similar to the structure in the *West Ham case* that the quarter sessions found themselves obliged on that authority to hold it rateable. In *Leicester Corporation* v. *Barrow-on-Soar Union*, Collins, J., said: "It is impossible to dissever a special part and say that as to that part alone it is to be taken as an independent sewer." So here, as this structure is above ground in some places and under the surface of the soil at other, I cannot bring myself to hold that in one man's field it is rateable and in another's not. It does not therefore, as a whole, certainly come within the exception in favour of ordinary underground sewers or simple sewers or whatever the anomalous exception may most exactly be described as being, and therefore, for the reason I have just stated, the whole must be regarded as rateable.

The order of quarter sessions will therefore be quashed and the rate directed to stand.

BUCKNILL, J.—I entirely concur.

*Appeal allowed.*

Solicitors for the appellants, *Warriner & Co.*, for *Davis, Lloyd, & Wilson*, Newport.

Solicitors for the respondents, *Wrentmore & Son*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

---

## House of Lords.

From C. A. (England). Feb. 15.

### EARL GREY v. ATTORNEY-GENERAL. (a.)

*Inland revenue—Estate duty—Settlement—Reservation of interest—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c).

*Any gift* inter vivos *of property not involving the entire cessation of any interest therein by the grantor, and excluding his possession and enjoyment thereof, is insufficient to avoid the payment of estate duty under the Finance Act*, 1894. *The property so granted or assigned and existing at the death of the grantor will be deemed to have passed on his death, and therefore liable to estate duty.*

*A transfer of property reserving a rent-charge to the grantor and providing for the payment of grantor's debts by the grantee, to the full exhaustion of the grantor's estate, is, therefore, ineffectual for the purpose of avoiding the said duty under section* 2, *sub-section* 1 (c), *of the Finance Act*, 1894.

*Decision of the* Court of Appeal *affirmed.*

Appeal from an order of the Court of Appeal (A. L. Smith, Rigby, and Vaughan Williams, L.JJ.), 47 W. R. 37, [1898] 2 Q. B. 534, affirming a decision of the Queen's Bench Division (Grantham and Channell, JJ.).

The documents and sections of the statutes are set out at length in the report below.

The substance of the documents is as follows:

By a deed dated the 19th of October, 1885, and made between the late Henry, third Earl Grey, of the one part, and the appellant, the fourth Earl Grey, then Albert Henry George Grey, Esq., of the other part, the third Earl Grey conveyed to the appellant all his real and leasehold estates in the county of Northumberland and elsewhere, subject to the payment of certain life annuities and mortgages affecting the same to the use that the third Earl Grey should thenceforth during his life receive an annual rent-charge of £4,000, to be issuing out of the said hereditaments (other than such part as the third Earl Grey was to occupy and enjoy under the trusts thereinafter declared), and subject thereto to the use of the appellant in fee simple, but as to the mansion-house at Howick and the premises to be enjoyed

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

therewith subject to the trusts thereinafter contained. And the third Earl Grey assigned to the appellant all rents, arrears of rents . . . owing in respect of the said real estates, and all furniture and effects in or about the said mansion-house and premises at Howick, and all stock, crops, and effects, and other personal property belonging to him (with certain exceptions), to hold the same to the appellant absolutely for his own use and benefit. And it was further declared that the mansion-house at Howick, together with the pleasure gardens, &c., as then occupied and enjoyed by the third Earl Grey, and all the furniture, &c., should be held upon trust to permit the said third Earl Grey to use and enjoy the same as theretofore during his life. And the appellant covenanted with the third Earl Grey to (1) Pay certain annuities mentioned in the schedule to the deed and all other annuities (if any) charged on any part of the property or payable by the third Earl Grey so long as the same should be payable; (2) pay a mortgage debt of £200,000 and interest and all other mortgage debts and charges affecting any part of the property, also a bond for £1,000 payable to the Honourable George Grey with interest, and discharge all liabilities of the third Earl Grey in respect of the property; (3) pay the said annual rentcharge of £4,000 to the third Earl Grey; (4) keep the mansion-house and buildings at Howick insured at the appellant's cost; and sundry other covenants, including one upon the death of the third Earl Grey to pay all his funeral and testamentary expenses, including all stamp and other duties, and also all his debts to the full exhaustion of all the property, real and personal, of the said third Earl. And there was a provision that, in the event of the appellant dying in the lifetime of the third Earl (or of any breach of covenant by the appellant and failure to remedy the same within thirty days after notice), it should be lawful for the third Earl Grey to revoke the deed, either wholly or in part, but without prejudice to the title under any sale or mortgage prior to such revocation.

By an indenture dated the 26th of September, 1894, the third Earl Grey, in consideration of £5,000 stated to be paid to him by the appellant, released to him the said rentcharge of £4,000 and also released the power of revocation contained in the deed of the 19th of October, 1885, and the covenant by the appellant to retain unsold and to farm certain lands near Howick.

The third earl died on the 9th of October, 1894, and whereupon the appellant succeeded to the earldom. The average net annual income of the said estates exceeded £4,000. Estate duty was claimed from the appellant on the principal value (less incumbrances subsisting thereon) of the whole of the property comprised in the said deed of the 19th of October, 1885, as property passing on the death of the said third Earl Grey within the meaning of sections 1 and 2, sub-section 1 (*c*), of the said Act (which incorporates the provisions of section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11, sub-section 1, of the Customs Act, 1889), and the Court of Appeal held that the Crown was entitled to a declaration to that effect.

*Haldane, Q.C.*, and *Bremner*, for the appellant.

*Sir R. E. Webster, A.G.*, *Sir R. B. Finlay, S.G.*, and *Vaughan Hawkins*, for the respondent, were not heard.

Earl of HALSBURY, L.C.—There are some cases so extremely plain that it is difficult to give any better exposition of the question than that which the statute itself provides. In the present case I did not at first quite understand the argument presented to your lordships, and I am not absolutely certain that I have got much further now; but, at all events, forming my own judgment upon the statute, nothing appears to me much more plain than this—that what the Act of Parliament intended to prevent was that what has been described as a gift *inter vivos* should nevertheless reserve to the settlor some benefit, or some part of that which purported to be given *inter vivos*. In this case can anybody doubt that something has been reserved to the settlor? The settlement itself has reserved £4,000 a year, and has reserved a right also on the part of the settlor that all his debts up to the period of his death should be paid and the payment secured by the estate. It seems to me that it is burning daylight to say that that is not within the express language of the statute, and I am really wholly unable to understand why these words are not as plain in the statute itself as any explanatory exposition could make them. That is really all I have to say upon the subject. It seems to me it is a particularly plain case, and I move your lordships that this appeal be dismissed with costs.

Lords MACNAGHTEN, MORRIS, SHAND, JAMES OF HEREFORD, and BRAMPTON concurred.

*Appeal dismissed.*

Solicitors for the appellant, *E. Flux & Leadbitter.*

Solicitor for the respondent, *Solicitor to the Treasury.*

---

From C. A. (England). Feb. 13.

LONDON AND NORTH-WESTERN RAILWAY *v.* WALKER. (*a.*)

*Arbitration — Railway — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 35—*Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

*Upon an application to compel a railway company to take up an award properly made under the Lands Clauses Consolidation Act of* 1845, *the question as to whether compensation should be paid under that or other Acts cannot be entertained.*

*Objections of this character should be made in the action to enforce the award.*

Appeal from decision of Court of Appeal (A. L. Smith and Romer, L.JJ., Collins, L.J., dissenting) reported as *Reg.* v. *London and North-Western Railway*, [1899] 1 Q. B. 921, 47 W. R. Dig. 170, where the main contention was as to the effect of the special Act in substituting certain clauses relating to minerals. This was not dealt with by the House of Lords, but merely the point indicated in the headnote.

The Divisional Court (Wills and Kennedy, JJ.) had made absolute a rule *nisi* for a *mandamus* calling upon the London and North-Western Railway Co. to take up an award, which the Court of Appeal affirmed.

*Sir E. Clarke, Q.C.*, *Page, Q.C.*, and *Arthur Underhill*, for the appellant.

*Cohen, Q.C.*, *Dugdale, Q.C.*, *W. J. Noble*, and *Pease*, for the respondents, were not heard.

---

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Earl of HALSBURY, L.C.—It seems to me that the course pursued by the railway company has been misconceived. The duty is a plain duty under the Act of Parliament if it was an arbitration under the Lands Clauses Act. The question of whether or not the subject-matter of discussion at the arbitration was properly entered into, and whether or not the rights of the parties are regulated by the earlier or by the later statute, seems to me to be irrelevant to the question now before your lordships. The question here is whether there was an arbitration properly constituted under the provisions of the Lands Clauses Act. If there was, the Act specially enacts that under such circumstances the railway company shall take up the award. It does not conclude the rights of the parties. When the award has been taken up, any objection to the award which can by law be made can then be made in an action upon the award; but at this preliminary stage how are your lordships to say that the Act of Parliament does not apply? Of course, if it could be made out that this was a proceeding *coram non judici* it might well be that your lordships would not enforce the duty which is by the statute cast presumably only upon those who have engaged in a proceeding which is, *primâ facie* at all events, a valid one. Here it has been admitted in the frankest possible manner, and I think quite rightly admitted, that the umpire appointed by the Board of Trade was rightly appointed, and that, he being rightly appointed, the proceedings before him were perfectly regular.

The effect of having made a protest, whatever that effect is, may, for aught I know to the contrary, be available hereafter to the parties; but it is impossible not to see that the very reason why they agreed to appoint (although under circumstances which appear to me to have been only calculated to create further expense) was this: They said, "If we do not appoint, the question will arise in this acute form, that they will proceed against us *ex parte*, and, of course, their own arbitrator is very likely to give them very large damages." That is what moved them to do it, and for the express purpose, therefore, of preventing the other side from proceeding *ex parte* they did that the very doing of which assumes its validity because it assumes the effectual bar to the proceeding *ex parte*. They cannot have it both ways. Either it was a valid appointment so as to prevent the *ex parte* proceedings, or it was not a valid appointment. They did prevent the *ex parte* proceedings, and I think, at present at all events, whatever may hereafter happen, we must assume it was validly done. Indeed, as I have said, it has been admitted by the learned counsel with great candour and propriety that it was a valid appointment and a valid arbitration. Why are your lordships now to interfere to prevent that which the statute says shall be the consequence of such an arbitration, and of an award made under that statute? I am really unable to give any answer to that question.

With all respect to Collins, L.J., he appears to me not to have really dealt with the point at all. I do not know whether he had the same candid admission before him as your lordships have had to-day, but he appears to have treated it (and at one time there was some reason to suppose some of your lordships took that view) as if it was entirely without jurisdiction, and, if so, of course a different question would arise; but it cannot be assumed now that it was without jurisdiction, and if there was jurisdiction there is the award and there is the statutable duty to take it up. Now, whatever may be the rights of the parties hereafter, your lordships are entertaining the comparatively immaterial question whether or not the fees of the arbitrator should be paid in order to decide important rights between these two parties. But that has no relation, at all events, to the plain duty created by the Act of Parliament under the circumstances with which your lordships are dealing.

I therefore move your lordships that this appeal be dismissed with costs, and the judgment affirmed.

Lord MACNAGHTEN.—I am entirely of the same opinion.

When once it is admitted that, notwithstanding the curious and cumbrous form in which the railway company appointed their arbitrator, they did really intend to join in an arbitration under the Lands Clauses Consolidation Act, it seems to me that the statutory consequence must necessarily follow, and that they must take up this award. It would not prejudice their rights hereafter when they come to litigate the question after they know what the award is, and if they desire to raise any question it will be perfectly open to them to raise it hereafter. Whether they might at an earlier stage have applied for an injunction to stay the proceedings it is not necessary to consider.

Lords MORRIS, SHAND, JAMES OF HEREFORD, and BRAMPTON concurred.

*Appeal dismissed.*

Solicitor for the appellant, *C. H. Mason.*

Solicitors for the respondent, *Whitfield & Harrison.*

---

## Court of Appeal.

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — March 13.

HICKMAN v. MAISEY. (a.)

*Highway—Trespass—User of highway.*

*The plaintiff was the owner and occupier of land crossed by a public highway, the soil of which was vested in him. The plaintiff had granted to a trainer of racehorses a licence for valuable consideration to exercise and train his horses upon the land. The defendant, who was the owner of a sporting newspaper, went upon the highway each morning for a considerable time and walked up and down it between two points about fifteen yards apart, not for the purpose of using it as a highway, but for the purpose of watching the performances and trial gallops of the racehorses on the adjoining land and taking notes thereof. The information thus obtained he published in his newspaper. The plaintiff brought an action of trespass, alleging that the acts of the defendant caused annoyance and detriment to himself and to his licensee.*

*Held, that, as the defendant was not using the highway for the purposes for which it was dedicated as a highway, but for the purpose of carrying on his business there, he was a trespasser.*

Application for judgment or a new trial in an action tried before Day, J., and a jury.

The action was brought to recover damages for trespass and for an injunction.

The plaintiff was the owner and occupier of certain

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

land in Wiltshire, largely consisting of down land, through which ran a public highway. The soil of the highway was vested in the plaintiff. The plaintiff had granted a licence for valuable consideration to one Robinson, a trainer of racehorses, to exercise and train his horses on part of the down land.

The defendant was one of the proprietors of a sporting newspaper in which the performances and trials of racehorses were recorded. He used to go each morning on the highway in question, near to the place where the racehorses were being exercised, and used to walk up and down the highway between two points fifteen yards apart for about an hour and a-half, watching with glasses the performances and trial gallops of the horses, and taking notes thereof. The information thus obtained he published in his newspaper. Robinson complained to the plaintiff of the acts of the defendant as being injurious to his business, and the plaintiff thereupon gave the defendant notice to discontinue the acts complained of. The defendant refused to do so, and the plaintiff brought this action to recover damages for trespass by the defendant to the soil of the highway and for an injunction to restrain the defendant from any repetition of the acts complained of, alleging that the acts were an annoyance and caused damage to him and to Robinson, his licensee.

At the trial the learned judge directed the jury that if the defendant had frequented the highway, not for the purpose of passing and repassing along it as an ordinary wayfarer, but for the purpose of carrying on his business there by watching racehorses, it was a trespass; but that if the defendant had only used the highway for the purpose for which it was dedicated to the public, that is, as a wayfarer, to pass and repass along it, it was not a trespass.

The jury found that the defendant did not use the highway as an ordinary wayfarer, and assessed the damages at 1s. Judgment was accordingly entered for the plaintiff, and an injunction was granted.

*Duke, Q.C.* (*J. W. McCarthy* with him), for the defendant.—The defendant was not committing an act of trespass on the highway. He was only passing and repassing up and down between two points on the highway watching, as he was entitled to do, what could be seen from the highway. A person is entitled to look about him when walking along a road, and cannot be prevented from taking notes of what he sees. Persons often stand about on highways to view processions passing, or to look at the scenery, and yet no one would say that in doing so they are trespassing on the highway. There must be some act of trespass on the highway subsequent to the entry on the highway. The wrongful act must be itself a trespass: *Shorland* v. *Govett*, 5 B. & C. 485. The intention with which a person goes on to a highway is immaterial unless there is a subsequent trespass to the soil of the highway. As Lord Cairns said in *Rangeley* v. *Midland Railway Co.*, 16 W. R. 547, at p. 549, L. R. 3 Ch. App. 306, at p. 311, a public highway is not an easement; it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing. The defendant did no act here which was a trespass to the highway. *Harrison* v. *Duke of Rutland*, 41 W. R. 322, [1893] 1 Q. B. 142, was a very different case. There the acts of the plaintiff consisted in placing himself on the road over which the grouse were being driven, and in waving his pocket-handkerchief and opening and shutting his umbrella so as to prevent the grouse from coming in the direction of the butts. Those were acts of interference with the duke's right of sporting over his own land. It was an active obstruction of the duke's legal user of his land. That was clearly a trespass.

He also referred to *Dovaston* v. *Payne*, 2 H. Bl. 527; *Reg.* v. *Pratt*, 3 W. R. 372, 4 E. & B. 860. [COLLINS, L.J., referred to *The Six Carpenters' case*, 8 Co. 146a; 1 Smith L. C. (10th ed.), p. 127.]

*J. A. Foote, Q.C.*, and *F. R. Y. Radcliffe*, for the plaintiff, were not called upon.

A. L. SMITH, L.J.—This is an action of trespass by the owner and occupier of certain land, over part of which he had granted a licence to a trainer of racehorses to exercise and train his horses. The alleged trespass complained of was committed on a highway, the soil of which was vested in the plaintiff. The defendant is what is commonly called a racing tout, and he had for a period of time used the highway for the purpose of watching the trial gallops of the racehorses on the downs, notwithstanding a notice to him not to continue to do so. He then published the information thus obtained, the result being that the land was depreciated in value as a training-ground for racehorses, and both the plaintiff and his licensee were damnified. The plaintiff thereupon brought this action of trespass. He alleges that the defendant has broken and entered his close. The defendant justifies on the ground that the *locus in quo* is a public highway, and that he was lawfully using it. Accordingly the question is whether it is made out that the defendant upon the occasion in question was using the highway for the purpose for which it was dedicated to the public—that is to say, for the purpose of passing and repassing along it. The evidence shows that the defendant walked up and down the highway between two points about fifteen yards apart at the time when the horses were having their morning gallops, and remained there each morning for about an hour and a-half watching the performances of the horses through glasses. It is said that that is not a trespass. It seems to me that unless the defendant shows that he was lawfully using the highway he does not prove his plea. The law as to what is a lawful user of a highway within the purpose for which it was dedicated to the public has been laid down in several cases. In *Dovaston* v. *Payne*, which is one of the leading authorities upon the point, it was said that the lawful user of a highway is for the purpose of passing and repassing along it. I agree with what Lord Esher, M.R., said in *Harrison* v. *Duke of Rutland*, that highways are, no doubt, dedicated *primâ facie* for the purpose of passage, but that things are done upon them by everybody which are recognized as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. It seems to me that that is a necessary development of the law as to the lawful user of a highway in the present day. A user of a highway by sleeping all night upon it can hardly be said to be a reasonable user of it. On the other hand, no reasonable person would be likely to complain of a person sketching on the side of a highway. I do not think that the acts of the defendant, who used the highway, not for the purpose of passing and repassing, but for the purpose of carrying on his business there to the detriment of the owner of the soil of the highway, can be said to be a reasonable user of the highway. For myself it is sufficient to say that this case is covered by the decision in *Harrison* v. *Duke of Rutland*. In that case the plaintiff used the highway, the soil of which was vested in the defendant, solely for the purpose of interfering with the rights which the defendant was lawfully exercising on another part of his land. With regard to the direction of the learned judge to the jury, I can see no misdirection. Nor

can I agree with the argument that the intention and purpose with which the defendant went on the highway are not to be taken into account in deciding the question whether or not the user is a lawful user of the highway. For these reasons I think that the appeal should be dismissed.

COLLINS, L.J.—I am of the same opinion. It is not easy to give an exact definition where the line should be drawn between the user of a highway as a highway and a user beyond that conferred by the dedication of the highway. It is not difficult, however, to put cases which are well on one side or other of the line. In the present case the user of the highway went well beyond the line which marked the proper user of the highway as a highway. It was argued for the defendant that when a person enters on a highway under a public right, if the question is going to be raised that the entry was not in the exercise of that public right, some act subsequent thereto must be found which is itself a trespass, so as to enable the court to say that the original entry was a trespass. Accepting that proposition, in my opinion there is evidence here to show a trespass by the defendant after his entry on the highway, because in the last resort the question must be whether what he did when on the highway was a reasonable user of the highway as such. Primarily a highway is dedicated to the public for passing and repassing along it. In modern times a legitimate extension of the doctrine as to the user of a highway for the mere purpose of passing and repassing along it has been recognized. For instance, if it were true that the cattle in *Dovaston* v. *Payne* casually eat some grass as they went along the highway, I do not think that they would be considered as committing a trespass on the highway. That is only an illustration of the principle that the right of passing and repassing along the highway is subject to all reasonable and legitimate extensions recognized as customary or necessary, owing to the requirements of the public becoming more extended as districts become more thickly populated. The larger user, however, to which a highway is thus rendered liable must always be such as is not inconsistent with the paramount right of transit over it. That is the kind of user to which Lord Esher referred in *Harrison* v. *Duke of Rutland*, when he said that "highways are, no doubt, dedicated *primâ facie* for the purpose of passage; but things are done upon them by everybody which are recognized as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser." It was then argued for the defendant that the court cannot inquire into the motive with which the defendant went on the highway. That contention seems to me to be contrary to all the old authorities. If we find a person using the highway outside the purpose for which it was dedicated to the public, that throws us back on the intent with which he entered. It is said that there is nothing here amounting to a trespass to show the intent with which the defendant entered on the highway, and in support of that proposition *Shorland* v. *Govett* was cited. That case, however, does not support the contention. It was a demurrer to a replication. The action was for trespass to the plaintiff's dwelling-house, and the defendant, who was the plaintiff's bailiff, justified under a *fi. fa.* The replication alleged that the defendant, shortly after he entered the plaintiff's dwelling-house and before the writ was fully executed, under colour and pretence of the writ unlawfully demanded, exacted, and received a larger sum of money than he was entitled to levy upon the plaintiff's goods, and that the plaintiff was obliged to pay to the defendant the whole sum demanded. It was pointed out by the judges that the demand and receipt of more than was due did not constitute a trespass, and that the replication did not show that the defendant held the goods longer than he was entitled to. If the defendant had done so, then the law would have adjudged by the subsequent trespass with what intent he had entered. Here the acts of the defendant on the highway can be looked at, on the authority of the *Six Carpenters' case*, to see *quo animo*, or with what intent he entered, namely, not for the proper user of the highway as such, but for the purpose of carrying on his business there as a tout.

ROMER, L. J.—I am of the same opinion. I cannot distinguish this case from *Harrison* v. *Duke of Rutland*. The defendant did an act on the highway which interfered with the use by the plaintiff of his land as a training ground for horses. He interfered with the plaintiff's undoubted right of user of his own land adjoining the highway. If the soil of the highway were not vested in the plaintiff, the acts of the defendant would not have been a trespass of which the plaintiff could have complained. But, as the soil of the highway belonged to the plaintiff, the question is whether the defendant came on the highway for the lawful user of the highway as such, or for the purpose of interfering with the lawful user by the plaintiff of his own land. We know that it was for the latter purpose that the defendant came on the highway. That brings the case clearly within the decision in *Harrison* v. *Duke of Rutland*. In that case Lord Esher, M.R., said: "But the plaintiff in this case, it should be observed, was doing that which comes within what Lord Campbell, C.J., said in *Reg.* v. *Pratt*—he was using this part of the highway, solely for the purpose of interfering with the rights which the owner of the land was exercising on another part of his land"; and Lopes, L.J., put it in the same way. I cannot see any distinction between that case and the present.

*Application dismissed.*

Solicitors for the plaintiff, *Goodale & Hobson*, for *Butterworth, Rose, & Morrison*, Swindon.

Solicitors for the defendant, *Prior, Church, & Adams*, for *A. E. Withy*, New Swindon.

---

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) March 3.

MILNER *v.* GREAT NORTHERN RAILWAY CO. (*a.*)

*Master and servant—Employment—Accident—Railway—Barmaid in refreshment room—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 3.

*A barmaid in the employment of a railway company while attending to her duties in a refreshment room at one of their stations, sustained accidental injury in consequence of a framed advertisement falling from the wall.*

*Held, that she was not employed on or in or about a*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

*railway within the meaning of section 7 of the Workmen's Compensation Act,* 1897, *and that, therefore, her employment was not an employment to which the Act applied.*

Appeal from an award of the judge of the Peterborough County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a barmaid who was employed by the Great Northern Railway Co. in their refreshment room at Peterborough Station. While she was attending to her duties in the refreshment room, a framed advertisement fell from the wall and caused her injury.

The question was whether the applicant's employment was an employment to which the Workmen's Compensation Act applied.

By section 7, sub-section 1, the Act applies to employment on or in or about a railway.

By sub-section 2 "railway" has the same meaning as in the Regulation of Railways Act, 1873.

By section 3 of the Regulation of Railways Act, 1873, "railway" includes "every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic."

The refreshment room in question formed part of the railway company's station buildings, the only entrance to it being from the station platform. It was directly managed by the railway company.

The county court judge was of opinion that, the refreshment room being part of a station used for purposes of public traffic, the applicant was at the time of the accident employed on or in or about a railway within the meaning of section 7, sub-section 1, of the Act, and he made an award in her favour.

The employers appealed.

*Montague Lush* (*A. Clutton Brock* with him), for the employers.—The applicant was not employed in the business of the company in their capacity as a railway company. The definition of "railway" includes every station belonging to a railway and used for the purposes of public traffic. The effect of incorporating this definition into the Workmen's Compensation Act is that the employment to which the Act applies must be limited to that business of the company which is concerned with public traffic. A refreshment room is not used for purposes of public traffic, and employment in a refreshment room is not concerned with public traffic. Parts of most stations are used for purposes which are only ancillary to the business of the company as carriers of public traffic, as, for instance, hotels, refreshment rooms, bookstalls, and lavatories. A refreshment room is used merely for accommodating passengers. Mere local proximity does not give a right within the Act. The words "or about" have the effect of extending the locality where the employment is within the Act. Probably a railway guard or porter, whose employment is within the Act, would be entitled to claim compensation if an accident happened to him in the refreshment room. He would carry his right with him into the room. But the mere fact of being employed in the refreshment room does not give a right within the Act.

*T. H. Walker*, for the applicant.—This case comes within the express words of the Act. The applicant was employed on a railway. For she was employed in this refreshment room, which is a part of Peterborough Station, that station being as a whole used for purposes of public traffic. And by the definition clause "railway" includes a station used for the purposes of public traffic. It is not necessary that each particular part of a station should be shown to be used for purposes of public traffic in the strict sense of that expression before it can be brought within the Act. [COLLINS, L.J.—Can a refreshment room be said in any sense to be used for the purposes of public traffic? Is not *South-Eastern Railway Co.* v. *Railway Commissioners*, 6 Q. B. D. 586, 29 W. R. Dig. 108, an authority to show that a refreshment room cannot be considered one of the reasonable facilities which a railway company are bound to provide for the receiving, forwarding, or delivering of traffic?] It is not necessary to consider what a railway company are bound to provide, or what it is reasonable for them to provide. It is sufficient that they do provide refreshment rooms, and they ought not to be allowed to escape liability on the ground that they are not bound to provide them.

A. L. SMITH, L.J.—I have come to the conclusion that this appeal ought to be allowed. In my opinion a refreshment room does not come within the meaning of a "railway" in the Workmen's Compensation Act coupled with the Regulation of Railways Act, 1873. By section 3 of the last mentioned Act "railway" is defined as including every station used for the purposes of public traffic. The question is whether a refreshment room can be said to be used for the purposes of public traffic; for in my opinion the definition is not meant to include every part of a station, where the station is used for the purposes of public traffic, but only includes that part of the station which is used for the purposes of public traffic. I think that an hotel, which is attached to a station and forms part of the same building, cannot be said to be used for the purposes of public traffic, neither can a bookstall. The learned county court judge has held that this refreshment room was used for the purposes of public traffic. There seems to me, however, good authority for saying that such a holding cannot be correct. In the case of *South-Eastern Railway Co.* v. *Railway Commissioners*, one of the questions was whether the Railway Commissioners had jurisdiction to order the railway company to reserve part of the station buildings at Hastings for refreshment purposes. The commissioners had assumed such jurisdiction, and ordered refreshment rooms to be provided. But the Court of Appeal held that they were wrong in doing so, and the ground of their decision was that refreshment rooms did not come within the meaning of "reasonable facilities for the receiving, forwarding, and delivering traffic," however desirable they might be for the comfort or convenience of passengers. That case shows clearly in which way the point now before us ought to be decided. Following that authority, I hold that a station refreshment room is not used for the purposes of public traffic, but is only for the convenience of passengers.

COLLINS, L.J.—I am of the same opinion. *Primâ facie*, no one would suppose that a barmaid employed in a refreshment room at a railway station came within the purview of an Act for the protection of railway employees against accidental injuries. And, when I look at the matter critically, as I am bound to do, I do not think that that part of a station building which is used as a refreshment room comes within the definition of "railway" contained in section 3 of the Regulation of Railways Act, 1873. It says that "railway" shall include every station used for the purposes of public traffic. This definition clearly lets in the *Hastings case*. The precise point there was whether refreshment accommodation was a reasonable facility for receiving, forwarding, and delivering traffic. If it was, the Railway Commissioners had jurisdiction to make the order which

they had made. The Court of Appeal held that it was not.

ROMER, L.J.—I agree. I think that this refreshment room, though it is a portion of the station building, ought to be considered as something apart from the station, in the sense that it is not included in a "station used for the purposes of public traffic" within the meaning of section 3 of the Regulation of Railways Act, 1873.

*Appeal allowed.*

Solicitor for the employers, *R. Hill Dawe.*

Solicitors for the applicant, *Bescoby & Williamson*, Retford.

## High Court of Justice.

Chan. Div. Stirling, J. — Feb. 10.

*In re* ASHTON'S TRADE-MARK. (*a.*)

*Trade-mark—Registration—Non-user—Non-appearance of proprietor—Removal from register—Service abroad of notice of motion.*

*A word was registered as a trade-mark in* 1891 *upon the instructions and in the name of an American giving Chicago as his address, with the name and address of an English firm of patent agents as his address for service. In* 1899 *an American company applied for the registration of the same word as their trade-mark, they having used it for a long time in America and also more recently in England. This application was objected to by the comptroller, in view of the previous registration. Thereupon inquiries were instituted by the company, the result of such inquiries being that the registered proprietor could not be found to have ever used the mark, or done any business either in America or in England; that he could not be traced in Chicago or elsewhere; that letters addressed to him at Chicago were returned through the Dead Letter Office; and that the patent agents named as the address for service could give no information with respect to him. The company then gave notice of motion to rectify the register by expunging the mark, and left a copy of this notice at the address for service and sent another copy of it in a registered packet to Chicago, accompanied by a letter as directed in* In re Compagnie Générale d'Eaux Minérales et de Bains de Mer, 40 *W. R.* 89, [1891] 3 *Ch.* 451.

*On proof of these facts, and the registered proprietor not appearing, though more than twenty-eight days had elapsed since the dispatch of the packet and letter to Chicago,*

*Held, that the mark should be expunged.*

This was a motion by the Hillside Chemical Co., an American company of New York, by which they applied to have the register of trade-marks rectified by the removal therefrom of the trade-mark consisting of the word "Terraline" standing in the name of William Henry Ashton.

The applicants had done an extensive business in a medicated oil called "Terraline" in America since 1886, and in England since 1898.

In 1899 they applied for the registration of this word in England as their trade-mark, but met with the objection that the identical word was standing on the register for the same class of goods in the name of Ashton, whose address was given as Chicago, with the name and address of an English firm of patent agents as his address for service. Upon inquiries being made by the company, it appeared that these patent agents had been instructed in 1891 by a patent agent of Ottawa, in Canada, to obtain, and had then obtained, the registration of the mark on behalf of Ashton, but that they had never seen him and could give no information with respect to him. No indication could be discovered that he had ever used the mark or done any business either in America or in England; he could not be traced in Chicago or elsewhere, and letters addressed to him at Chicago were returned through the Dead Letter Office. The company thereupon gave notice of motion to rectify the register by expunging the mark, and on the 10th of January, 1900, a copy of this notice of motion was sent in a registered packet to Ashton at Chicago; a copy was also left at the address for service, but the patent agents were not willing to accept service. The Comptroller of the Patent Office was also served, but did not appear in the proceedings.

*L. B. Sebastian*, for the applicants.—Upon the evidence it must be taken that Ashton has never done any business in this country, and that he never used or had any *bonâ fide* intention of using the mark he registered. This being so, the mark is an unused mark obstructing a *bonâ fide* applicant, and should be expunged, as was done in *In re Batt's Trade-Marks*, [1898] 2 Ch. 432, [1899] A. C. 428. The registered packet containing the notice o motion and letter was sent in accordance with the direction given in *In re Compagnie Générale d'Eaux Minérales et de Bains de Mer*, 40 W. R. 89, [1891] 3 Ch. 451, and thirty-one days have elapsed since the date of it being posted to Chicago, whereas twenty-eight days after service is the time for appearance for a party at New York (see Annual Practice, 1900, p. 1043).

STIRLING, J., was satisfied that every proper attempt had been made to serve Ashton, and, upon the evidence produced, ordered that the mark should be expunged from the register.

Solicitor, *C. Urquhart Fisher.*

Chan. Div. Cozens-Hardy, J. — Jan. 16.

WEST *v.* DIPROSE. (*a.*)

*Bill of sale—Payment by instalments—Authority to sell mortgaged property—Sale before instalments were due—Interest subsequent to sale.*

*Where repayment under a bill of sale was to be made by monthly instalments extending over a certain period, and where before the expiration of that period the mortgagee by agreement with the mortgagor sold the security, and deducted from the purchase-money the principal and interest due to him up to the end of the period,*

*Held, that the mortgagee could only claim the principal and the interest up to the date the security was realized.*

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

By a bill of sale dated the 17th of September, 1898, made between the plaintiff Helena West, as the mortgagor, and the defendant Henry Diprose, as the mortgagee, the mortgagor, in consideration of the sum of £500 then paid to the mortgagor by the mortgagee, assigned to the mortgagee all and singular the several chattels and things specifically described in the schedule thereto annexed then in and about the premises known as 17, Ovington-gardens, South Kensington, by way of security for the payment of the said sum of £500 and interest thereon at the rate of 60 per cent. per annum; and it was further agreed that the mortgagor should pay to the mortgagee the principal sum aforesaid, together with the interest thereon, by monthly instalments of £50 each, until the whole debt, including principal and interest had been liquidated, the first payment to be made on the 17th of October, 1898.

A further clause was inserted that the chattels assigned should not be liable to seizure or to be taken possession of by the mortgagee for any cause other than those specified in section 7 of the Bills of Sale (1878) Amendment Act, 1882.

The first instalment was paid, and shortly afterwards the plaintiff arranged with the defendant that the defendant should take possession of the house and furniture and sell the same, and after repaying himself what was owing to him on the security of the bill of sale should pay the balance to the plaintiff.

The defendant sold the house and furniture on the 3rd of January, 1899, for the sum of £750, and submitted a statement of account showing a balance in the plaintiff's favour of £6 7s. 2d.

In this account one item was as follows: "Loan, interest, stamps, registration, inventories, £650."

The defendant subsequently allowed the sum of £12 10s. in respect of stamps, registration, and interest. The plaintiff claimed that the defendant was only entitled to the sum of £550 for principal and interest, being the amount due up to the date of the realization of the plaintiff's property on the 3rd of January, 1899.

The question turned on the issue whether the defendant could charge interest at the rate of 60 per cent. for the whole time during which the security was intended to continue.

*A. R. Ingpen*, for the plaintiff, claimed that the defendant could only charge interest for the four months during which the bill of sale continued: *Weardale Coal and Iron Co.* v. *Hodson*, 42 W. R. 424, [1894] 1 Q. B. 598.

*Cababé*, for the defendant, argued that the defendant was acting as agent for the plaintiff in the matter of the sale, and the defendant could deduct the amount for which the plaintiff was liable under the bill of sale: *Ex parte Ellis*, 46 W. R. 531, [1898] 2 Q. B. 79; *Forster* v. *Clowser*, [1897] 2 Q. B. 362, 46 W. R. Dig. 123.

*A. R. Ingpen* replied.

COZENS-HARDY, J., stated the facts, and continued: Under the bill of sale, if nothing more had happened, I think the mortgagor could not have compelled the mortgagee to receive the money except by instalments. But if the mortgagee took steps to realize his security, I think the court would only have held due to him the principal and interest up to the date when the principal sum was paid off, for the reason that the mortgagee had taken steps to show that he was not insisting upon his strict bargain. But the Court of Appeal has decided in the case of *Forster* v. *Clowser* that where under the interpleader rule, ord. 57, r. 12, goods or chattels have been seized or taken in execution by a sheriff, and the judge has thought fit to direct a sale and the application of the proceeds of the sale in such manner and upon such terms as may be just, it is not just under such circumstances as these that the bill of sale holder should get more than his interest up to the date when he received the actual cash. The principle is that the mortgagee cannot be compelled to take his mortgage money except under the terms of his own contract, but if he takes steps to get the money back either by his own act or by the order of the court under the interpleader rules then interest is only to be paid up to the time of realization.

The present case turns upon a sale which took place in virtue of an authority given to the mortgagee by the grantor. The owner of the bill of sale elected to sell the property, to receive the money and to deduct his due. I do not think there is any rule of the court which hinders me from doing what is clearly just—namely, that the interest at the rate of 60 per cent. must stop from the moment when the principal money was received by the mortgagee. In saying this I intend to follow the rule as laid down in *Forster* v. *Clowser*.

Solicitors, *Apps & Son; John Westcott.*

---

Chan. Div.
Buckley, J. } March 2, 5, 6, 7.

J. C. & J. FIELD (LIMITED) v. THE WAGEL SYNDICATE (LIMITED).
*In re* J. C. & J. FIELD'S TRADE-MARK. (a.)

*Trade-mark—Registered five years—"Savonol"—Invented word—Foreign word with meaningless affix—Action for infringement heard together with cross-motion to rectify—Certificate of right to exclusive use—Patents, &c., Act,* 1883 (46 & 47 *Vict. c.* 57), *s.* 77a.

*The word "Savonol," being meaningless, is an "invented word," and as such is capable of being registered as a trade-mark for soaps, notwithstanding that the French word "savon" had been used for many years in the soap trade. Even if "Savonol" does suggest "savon" and "soap," it is only a covert or skilful allusion to the character or quality of the goods, and may still be an "invented word."*

*A meaningless affix like "ol" is distinguishable from such terminations as "ette" and "ine," which indicate resemblance.*

Eastman's Photographic Materials Co. (Limited) v. Comptroller-General of Patents, Designs, and Trade-Marks, 47 *W. R.* 152, [1898] *A. C.* 571, 15 *Rep. Pat. Cas.* 476, *commented on.*

*Where a motion to rectify the register by the removal of a trade mark more than five years old is heard together with an action for infringement of the trade-mark as one matter, the court has power under section* 77a *of the Patents, &c., Act,* 1883, *to grant a certificate that the right to the exclusive use has come in question.*

Action and motion.

In March, 1890, the plaintiffs and respondents, J. C. & J. Field (Limited) registered the word "Savonol" as a trade-mark for common soaps, detergents, and soft soaps, as No. 96,997. The

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

defendants and applicants, the Wagel Syndicate (Limited), were incorporated in 1899, and had been trading in soft soap under the name of "Savoline." The plaintiffs in the action asked for an injunction to restrain the defendants from passing off their goods as the plaintiffs' goods, and to restrain the infringement of the plaintiffs' trade-mark. The defendants brought a cross-motion for an order that the trade-mark register might be rectified by the removal of the trade-mark No. 96,997. The judge before whom the matters were pending made an order that the motion was to be heard with the action, and on the same oral evidence. Accordingly, upon the trial of the action and hearing of the motion, this course was followed, and the action and motion were treated as one matter. The case, however, is reported upon the questions that arise in respect of the motion to rectify. It was admittted at the trial that the word "savon" had been for many years used in the soap trade, as in the case of the toilet soaps, "Savon de luxe," "Savon regina," "Savon velours."

*John Cutler, Q.C.*, and *A. J. Walter*, for the applicants, the Wagel Syndicate (Limited).—The comptroller does not appear, as we have undertaken to give him notice if we ask for anything except simple removal of the mark. The application to rectify must be by motion, as the mark is five years old: *Apollinaris Co.* v. *Herrfeldt*, 4 Rep. Pat. Cas. 478. We are "parties aggrieved": *Batt (John) & Co.* v. *Dunnett*, [1899] A. C. 428, 15 Rep. Pat. Cas. 534. "Savonol" is not an invented word. It is composed of "savon," which is French for soap, and is commonly used in the soap trade, and of the affix "ol." It therefore only slightly differs from a word indicating character or quality. You could not register, *e.g.*, "Win-ol" for a kind of wine, just as you cannot register "Satinine" for starch to produce a satin appearance: see remarks of Lord Herschell in *Eastman Photographic Materials Co. (Limited)* v. *Comptroller-General of Patents, &c.*

*H. Terrell, Q.C.*, and *Sebastian*, for the respondents, J. C. & J. Field (Limited), were not called on on the motion.

BUCKLEY, J.—The defendant company, incorporated in 1890, say that they are "persons aggrieved" by the word "Savonol" being upon the register because, being traders in soft soap, the area of their trade is affected by that fact. I have then to consider whether "Savonol" is an invented word. By section 10 of the Patents, &c., Act, 1888, substituted for section 64 of the former Act, a trade-mark may be (sub-section (*d*)) "an invented word" or "invented words," and (sub-section (*e*)) a word or words having no "reference to the character or quality of the goods, and not being a geographical name." The case of *The Eastman Photographic Materials Co. (Limited)* v. *The Comptroller-General of Patents, &c.*, decides that an invented word can be registered, although it has reference to the character or quality of the goods, that is to say, that sub-section (*d*) has to be read by itself, and not in conjunction with sub-section (*e*). [His lordship then read passages from the judgments of the learned law lords in *Eastman, &c., Co. (Limited)* v. *The Comptroller of Patents, &c.*, on pages 47 W. R. 152–154, [1898] A. C. 577, 581.] The termination "ine" in "Satinine," referred to by Lord Herschell, and in such words as "crystalline" and "maltine" indicates a resemblance to the principal word. The word "Savonol" has to me no meaning. I am not acquainted with "ol" as an affix to express a sub-meaning of the principal word. It means nothing as far as I know. Mr. Cutler puts to witnesses words like "savonette," which is to me a totally different thing, "ette" is a form of diminutive in French, and "savon" is soap, but "savonal" has no meaning. Lord Macnaghten says, page 47 W. R. 155, [1898] A. C. 583, "If it is an invented word, if it is 'new and freshly coined' (to adopt an old and familiar quotation), it seems to me that it is no objection that it may be traced to a foreign source, or that it may contain a covert or skilful allusion to the character or quality of the goods." If "Savonol" does suggest to the hearer "savon," and if he happens to know French—I take it many of the people who buy soft soap do not know French—he might think that it was "a covert or skilful allusion to the character or quality of the goods." But Lord Macnaghten says that this is no objection. It is true Lord Shand says (47 W. R. 155, [1898] A. C. 585), "The employment of a word in such" (*i.e.*, ordinary or common) "use with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an invented word, and a word would not be invented which with some trifling addition or some trifling variation still leaves the word one which is well known or in ordinary use. . . . It is on these words that the applicants principally rely. . . ." I do not think Lord Shand intended anything different from what was said by the other learned lords. The applicants rely on the fact that for many years people who in the trade have spoken of soap by the French instead of by the English word. I do not think that that makes "Savonol" any more or less an invented word. The motion to rectify the register fails.

[In the action for infringement his lordship held that the infringement was proved, and gave judgment for the plaintiffs.]

*Terrell, Q.C.*, asked for a certificate under section 77*a* of the Patents, &c., Act, 1883, that the right to the exclusive use of the mark had come in question. *Cutler, Q.C.*, pointed out that there was a difficulty in the court doing this, as the section only applied to cases where the right to the exclusive use had come into question in an action for infringement, and that here it had come in the motion, and could only come on in a motion, as it was a five-years' mark.

*Terrell, Q.C.*, and *Sebastian*, for the respondents.—The motion and action came on as one matter, and therefore the right to the exclusive use may be said to have come into question in the action.

They cited the following cases where certificates had been granted: *Barlow & Jones (Limited)* v. *Jabez Johnson & Co.*, 7 Rep. Pat. Cas. 395; *Apollinaris Co. (Limited)* v. *Snook*, 7 Rep. Pat. Cas. 474, at p. 478; and *Pinto* v. *Badman*, 8 Rep. Pat. Cas. 181, but these were cases where the trade-mark was not five years old, or where the question had not been raised. They also referred to *Benjamin Edginton (Limited)* v. *John Edginton (Limited)*, 6 Rep. Pat. Cas. 513, 38 W. R. Dig. 197.

BUCKLEY, J.—Where there is an action for infringement and a motion to rectify the register, the question as to the right to the exclusive use of the trade-mark may come in question upon the motion and not in the action if you are going to divide the two. I have to determine whether in this case the right came in question in the action, if "action" in section 77*a* means action as distinguished from motion. The mark in this case has been registered more than five years, with the result that under section 76 of the Act the registration is conclusive evidence of the right to the exclusive use subject to the provisions of the Act, one of which (section 90) enables

the court on a motion to rectify, to remove the mark. In a sense, then, the right to the exclusive use of this mark cannot come in question in the action, but only on the motion, the jurisdiction of the court being a statutory one. But if I could not in this case give the certificate, it seems to me that the owner of a trade-mark registered for more than five years could in no case get a certificate under section 77*a*. This result is so inconsistent with the spirit of the Act that I do not think I ought to come to such a conclusion. I think that under the circumstances of this case I can, and I do therefore, decide that the right has come in question in the action; and I shall give the certificate asked for.

I wish to add that the order I am making is in some sense *ex parte*, as the defendants and applicants are not interested in the question. If hereafter a defendant in some future action is sought to be charged with solicitor and client costs upon the strength of this certificate it will be perfectly competent for him to argue that the court had no jurisdiction to make it, and the question can then be decided after both sides have been heard.

Solicitor for the plaintiffs, *Edward Chester*.

Solicitors for the defendants, *Lemprière & Co.*

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 19.

FENNER *v.* BLAKE. (*a*.)

*Landlord and tenant—Tenancy from year to year not in writing—Parol agreement to give up possession of premises at a particular date—Surrender by operation of law—Estoppel by conduct—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 3.

*Under a three years' agreement in writing the defendant B. became tenant of certain premises belonging to the plaintiff F., and after the expiration of his tenancy in March,* 1898, *B. remained on in possession as tenant from year to year.*

*In December,* 1898, *B. asked F. to release him from his tenancy, and it was verbally agreed that B. should go out on the 24th of June following. F. placed a notice board on the premises that the same were "to be let," and subsequently sold the premises to a third party, who bought with possession at Midsummer,* 1899.

*On the 24th of June,* 1899, *the defendant refused to give up possession.*

*In an action of ejectment brought by F. against B.,*

*Held, that the plaintiff was entitled to judgment on two grounds:* (1) *Because the agreement of December, although bad as an agreement to surrender by reason of it not being in writing, was neveertheless an acceptance of a new tenancy by B., which was to end at Midsummer,* 1899, *and that acceptance worked a surrender of the old tenancy by operation of law; and* (2) *because the defendant, by his conduct in standing by and permitting the plaintiff to contract an obligation with the purchaser, was estopped from denying that his tenancy was other than that upon the footing of which he allowed his landlord to sell the property to the purchaser.*

Appeal by the defendant from the judgment of the judge of the county court of Norfolk, holden at Yarmouth, who had entered judgment for the plaintiff in an action for possession of a tan-office, shop and premises. The appeal was brought on the ground that the defendant was tenant from year to year from March, 1898, and that no sufficient notice to determine the tenancy had been given or proved; and that an alleged agreement to quit or surrender the premises being verbal only, it was, if proved insufficient at law, to determine the tenacy or entitle the plaintiff to possession by reason of section 3 of the Statute of Frauds.

The premises were originally let by the plaintiff to the defendant on the 25th of March, 1895, for three years at a rental of £40 per annum, and after the expiration of the three years the defendant remained on, and continued to pay rent as before as tenant of the premises from year to year. The plaintiff at the trial gave evidence to the effect that in December, 1898, the defendant asked to be released from his tenancy, and that an arrangement was then come to whereby the defendant was to give up possession on the 24th of June, 1899. A board was put up stating that the premises were "To be let." On the 8th of February the defendant made an offer of £30 a year for the premises, which was refused. The plaintiff subsequently found a purchaser to whom he agreed to sell the premises with possession on the 24th of June. He informed the defendant that he had sold the premises, and told him he could leave on the 25th of March if he chose. This the defendant refused to do unless he had a quarter's rent, £10, allowed him, saying that otherwise he should stay on until the 24th of June. In cross-examination the plaintiff said: "The agreement was mutual and came to this—that if the defendant found a tenant, the tenancy should be given up. I did not refuse to release him. I did not refuse to accept a tenant in his place. Six months' notice was understood from the date of our interview in December. He might have gone out in March if he had wished, but he wanted £10 for doing so. In the ordinary course of events the tenancy would have terminated in March, 1900. The agreement between us was that the defendant should remain till June, unless in the meantime another tenant was found.

On the 24th of June the defendant refused to give up possession. The plaintiff brought ejectment. At the hearing the defendant pleaded that the agreement to surrender the premises in June, not being in writing was void, and that his tenancy had therefore not been terminated.

The learned county court judge gave judgment for the plaintiff, and the defendant appealed.

*T. Willes Chitty*, for the defendant.—The agreement of December, 1898, was clearly bad as a surrender, for the surrender of a tenancy by section 3 of the Statute of Frauds must be in writing, whether the existing tenancy from year to year was created by parol or by implication: *Taylor* v. *Chapman* Peake N. P. Ad. Cas. 19; *Mollett* v. *Brayne*, 2 Camp. 103. The plaintiff's acceptance of the defendant's offer to quit did not operate as a surrender by operation of law: *Johnstone* v. *Hudlestone*, 4 B. & C. 922. [CHANNELL, J., referred to *Lyon* v. *Reed*, 13 M. & W. 285, where it was held that a surrender by deed is unnecessary where the former lessee is the party who takes the new lease, as the fact of his so doing is evidence that the new lease has been accepted by him and such acceptance operates as a surrender in law; but it is not enough that the lessee agrees to an act done by the reversioner.] In *Phené* v. *Popplewell*, 10 W. R. 523, 12 C. B. N. S. 334, it was held that a parol agreement by a tenant from year to year to surrender followed by a lease or sale to a third person with the tenant's consent and the tenant gave up possession, operated as a surrender, but here the tenant never did give up possession.

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

See also *Wallis* v. *Hands*, 41 W. R. 471, [1893] 2 Ch. 75.

*H. Dobb*, for the plaintiff.—The landlord sold the premises to a third party acting in good faith on an agreement under which the defendant agreed to give up possession before the termination of his tenancy. In *Phené* v. *Popplewell*, it was held that there had been a surrender of the premises by operation of law, by agreement of the parties followed by a taking possession on the part of the landlord. Here the landlord having altered his position on the faith of the agreement to surrender, the defendant is estopped from disputing that his tenancy was not terminated in June, and when there has been a dealing with the property by the landlord with the tenant's consent, the latter, who stands by, cannot afterwards set up the Statute of Frauds.

*T. Willes Chitty*, in reply.—In *Phené* v. *Popplewell* the landlord entered, but here there has been no possession by the plaintiff inconsistent with the continuance of the defendant's term: *Oastler* v. *Henderson*, 2 Q. B. D. 575, 25 W. R. Dig. 198. For the same reason this case differs from *Lyon* v. *Reed* and is within the principle laid down in *Baring* v. *Abington* (1892), 2 Ch. 374.

CHANNELL, J.—This case becomes of some importance owing to the number of cases that have been cited during the argument. I think myself that the judgment of the county court judge must be affirmed, because it appears to me that there are two grounds upon either of which the plaintiff is entitled to succeed. The defendant was a tenant who had an ordinary tenancy from year to year terminable by notice in March. The parties met in December, 1898; the defendant said he wanted to get rid of his tenancy, and not having given notice to quit in the folowing March, they agreed that the tenancy should end in the following June. The question is, What is the effect of that parol agreement? It is by no means uncommon for a landlord and tenant to meet and agree verbally to an alteration as to the rent to be paid in future, and at all events in cases where the tenancy was such that the contract creating it was not required by law to be in writing, as in the case of a tenancy from year to year, a parol variation of the terms as to rent would be perfectly good and sufficient in point of law. Then why may not equally an agreement as to the alteration of the date when the tenancy shall be determinable be a binding agreement though not in writing? Here the defendant agreed to accept a new tenancy for six months terminable in June in the place of the existing tenancy, and on the authorities the acceptance of a new tenancy works a surrender of the old tenancy by operation of law, and therefore on that ground the action is maintainable.

But there is also another ground why the plaintiff should succeed since the facts raise an ordinary case of estoppel, which is not displaced by the case of *Lyon* v. *Reed* relied on by Mr. Chitty. The defendant was in possession of the premises and he wanted to go away. He consented to his landlord selling the premises with a right to a purchaser to possession on a certain day in June—namely, the day in June that he said he would go out. The landlord sells with possession at that date, and thereby rendered himself liable to an action at the suit of the purchaser if it turned out he was unable to give him possession at that date. All this having been done by the landlord with the tenant's consent, it seems to me clear that the tenant is estopped from saying that his tenancy, whatever it was in fact, did not run out until after June.

It is an invariable practice when a reversion is put up to auction for the vendor to state what the terms of the tenancy are and when it expires, and if the tenant is communicated with before the sale and agrees that his tenancy is of such and such a character and thereupon the vendor so describes it and the property is sold on that footing, it is impossible to contend that the tenant is not estopped from saying that the tenancy is other than that upon the footing of which the property was sold. On this ground of estoppel also, in my opinion, the county court judge was right.

BUCKNILL, J.—I am of the same opinion. There seems to me to be ample evidence from the judge's notes that the parties here agreed that there should be a new tenancy for six months terminating in June and the acceptance of such a new tenancy amounts to a surrender by operation of law of the then existing tenancy. I also entirely agree with what my brother Channell has said upon the point of estoppel. Upon both grounds I think the judgment appealed from should be supported.

*Appeal dismissed; leave to appeal refused.*

Solicitors for the appellant, *Torr, Gribble, Oddie, & Co.*, for *Danby, Palmer, & Blake*, Great Yarmouth.

Solicitors for the respondent, *Howard & Fenner*.

---

Q. B. Div.
(Ridley and Darling, JJ.) Nov. 3.

LONDON COUNTY COUNCIL (*Appellants*) v. READ (*Respondent*). (a.)

*Bread—Sale of, otherwise than by weight—3 Geo. 4, c. 106, s. 4.*

*An inspector employed by the London County Council sent a man to purchase a loaf of bread at the respondent's shop. The man entered the shop and asked for a twopenny loaf, and was accordingly served by the respondent with a loaf for which he paid twopence. The loaf, before being handed to him, was not weighed by anyone in the shop in his presence, nor was any statement made to him as to its weight. On being weighed by the inspector, it was found to be 2¾oz. short of a 2lb. loaf. The loaf was similar in shape and appearance to loaves which are usually sold as 2lb. loaves.*

*Held, on a summons being taken out against the respondent under section 4 of the Bread Act of 1822, for selling bread otherwise than by weight, that it was no answer to the charge that the purchaser asked for a loaf of a specified value, and did not ask for a loaf of any particular weight.*

Case stated.

This was a case stated by the justices of the peace for the County of London.

Upon the hearing before the justices at the Town Hall, Kensington, on the 21st of March, 1899, of a summons upon complaint made by Harry Christopher Strugnell, an inspector in the employment of the London County Council (hereinafter called the appellants), against William Read (hereinafter called the respondent), that the respondent on the 15th of March, 1899, did sell, or caused to be sold, bread in other manner than by weight, contrary to the statute 3 Geo. 4, c. 106, s. 4, the following facts were proved.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The respondent is a grocer and general dealer carrying on business at a shop No. 202, North End-road, Fulham.

On the 15th of March H. C. Strugnell, in the course of his duties as an inspector appointed by the appellants, sent one Alfred Bond to purchase a loaf of bread at that shop.

Alfred Bond thereupon entered the shop and asked for a twopenny loaf. He was accordingly served by the respondent with a loaf for which he paid twopence. The loaf before being handed to him was not weighed by anybody in the shop in his presence, nor was any statement made to him as to its weight. There was no evidence given that it ever had been weighed, but the respondent stated (not on oath) that all the bread he sold at twopence was weighed beforehand. It was subsequently weighed by H. C. Strugnell and found to be 29¼ozs.—*i.e.*, 2¾ozs. short of a 2lb. loaf.

The loaf was an ordinary cottage loaf, similar in shape and appearance to loaves which are usually sold as 2lb. loaves.

It was contended for the appellants that the loaf so sold was, under the circumstances, sold otherwise than by weight, and that the respondent had been guilty of an offence against section 4 of 3 Geo. 4, c. 106.

On behalf of the respondent it was contended that he was not asked for bread by weight, but was asked for a twopenny loaf, and supplied one accordingly of that value. It was further contended that he was not a baker, but a seller of bread. That he bought this particular bread knowng it to be under 2lb., it having been made at 1¾lb. each loaf on purpose for sale at twopence a loaf, that he could not afford to sell 2lb. in weight at twopence; and that his price for 2lb. loaves was twopence halfpenny for "Chibnall's" and twopence three-farthings for "V. V." bread.

The magistrates were of opinion that if the purchaser had asked for a 2lb. loaf they should, of course, have convicted the respondent, but as he asked for a twopenny loaf they were of opinion that the vendor was under no obligation to sell him 2lb. of bread or any particular weight. They were further of opinion, having regard to the statement of the defendant, that the bread had been weighed at some time before the sale, although not by the respondent, to ascertain that it was under 2lb., so as to enable the vendor to sell it at twopence.

The justices therefore dismissed the summons.

The question for the decision of the court was whether their decision was right in law.

By the Bread Act, 1822 (3 Geo. 4, c. 106) s. 4 (which is the same as section 4 of the Bread Act, 1836 (6 & 7 Will. 4, c. 37), it is provided as follows: "From and after the commencement of this Act all bread sold beyond the limits aforesaid shall be sold by the several bakers or sellers of bread respectively beyond the said limits by weight; and in case any baker or seller of bread beyond the limits aforesaid shall sell or cause to be sold bread in any other manner than by weight, then and in such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding forty shillings, which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted shall order and direct; provided always, that nothing in this Act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same."

*Horace Avory*, for the appellants.—The decision of the magistrates was wrong; the justices thought that the fact of purchasers asking for bread of no particular weight relieved the vendor from the obligation of selling by weight. That is not so. The policy of the enactment is that all bread other than French or fancy should be sold by weight, and in no other manner. In the case of *Hill* v. *Browning*, 19 W. R. 21, L. R. 5 Q. B. 453, which was decided under section 4 of the Bread Act of 1836, which section is similar to the section under which the respondent in the present case was proceeded against, it was held that the bread must be weighed as bread before being sold, and that it is not sufficient that it be weighed in the raw state as dough.

No counsel appeared on behalf of the respondent.

Ridley, J.—I am of opinion that the decision of the justices in this case was wrong, and that they ought to have convicted the respondent. It is unfortunate that no one appears for the respondent to put before us something that might be argued on his behalf, and in the absence of anyone doing so we are unable to find such argument. We think the case must be remitted to the magistrates with the intimation that in our opinion they ought to have convicted.

Darling, J.—I agree.

*Appeal allowed.*

Solicitor for the appellants, *W. A. Blaxland.*

---

## House of Lords.

From C. A. (England). March 1.

Cartwright v. Soulcoates Union. (a.)

*Poor law — Rating — Assessment — Rateable value — Licensed premises—Trade profits.*

*When assessing licensed premises for the poor rate, the existence of the licence and the amount of business done thereon is proper matter of inquiry and consideration. Evidence of the actual profits made by the occupier are also admissable, but is to be avoided where possible.*

Dodds *v.* South Shields Assessment Committee, 43 *W. R.* 532, [1895] 2 *Q. B.* 133, *commented on.*

*Decision of the* Court of Appeal ([1899] 1 *Q. B.* 667, 47 *W. R. Dig.* 148) *affirmed.*

This was an appeal from a decision of the Court of Appeal (Earl of Halsbury, L.C., and A. L. Smith and Collins, L.JJ.), affirming that of the Divisional Court.

The appellant was tenant and occupier of the "Star and Garter" public-house, which was fully licensed, situate at the corner of two streets in the city and county of Kingston-upon-Hull.

By the rate for the relief of the poor, now appealed against, the appellant was rated on an assessment in respect of the said premises of £850 gross estimated rental, and £680 net rateable value.

The appellant gave notice of appeal to the general quarter sessions of the peace for the city and county of Kingston-upon-Hull against the rate and assessment, on the ground that he was over-rated.

(a.) Reported by C. H. Grafton, Esq., Barrister-at-Law.

By an agreement and by an order of Day, J., the matters of the said appeal were by consent ordered to be referred to the arbitration of a barrister-at-law. The arbitrator, after hearing the parties and the evidence adduced by them, made his award in the form of a special case for the opinion of the Queen's Bench Division.

On the hearing before the arbitrator, cross-examination of the appellant took place as to his weekly takings and payments; and evidence was given as to the actual number of persons observed to enter the appellant's premises during a certain period of fourteen days (during which they were under observation by the respondents), and a deduction therefrom of the amount of the annual trade done upon the premises by the appellant; and valuations of the premises on the basis that such an annual trade is done upon them, and including therein the value of such trade.

The arbitrator rejected the evidence of and disallowed the cross-examination of the appellant as to his weekly takings and payments, and found as a fact that—first, the goodwill attached to the premises, so far as it consisted of the personal connection between the appellant and his customers, was non-existent, or, if existent, of inappreciable value; secondly, that the personal qualities and capacity for business or management possessed by the appellant had no effect on the trade done or the profits made in the premises.

The arbitrator also held that, for the purpose of ascertaining the amount of the assessment of the appellant's premises, it was lawful to take into account—(*a*) the value of the trade already done there; (*b*) the value of the goodwill attached to the premises so far as it consists of the probability that the customers now resorting to the premises will continue to do so, whether the appellant continues to occupy the premises or not.

This was affirmed by the Divisional Court and the Court of Appeal.

*Balfour Browne, Q.C.*, and *H. S. Cautley*, for the appellant.

*Bray, Q.C.*, and *R. Cunningham Glen*, for the respondents.

Lord MACNAGHTEN.—Notwithstanding the able argument on the part of the appellants, I think this is a very simple case. To my mind it is a question of common sense and not a question of law. It is a question of common sense, having regard to the plain language of the Act of Parliament. What your lordships have to consider is whether the learned arbitrator proceeded on the lines on which the Act of Parliament directs or fairly indicates that he ought to proceed.

Now, what has the learned arbitrator done? He has found that in this particular case there does not exist the ordinary basis of computation, and he has excluded any inquiry into profits. In that I think he was perfectly right; not that the profits if they could be ascertained would not be an element in arriving at the rent which a tenant might reasonably be expected to pay, but that any further inquiry into profits should be avoided, because it would be oppressive. There is nothing that a tradesman so much dislikes as any inquiry into his profits. In some cases possibly it cannot be avoided, and then, according to the decided cases, it may be done; but in this case there has been no inquiry into profits. What the learned arbitrator has done is—he has taken into consideration the amount of business which this public-house was doing. Was he wrong in that? Surely the very first thing that a tenant who was going to make an offer for a house of this sort would do would be to consider (roughly, if he could not do it accurately) what amount of business he was likely to do there. It appears to me that the volume of business done in a public-house as apparent to the man in the street, if I may use such an expression, is the very first thing that a tenant proposing to make an offer for such a house would take into consideration. That really is all that the arbitrator has done. That, according to the case to which Mr. Bray referred us, which came before Lord Denman, is clearly one of the circumstances which would guide a person valuing the rent of such a house as this.

I think that the judgment of the Court of Appeal is perfectly right, and I do not think it is necessary to say anything more, because it is very inexpedient to multiply decisions, or to paraphrase the language of an Act of Parliament, or to lay down anything which in another case could be treated as a rule. All we have to consider is whether, in the particular circumstances of this case the arbitrator is right or wrong. I think he is perfectly right. Therefore I move your lordships that this appeal be dismissed with costs.

Lord MORRIS.—I concur, and I especially concur in the opinion that this is a very plain case.

The Act of Parliament states very concisely that the question to be solved is, what would it be reasonably expected that the premises would let for to a tenant? That has been paraphrased (and personally I do not object to it) into, what would a hypothetical tenant pay? Now, there does not appear to me to be any law at all in that question. I am told that two great divisions have been made by those who have built a superstructure of law upon that rather simple line in the Act of Parliament—into what are called "exceptional cases" and "ordinary cases," but I can find no such distinction in the Act of Parliament. The Act of Parliament leaves it general. The tribunal that has to assess is to decide what the premises would be reasonably expected to be let for. That may in certain cases like railways, gas companies, docks, &c., be most difficult to ascertain, because there is no probability—I might almost say no possibility—of considering that there a tenant would ever arise to take it. Therefore, in that case the tribunal is obliged to resort to a discussion as to the amount of profits that have been made, and to deduce some sort of estimate in a rough way from that to solve the problem of what the hypothetical tenant would pay.

The present case relates to a public-house, which is at a corner—they generally are, so as to capture two streets—and it is said that it was not competent for the arbitrator as a matter of law to take into consideration the amount of profits or to weigh that in his mind largely or lightly. I am sure I do not know which, because this case has been rather dealt with as if appeals could be made to the Court of Queen's Bench, the Appeal Court, and this House as to whether the arbitrator came to a right conclusion, not in point of law, but in point of fact. What error did he make in point of law? He asked himself almost the very first question that the hypothetical tenant would ask—namely, is this a house doing a good business or a bad business? Is it a house with what is properly called a roaring business, or is it a house that is going down for some reason or other, such as there being other houses in its neighbourhood? That is the very first question that a hypothetical tenant would put to himself. What have been the profits that have been made in it?—because that is the best proof as to whether it is doing a good business or not. True it is said A. B. might make good profits, but C. D. might lose. All that, it is to be presumed, the arbitrator would consider; he would not value it on the principle that it was always to have superlatively good occupiers, or the worst of

occupiers. I suppose he would as a sensible man take a sort of average between them. The contention, as I understand it, is that the arbitrator in deciding that question as to what a hypothetical tenant would pay is to be precluded as a matter of law from entering upon the very question which, as I have said, in my opinion, is almost the first question that the hypothetical tenant would put. It is true that the best way of ascertaining what the trade was which was going on would be the production of the books of the then tenant; but that was objected to. It is suggested that the case of *Dodd* v. *South Shields Assessment Committee* 43 W. R. 532, [1895] 2 Q. B. 133, decided that that is improper evidence. If it did so decide, I can only say that I entirely disagree with it; and not being bound by it here, as the Lord Chancellor was when sitting in the Court of Appeal—if it goes that length—I have not had the opportunity of looking into it. I am entirely of an opposite opinion.

It is said that this would be an inquisitorial inquiry, a mischievous one, and several other adjectives are applied to it. I do not see how it is inquisitorial if the parties themselves are ready to bring the evidence forward. There is no force put on a publican to produce his books; he is not in this inquisition threatened with the screw, and if he chooses not to bring forward his books he need not do so; and the arbitrator is then obliged to forage about for the purpose of ascertaining in the best way he can, under those circumstances, what the profits would be. As I have said, that question, in my opinion, is one of the most important factors in arriving at a conclusion as to what a sensible man would pay as rent for the premises.

On these grounds I am clearly of opinion that the decision of the Court of Appeal should be affirmed.

Lord SHAND.—I am of the same opinion. The simple question which had to be answered by the arbitrator, and which this House has now to consider in dealing with his award, is—At what rent would the premises be reasonably expected to let from year to year? I am of opinion with your lordships that the arbitrator has taken the proper elements into view in deciding that question.

It may be that in a case of this class it is not competent to prove, as the courts have held in *Dodds' case*, the amount of the actual detailed profits made by the tenant in the particular house in bygone years. The true ground for so holding is, I think, that such proof is or might be of an inquisitorial character. I can very well understand that on the part of the tenants it may be a very reasonable objection for them to make to evidence of that kind, that it would rip up affairs which they are not bound to disclose to the public in questions of this kind. If it were not so, it seems to me that such evidence would be admitted as an important element in ascertaining what trade has been done in the house; for really it appears to me that this would be the element of all others which a tenant might be expected to take into view in fixing the rent he ought to give for the premises. In this case the arbitrator made the trade actually done the main element in ascertaining the trade which might be expected to be done, and in reaching the rent which might reasonably be expected. In doing this I am of opinion that he was right, and I therefore concur with your lordships that the appeal ought to be dismissed.

Lord DAVEY.—I am of the same opinion, and I am so entirely satisfied with the judgments which were delivered in the Court of Appeal that I should not trouble your lordships with any observations were it not for the use which has been made in the argument addressed to your lordships of *Dodds* v. *South Shields Assessment Committee*. That case has been presented to us by counsel for the appellant as if it laid down some great principles of law. They elevated the distinction which is drawn in the judgments in that case between what they call exceptional cases and cases which are not exceptional into a principle of law, and they have gravely argued before your lordships that evidence which is admissible in the one case is not admissible in the other case. I say at once that I do not understand *Dodds' case* to have laid down any rule of the law of evidence; in my opinion, the learned judges merely intended to sanction the practice which had obtained in dealing with these cases of rating. I do not understand them to have laid down any new principle nor any old principle in the law of evidence, and if I thought that they had intended to lay it down that evidence which would be admissible in what the learned counsel is pleased to call exceptional cases would not be admissible in point of law in other cases, all I can say is I should hesitate very long before I accepted *Dodds' case* as correctly laying down the law.

The question whether evidence of a particular class is or is not admissible in prosecuting the inquiry which the statute prescribes to us—namely, what rent a tenant from year to year might reasonably be expected to give for the premises—must be the same question whatever the form of the inquiry be—whether the inquiry be of an easy character or whether it be of a complex character; whether it be in a case which occurs frequently in ordinary life or whether it be one that occurs only occasionally. It appears to me that all that *Dodds' case* purported to do was to lay down a very convenient rule of practice. It may be shortly stated, paraphrasing the language—for I am not intending to use the language that was used by the learned judges, but giving my own interpretation of it—that where the premises in question are premises of a character which have what may be described as a market price, where a valuer acquainted with that class of property can come and say, "Property of the class to which these premises belong lets for so much a year; I can readily procure a tenant for the premises for so much, and I cannot procure a tenant for more"—then you do not want to go into the trade done on the premises. You have there what the statute prescribes to you; and if you have evidence of that kind, if you have the market price and what Blackburn, J.—not using, I take the liberty to say, his own language, but the language of Adam Smith—calls the result of "the higgling of the market," you do not want to go into evidence of the particular character of the trade done on the premises; and in that case it is an exceedingly convenient rule of practice that you should not allow questions of an inquisitorial character which may be vexatious and mischievous to be addressed to the occupier of the premises unnecessarily.

Now, what is the true principle upon which this inquiry is to be conducted? I conceive it is that which is stated by Lord Blackburn in the *Mersey Docks case*, 22 W. R. 184, L. R. 9 Q. B. 84. It is quoted in the judgment of Collins, L.J., but I will take the liberty of beginning to read a little earlier: "If the hereditaments," he says, "are such as to afford peculiar facilities for carrying on any kind of business, that facility does, beyond all question, enhance the value of the occupation; but though the profits which may be reasonably expected to arise from such a business no doubt form an element in estimating the enhanced value of the occupation of the premises, the actual profits made do

not form any element, except in so far as they afford evidence of what might be reasonably expected to be made from the occupation of premises affording facility for carrying on such a business." I say, in answer to a suggestion that was made from the bar, that, in my opinion, Lord Blackburn was there laying down a general principle applicable to all such cases, and not merely one that applied only to exceptional cases where there is no market value or price or letting rent to which you can refer. I venture to think that that is founded upon common sense. I repudiate this distinction which has been made so much of, between exceptional and ordinary cases. You have in each case to find out in the best way you can what is the rent which a tenant may reasonably be expected to give, and if the best way under the particular circumstances is to ascertain the use which is made of the premises and the use which a tenant might expect to be able to make of the premises and the trade which he might reasonably expect to be able to carry on there; or, in other words, the facilities afforded by the premises for the carrying on of a large trade, that appears to me to be a most primary and elementary consideration in each case. If you are to take into account the fact that the premises command a trade, you must surely ask, what trade? Is it a large trade or is it a small trade? And I do not know myself any better test of what trade they may be expected to command than the trade which they actually do command. It is not that you rate the profits—it is not that you rate the man's skill and judgment and discretion in the mode of carrying on the business; but you have to ascertain what sort of a trade the hypothetical tenant, as he is called, may reasonably expect to be able to carry on on those premises.

I entirely agree in a passage in the Lord Chancellor's judgment, which I will take the liberty of quoting and adopting as an expression of my own mind. His lordship says: "It would be to my mind one of the most extraordinary things in the world if you could give expert evidence that such and such a house would be likely to command such and such a business, and yet not be able to verify that *à priori* opinion by proof of the fact that it did command such a business." A. L. Smith, L.J., says: "You may call it goodwill, or you may call it anything else you like, but it is legitimate evidence to show not only that it is a house capable of carrying on a good trade according to the matters which have to be taken into consideration by the hypothetical tenant; and he fortifies that evidence by saying it is carrying on a good trade because I see such and such things going on every day to my own knowledge."

That appears to me to sum up the whole of this case.

Lord BRAMPTON.—I am of the same opinion. It appears to me that, according to the dictates of good sense, the arbitrator has taken a very proper and correct view of this matter. The purport of the inquiry was, what would a tenant, who desired to carry on the business for which the house is adapted, in that house, give as the rent to a landlord who was willing to let the premises to him? It is said you must look at the value of the surrounding property, or, at all events, you are not to take into consideration the actual amount of the profit that was capable of being made in that house which is the subject of the inquiry.

In the first place, the proposition which is put forward by the arbitrator in the award which I have before me is this. He says: "I find as a fact that any person desiring to become a tenant of the appellant's premises in order to occupy them as a public-house would endeavour to ascertain the trade actually done thereon, by reference to the weekly or yearly takings, or otherwise, before deciding what rent he would pay." Undoubtedly it is obvious that is the course that any prudent intending tenant would take, and the question is, how is he to be satisfied with regard to what profits he could make if he did become a tenant and carried on the business in the house for which it was adapted? The house itself stands at the corner of the street—a very eligible position for a public-house to stand in. It is admirably adapted for the purpose of doing a large business, and it has a licence. The business that was carried on therein undoubtedly has yielded, as is admitted on all hands, a very considerable profit, and that profit in that position in that part of the town can only be made while the house stands there unapproached by any other of the same character. It can only be made by using that house, which has a licence already attached to it, in the way in which it has been used by the tenant for the last nineteen years. There is every reason to suppose that the customers who have been going there, spending their money and consuming liquor there, will continue to do in the future just as they have done in the past.

It is said that the trade is not to be taken into consideration. How would the landlord himself look at the matter apart from the tenant altogether? He would say: I have a house; it is a house capable of enabling a man to earn by diligence and the application of his own personal abilities £1,000 a year in that house. He wants to hire it from me. I am not going to let it to him for a mere percentage representing the interest upon what I have laid out in bricks and mortar upon the house; that would not represent what I think the value of the house is. It is upon a spot where custom is attracted to it. If he can make a thousand a year, as I think he can, I must have a suitable proportion—at all events a larger rent than I should have if the house were only capable of yielding him a profit of £100. I will put the case in this way: Supposing in a street which runs at right angles to another street so as to form in point of fact two streets two ordinary houses are built both alike in all their materials and in the accommodation which is provided. They are each licensed. The one house is let at £200 a year, but in that house there is very little custom done, but yet there is enough custom there to support a man who pays his £200 a year rent, and he is quite satisfied to pay that in that house. The house on the opposite side at the opposite corner of the street is capable of enabling a man to earn £1,000 a year. Is it right or reasonable or good sense to suppose that the landlord would let the one house for £200 a year to a man who could earn by diligence £1,000 a year in that house simply because the two houses were like each other? He must take into consideration the capability of the house, the position it is in, and the power it gives to a tenant who properly occupies it to make a very large sum of money for his own profit. It seems to me that common sense would dictate the course I have suggested to the landlord.

Now, what has the arbitrator done according to the finding?—for I rather prefer to take the language of the arbitrator himself. What has he found? He says: "I hold that although the profits of trade (as such) cannot be rated" (nobody contends they can), "yet in estimating the rateable value of a public-house, if the ability to carry on a gainful trade therein adds to the value of such public-house, that value cannot be excluded merely because it is referable to the trade." I think he has very properly found that, although the profits in this house cannot themselves

report at all; but, as I say, the clue to the judgment is what I have already pointed out; and therefore, to my mind, that decision presents no difficulty at all in arriving at the conclusion I have indicated—namely, that this judgment ought to be affirmed; and I therefore move your lordships that this appeal be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion. I think this case comes well within the principle of the decision in *The Greta Holme*, and on that I do not propose to add a single word. But, as I happen to have taken part in the decision of *The City of Peking case* in the Privy Council, I will say a few words about that case. I do not pretend to have a very accurate recollection of it; but I have endeavoured to refresh my memory, and, as far as my recollection goes, the question at issue in this case was not raised there. Certainly it was not raised directly, and I do not think it was presented to the court at all. In that case both the parties accepted up to a certain point the ruling of Dr. Lushington in the case of *The Black Prince*, Lush. 568. The only question was whether Dr. Lushington's ruling upon the particular facts of that case was applicable to the case of *The City of Peking*. In that case substituted service was provided, but the provision of substituted service was not a benefit at all to the persons injured by the collision, but to a different shipping company. In the case of *The City of Peking*, the parties admitted that the substituted service was provided at the expense of the wrongdoers, the Peninsular and Oriental Co., and that there had been no loss of profit whatever. Under those circumstances they claimed this extravagant amount or money in respect of the demurrage simply upon the authority of *The Black Prince*. They asked for nothing less. They asked for the whole sum as demurrage upon a vessel of that tonnage on the strength of the judgment of Dr. Lushington in *The Black Prince*. Their lordships had no hesitation in rejecting that claim, because, as my noble and learned friend said, that would have been paying them twice over. I really do not think the point now at issue was raised in that case, and I observe that that case was not cited in the Court of Appeal on either side or mentioned in the judgment.

Lord MORRIS.—I am of the same opinion. I am clearly of opinion that this case comes within the principle asserted by this House in the case of *The Greta Holme*, which I am equally clearly of opinion overruled the decision of the previous cases as regards the mode of the assessment of damages.

Lord SHAND.—I will only add a few words in expressing my entire concurrence in the decision about to be pronounced by this House.

There is no question of amount here involved, because the parties are agreed by the case that if any amount of damages is to be given the sum to be awarded is £300.

On the principle to be applied to the case, I think it important to notice what is observed by A. L. Smith, L.J., that there was a finding in the case by the registrar that this sixth lightship was kept at an expense of about £1,000 a year. The ship *Orion* was kept therefore, as it appears from the report, expressly for the purpose of meeting such an emergency as this, and it appears from the report itself that on no less than eleven occasions in twenty-five years a substitute has been called for and used in the case of a lightship being run down. In those circumstances, it appears to me that if the commissioners had hired a ship for the purpose of doing duty as a sixth lightship, finding that necessary in the course of their administration, there could have been no answer to their claim for the cost of hiring that ship. But if so, it appears to me that if there could have been no answer in that case, as little is there any answer here. In the case of that particular board, instead of waiting for an emergency suddenly occurring, they have thought fit to have a ship ready. It costs them £1,000 a year to have it ready. It appears to me that the expense of having this ship ready, instead of having to look for a ship when the emergency occurs, must properly fall upon the person who has been guilty of running down the lightship.

I am therefore of opinion that the judgment ought to be affirmed.

Lord JAMES OF HEREFORD.—I entirely concur in the judgment moved by the Lord Chancellor, and I will only add that I think there is a distinction between the case now at the bar and the case determined in the Privy Council, arising from the fact that in this case there has been expense incurred in providing the very remedy supplied in order to get rid of the effect of the act of the wrongdoer, whereas in *The City of Peking case* there was no expense incurred in order to remedy the injury. All that was done was to use a particular vessel that was already in existence without adding to the cost of the existence of that vessel. I think that is an additional ground for distinguishing the case in the Privy Council from the present case.

Lord BRAMPTON.—I am of the same opinion. I concur entirely in the judgment which has been pronounced by the Lord Chancellor in, I think, much better language than that in which I could have expressed it myself. One word, however, I desire to say with regard to *The Orion*, which was the substituted vessel in this case. She had been built by the respondents, and was maintained by them at great expense in order that, as between themselves and the public, they might have ready means at their command to obviate the great danger and inconvenience which might arise from such a misfortune as befel *The Comet* by the negligence of the appellants; but as between themselves and the wrongdoer causing the damage to *The Comet* they were under no obligation whatsoever to use *The Orion* at all. They might have used a hired vessel had they so pleased, in which case the liability for the hire would have been clear. But the respondents prudently, having a vessel suited for the purpose lying idle, thought it right in their discretion to use her instead of hiring perhaps a less efficient substitute for *The Comet*. The services of *The Orion*, however, were valuable; and why should the appellants claim to have them gratuitously, including the wages of the men who might have been employed on board her? They might equally claim gratuitously to have the services of skilled workmen—engineers hired by the year and paid by the respondents—who happened at the time to be idle, or to have no particular work in hand. That cannot be, and, in my judgment, is not, the law. In my opinion the value of the services ought to be paid as a compensation for the damage which accrued to the respondents by reason of the detention of their vessel under the circumstances. I concur, therefore, in thinking that this judgment ought to be affirmed, with costs.

*Appeal dismissed.*

Solicitors for the appellants, *Thomas Cooper & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

Solicitors for the respondents, *Rowcliffes, Rawle, & Co.*, for *Squarey*, Liverpool.

## Court of Appeal.

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) } Feb. 22, 23, 26, 27 March 20.

ST. MARY, ISLINGTON, VESTRY v. HORNSEY URBAN DISTRICT COUNCIL. (a.)

*Metropolis—Management—Sewer—Agreement to receive sewage of outside district—*Ultra vires*—Estoppel—Jurisdiction of court to grant injunction which will result in public nuisance—Metropolis Management Act,* 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 135, 138, 140, 250—*Metropolis Management Amendment Act,* 1862 (25 *&* 26 *Vict. c.* 102), *s.* 61—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55).

*There is no provision in the Metropolis Management Act,* 1855, *the Metropolis Management Amendment Act,* 1862, *or the Public Health Act,* 1875, *which authorizes a parish outside the metropolitan area to send its sewage into any sewer of any parish within that area, without the consent of such latter parish.*

*The vestry of a parish inside the metropolitan area has no higher power to grant its consent to a district outside the metropolitan area to send its sewage into the drains of such vestry than the Metropolitan Board of Works had to grant a similar consent under the provision of section* 61 *of the Metropolis Management Amendment Act,* 1862, *as read in connection with sections* 135, 138, 140, *and* 250 *of the Metropolis Management Act,* 1855. *The Metropolitan Board of Works had power under the above sections to grant such consent as above mentioned only in the form of a revocable leave and licence, but no power to grant an irrevocable licence of the kind in perpetuity, or even for a definite period.*

*A public body with limited powers, which has purported to permit the doing of a certain act, the permission of which is* ultra vires *its powers, is not subsequently estopped by such permission from asserting its right to prevent what it has hitherto purported to permit, and even encouraged and agreed to allow.*

*The fact that, if an injunction be granted, a public nuisance will be a necessary consequence unless the persons against whom the injunction is granted take steps to prevent it, affords the latter no defence to an action for such an injunction, even if it be true that they cannot take steps to prevent the nuisance without obtaining statutory powers.*

*At the same time, the difficulty in which such an injunction would place the defendants will in many cases induce the court to use its discretion, and not to exert its jurisdiction to the utmost when it is not absolutely essential to do so.*

*Decision of Kekewich, J.* (80 *L. T. Rep.* 746, 47 *W. R. Dig.* 128), *reversed.*

**Appeal** from a decision of Kekewich, J. (80 L. T. Rep. 746, 47 W. R. Dig. 128), given on the 9th of May, 1899, refusing to grant an injunction to restrain the defendants from permitting their sewage to flow into the Stroud Green sewer, the property of the plaintiffs.

The Stroud Green sewer was constructed by the Tottenham and Hampstead Junction Railway Co. in 1865 under the provisions of their special Act; and at the present time was vested in the plaintiffs under section 68 of the Metropolis Management Act, 1855, and under section 59 of the special Act above mentioned. The whole of the said sewer was situated in the parish of St. Mary, Islington, which parish was within the metropolitan area. In 1868, or thereabouts, certain owners of land in the parish of Hornsey, which was wholly outside the metropolitan area, began to develop their property as building estates, and were allowed by the plaintiffs to make certain comparatively small openings (mostly 12in. pipes) into the Stroud Green sewer on certain conditions and on making certain payments. At the present time these openings were vested in the defendants under section 13 of the Public Health Act, 1875, and the right (if any) of the said landowners to drain into the Stroud Green sewer had been transferred to the defendants.

In 1883 the defendants were permitted by the plaintiffs, for a certain consideration, to enlarge two of the above-mentioned openings by inserting two 18in. pipes instead of a 12in. and a 15in. pipe respectively. Subsequently to this last-mentioned period considerable further building operations had taken place in Hornsey; and a large number of extra houses now drained, by means of the aforesaid openings, into the Stroud Green sewer, with the result that in storm time so much sewage and surface water was now sent down from the Hornsey district through the before-mentioned openings that the Stroud Green sewer was unable to accommodate it; the sewage was forced up through the gullies and manholes; and there resulted an intolerable nuisance.

The plaintiffs accordingly sought an injunction to restrain the defendants from any longer permitting their sewage to flow into the plaintiffs' sewer.

Kekewich, J., however, refused to grant the injunction sought for on the ground (*inter alia*) that the result of compelling the defendants to disconnect their drains from the Stroud Green sewer would be the immediate creation of another public nuisance; and that even supposing that it were competent for the court to grant so disastrous an injunction, it ought not in its discretion to be guilty of such a proceeding.

From this decision the plaintiffs now appealed.

*Danckwerts, Q.C.*, and *Micklem, Q.C.*, for the appellants.—(1) The defendants possess no statutory or other justification (unless they succeed in showing that we granted them a valid, irrevocable licence) for sending down their sewage into our sewers: *Metropolitan Board of Works* v. *London and North-Western Railway Co.*, 29 W. R. 693, 17 Ch. D. 246; *Attorney-General* v. *Acton Local Board*, 31 W. R. 153, 22 Ch. D. 221; *Attorney-General* v. *Clerkenwell Vestry*, 40 W. R. 185, [1891] 3 Ch. 527; *Brown* v. *Mayor, &c., of Dunstable*, 47 W. R. 538, [1899] 2 Ch. 378. (2) The permission granted by us to the defendants in and after the year 1865 had application only to a limited number of houses. (3) Even this permission was of the nature of a revocable licence, and has now been duly revoked. (4) If such limited permission purported to be more than a revocable licence, then we say that, on our part it was *ultra vires*, and cannot, accordingly, be of any validity: *Haywood* v. *Lowndes*, 7 W. R. 279, 4 Drew. 454; *Ashbury Railway, &c., Co.* v. *Riche*, 24 W. R. 794, L. R. 7 H. L. 653, *per* Lord Cairns at p. 672; *Mulliner* v. *Midland Railway Co.*, 27 W. R. 330, 11 Ch. D. 611; *Metropolitan Board of Works* v. *London and North-Western Railway Co.*; *Hobbs* v. *Midland Railway Co.*, 30 W. R. 516, 20 Ch. D. 418; *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623, at p. 634, 32 W. R. Dig. 112. (5) The practical inconvenience that would result from granting the injunction asked for, is no ground for refusing it: *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, 14 W. R. 562, L. R. 1 Ch. App. 349; *Attorney-General* v. *London and North-Western Railway Co.*, [1900] 1 Q. B. 78.

*Macmorran, Q.C.*, and *F. Low*, for the respondents.

(a.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

—(1) We had no power to prevent the builders of new houses in the Hornsey district from draining into these openings, although, when made, these drains came under our control under section 13 of the Public Health Act, 1875. All we could do was to see that the drains at the time of their making duly complied with our bye-laws: *Reg.* v. *Tynemouth Rural District Council*, 44 W. R. 646, [1896] 2 Q. B. 451. (2) The licence given us was not *ultra vires*, for section 61 of the Metropolis Management Act, 1862, does not prohibit those who have the control of sewers in the metropolitan area from granting licence to those outside to drain into their system (*Metropolitan Board of Works* v. *London and North-Western Railway Co.*); and although licences are generally revocable, they become irrevocable when the grantees have incurred expense on the strength of them. (3) But even suppose that this licence was *ultra vires*—no one can take advantage of his own *ultra vires* as plaintiff, whatever he can do as defendant. [VAUGHAN WILLIAMS, L.J., referred to *Burkinshaw* v. *Nicolls*, 26 W. R. 819, 3 App. Cas. 1004.]

*Cur. adv. vult.*

March 20.—LINDLEY, M.R., delivered the judgment of the court: The appeal in this case raises two important questions—viz., whether the defendants are entitled to have the sewage from part of the parish of Hornsey pass down a sewer called Stroud Green sewer, which is in the parish of Islington, and is vested in the plaintiffs; and secondly, whether, if this question is decided against the defendants, the plaintiffs are entitled to an injunction to prevent such passage, seeing that, if it were prevented, a very serious public nuisance would be the consequence. The learned judge has dismissed the plaintiffs' action and they are the appellants; and the first question for our determination is—what rights, if any, the defendants have to send the contents of their sewers into the Stroud Green sewer, which is vested in the plaintiffs. These rights, if any, must be conferred by statute or be based on some agreement. A careful examination of the statutes leads to the negative conclusion that there is nothing in them which confers any such right apart from agreement. The statutes which have to be considered are the Public Health Act, 1875, and the Metropolis Management Acts, 1855 and 1862. These contain sections under which drains from private houses can be made into sewers, and under which arrangements can be made with the consent of the Metropolitan Board of Works for connecting sewers in the metropolis with the main sewers, and under which arrangements can be made between several parishes all within the metropolitan area for connecting the sewers of such parishes. But we have looked in vain for any enactment which provides for or authorizes a parish beyond the metropolitan area to send its sewage into any sewer of any parish within those limits without the consent of such parish. If, then, the plaintiffs are bound to receive the sewage from Hornsey it must be by virtue of some agreement or consent which they cannot recall; and it is upon such an agreement or consent that the defendants mainly rely. It is necessary, therefore, to ascertain what agreement or consent has been entered into, and its legal effect. There is no formal agreement under seal, nor any formal agreement to which the Metropolitan Board of Works were parties. But there is abundant evidence of arrangements between the plaintiffs and the defendants and persons in Hornsey by which the passage of some Hornsey sewage through the plaintiffs' Stroud Green sewer has been permitted for many years. These arrangements and the conduct of the plaintiffs are strongly relied upon by the defendants as disentitling the plaintiffs from any relief in this action, and Kekewich, J., has decided against them mainly on this ground. The appellants' counsel did not deny the facts relied upon by the defendants, but they contended that, although the plaintiffs had permitted Hornsey sewage to pass down their sewer for many years, they had done nothing to preclude them from recalling their permission if and when the Hornsey sewage so increased in bulk as to create a nuisance in Islington. They also contended that the plaintiffs could not in point of law bind themselves and the parish of Islington to receive Hornsey sewage for ever, or, indeed, for any definite period; and that in effect all that the plaintiffs had done, and all that they legally could do, was to grant revocable licences to various persons now represented by the defendants to empty their sewers into the Stroud Green sewer. The inability of the plaintiffs to do more than this is said to be established by the statutory enactments and by the decision of Hall, V.C., in *Metropolitan Board of Works* v. *London and North-Western Railway Co.*, 14 Ch. D. 521, 28 W. R. Dig. 143, and affirmed on appeal, 29 W. R. 693, 17 Ch. D. 246. The Vice-Chancellor certainly expressed a strong opinion that even the Metropolitan Board of Works could not make a valid contract to admit buildings outside the metropolitan area into their drainage system. The Court of Appeal expressed no opinion on this point, but affirmed the Vice-Chancellor's decision on the ground that no such contract had in fact been entered into. The point turns mainly on section 61 of the Metropolis Management Act, 1862, which, however, has to be read in connection with sections 135, 138, 140, and 250 of the Metropolis Management Act, 1855. Having carefully studied these sections, we have come to the conclusion that the construction put upon them by Hall, V.C., is correct, and we adopt his reasoning on pp. 527-9 in the report. What the Metropolitan Board of Works could not do, the plaintiffs clearly cannot do. It follows that Mr. Danckwerts has, in our opinion, made good his contention that, whatever the plaintiffs may have permitted or even agreed to do, the legal effect of their conduct cannot be put higher than leave and licence to several persons to empty their sewers into the Stroud Green sewer. A grant of an easement or an enforceable agreement to grant an easement cannot be established in law even if proved in fact. A temporary permission is very different from a binding agreement or grant. This conclusion renders it necessary to examine very minutely what the plaintiffs have hitherto really assented to. [His lordship shortly reviewed the facts.] These are the main facts relied upon by the defendants as precluding the plaintiffs from obtaining relief in this action. Now this is not a question affecting the plaintiffs as private individuals. They are a public body, with public duties, and with rights and powers conferred upon them for the purpose of enabling them to discharge those duties. This must be borne in mind in considering the effect of their past conduct, when that is relied upon as estopping them from asserting a right to put an end to what they have permitted, and even encouraged and agreed to allow. If this were an information by the Attorney-General, instead of an action by the Islington Vestry, the defendants would, in our opinion, have no defence whatever to the claim for an injunction. Considering who the plaintiffs are, we cannot think that they are estopped at law or in equity from obtaining the relief they seek. In *Fairtitle* v. *Gilbert*, 2 T. R. 169, some turnpike trustees, who had power to mortgage their tolls, but not toll houses, mortgaged both by deed. They were, nevertheless, held entitled to recover the toll houses from their mortgagees; and the doctrine of estoppel was held

inapplicable to the case, on the ground that the plaintiffs were a public body, with limited powers conferred by statute, and could not exceed those powers. Many other decisions to the same effect are to be found in the books, the most recent being *The Great North-West Central Railway Co.* v. *Charlebois*, [1899] A. C. 114, in the Privy Council, where a public company, who had entered into an agreement beyond its powers, and had consented to a judgment against it in an action brought on that agreement, was nevertheless held entitled to impeach both the agreement and the judgment, and both were set aside. For similar reasons the plaintiffs cannot, in our opinion, be treated as precluded from obtaining relief on the ground of *laches* and acquiescence. This is not a case in which the court can properly leave the plaintiffs to their legal remedies, for there are none which would be of any use to them. But, in considering the terms of the order which ought to be made, it is only right and proper to have regard to the fact that the plaintiffs have to some extent themselves brought about the present state of things. The fact that if an injunction were granted a nuisance would be a necessary consequence unless the defendants take steps to prevent it, affords them no defence to the action, even if it be true that they cannot prevent it without obtaining further statutory powers. It is the defendants' duty to keep the Hornsey sewage out of the plaintiffs' sewer, and the defendants cannot effectually urge their inability to perform their duty as a reason for the court doing nothing. Upon this point *Attorney-General* v. *Council, &c., of Birmingham*, 6 W. R. 811, 4 K. & J. 528, and *Attorney-General* v. *Colney Hatch Lunatic Asylum*, 17 W. R. 240, L. R. 4 Ch. App. 146, are well-known authorities. At the same time, the difficulty in which an injunction may place public bodies if compelled to close sewers under their control, but in daily use, has induced the court in many cases not to exert its jurisdiction to the utmost where it is not absolutely essential to do so. *Attorney-General* v. *Acton Local Board*, and other cases following it and cited in the argument, are illustrations of this reluctance. Having regard to these decisions and to the conduct of the plaintiffs we think that all that the court ought to do in this case at the present moment is to make a declaration establishing the plaintiffs' right to relief, and to give the defendants reasonable time to do what is necessary to prevent the flow of the Hornsey sewage down the Stroud Green sewer to the injury of the plaintiffs, and to give the plaintiffs liberty to apply for an injunction at the end of that time. This will give the defendants time to make other arrangements, and we trust will induce the plaintiffs to assist them in their endeavours to do what is necessary to drain their own district without invading the plaintiffs' rights. Such an order will, we think, be more just than an injunction now with a stay of execution. Such an injunction, however carefully worded, might prove unnecessarily oppressive. The order of the court, therefore, will be as follows: Allow the appeal and reverse the judgment of the court below, and order the defendants to pay the costs of the action and of the appeal. Declare that the defendants are not entitled to send sewage from any sewers in the parish of Hornsey into the Stroud Green sewer without the consent of the plaintiffs. And let the plaintiffs be at liberty to apply to the judge to whose court this action is attached at the end of twelve months from the date of this order for an injunction to enforce their rights as above declared.

*Appeal allowed.*

Solicitors, *Bramall, White, & Sanders; Tatham & Hardy.*

From Chan. Div. (Lindley, M R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 6, 8, 9, 12, 13; March 6.

ATTORNEY-GENERAL (ON THE RELATION OF THE POWELL DUFFRYN STEAM COAL CO.) *v.* GUARDIANS OF MERTHYR TYDFIL UNION. (*a.*)

*Poor law — Relief — Improper relief—Strike—Wilful refusal to work—"Sudden and urgent necessity"—Poor Law Act*, 1601 (43 *Eliz. c.* 2), *ss*, 1, 2—*Poor Law Act*, 1834 (4 *&* 5 *Will.* 4, *c.* 76), *ss.* 15, 42, 52, 54, 105—*Poor Law Audit Act*, 1848 (11 *&* 12 *Vict. c.* 91), *s.* 4—*Vagrants Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

*The payment by poor law guardians out of the poor rates of any money for setting to work or for the relief of able-bodied men, who are at the time able to obtain and perform work at wages sufficient to support themselves (and their wives and families, if any), is unlawful, and ought to be disallowed by the auditor on auditing the guardians' accounts. But this statement of the law does not include relief given to or for the wives and children of such men; and it is also without prejudice to, and is in no way to affect, the power of the Local Government Board to remit such disallowed payments, even although unlawfully made, under the statute* 11 *&* 12 *Vict. c.* 91, *s.* 4, *or any other statute enabling them so to do.*

*Decision of* Romer, J. (80 *L. T. Rep.* 618, 47 *W. R. Dig.* 149), *reversed.*

*It is not, however, lawful for guardians to refuse relief to those who are in immediate physical need of it, and are at the time unable to obtain and perform work, on the ground that such persons have reduced themselves to their present incapacity to obtain and perform work by their own wilful neglect and refusal to work in the past.*

Appeal from a decision of Romer, L.J. — then Romer, J.—(80 L. T. Rep. 618, 47 W. R. Dig. 149), given on the 27th of March, 1899, to the effect that it was lawful for the Merthyr Tydfil Guardians to grant out-door relief to able-bodied strikers during the continuance of a coal strike in South Wales.

On the 31st of March, 1898, owing to the discontent of the colliers with the sliding scale of wages then in use in connection with the collieries in the neighbourhood of Merthyr Tydfil in South Wales, the colliers decided to stop work, and the collieries were accordingly closed. As a result of this strike a number of iron and steel workers in the locality were involuntarily thrown out of work. On the 11th of April the colliery owners, in order to induce the men to return to work, caused notices to be posted at the pit tops and other places offering them a substantial advance on their former rate of wages. These notices remained posted up at the collieries until the 18th of July, up to which date it was competent, as alleged by the plaintiff, for any single workman, or number of workmen, had he, or they, so desired, to resume work in the collieries on the advertised terms. The strikers, however, declined for many months to avail themselves of the opportunity thus offered. The notices thus posted had no application to labourers at the steel and iron works who were then out of occupation.

Towards the end of April, 1898, a large body of colliers and iron and steel workers, who were out of work by reason of the strike, applied for relief to the poor law guardians of the Merthyr Tydfil Union. On the 23rd of April the guardians resolved to form themselves into a

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

committee to discuss the necessary arrangements; and on the 26th of April they resolved, on the recommendation of their poor law inspector, to open stoneyards, where required, throughout the union. Such yards were accordingly opened on the 10th of May, and on an average some 4,360 able-bodied strikers were daily employed at the yards, till the same were closed by another resolution of the board on the 6th of August. About 1,300 of those thus daily employed were labourers in the steel and iron works. The men employed in the yards were relieved, as to one-third, in money, and as to two-thirds, in kind; the amount being regulated in the case of each striker by the number of persons constituting his family. In order to raise the sums of money necessitated by the opening of the stoneyards, the board of guardians resolved on the 2nd of July that a call of £20,000 should be made on the parishes composing the union; and on the 9th of July orders were issued to the overseers of the different parishes for the levying of their respective assessments. On the 3rd of August, 1898, the writ was issued in the present action, which was instituted by the Attorney-General on the relation of the Powell Duffryn Steam Coal Co. (Limited) on behalf of themselves and all others the ratepayers of the Merthyr Tydfil Union. The plaintiff sought (1) an injunction to restrain the board of guardians from defraying out of the common fund of the union the expenses of maintaining the before-mentioned stoneyards, and from defraying out of the said fund the expenses of relieving at such yards any able-bodied persons otherwise than in accordance with the statutes in relation to, and the orders of the Local Government Board regulating, the relief of the poor in the said union; (2) an injunction to restrain the board from issuing or enforcing or receiving payments in respect of any of the parishes in the said union towards the relief of the able-bodied persons in the said union otherwise than in accordance with the said statutes and orders; (3) a declaration that "the establishment and maintenance by the defendants of labour yards or relief works for the purpose of providing out-door relief for able-bodied persons, to the knowledge of the defendants otherwise able to maintain themselves and their families, and the expenditure by the defendants of part of the common fund of the union for the purpose of relieving such able-bodied persons and their families constituted a breach of the statutory duties of the defendants; (4) repayment to the common fund of the said union by the defendants of all moneys paid by them out of such fund to or for the able-bodied workmen already mentioned.

The power of the Merthyr Tydfil Union to grant relief to able-bodied paupers was regulated by two orders, dated respectively the 1st and the 29th of October, 1870, and made by the Local Government Board in pursuance of the authority for that purpose vested in them by section 52 of the Poor Law Act, 1834. The nature and contents of these orders, so far as is material to the present issue, are sufficiently set out in the judgment of Lindley, M.R., below.

It appeared from the evidence given at the trial of the action before Romer, J., on the 21st and 22nd of February, 1899, that in a large number of instances in which relief had been given to able-bodied strikers between the 10th of May and the 6th of August, 1898, no report had been made to the Local Government Board within the period of fifteen days provided for such report by section 152 of the Poor Law Act, 1834. In other cases, however, the requisite report had been duly made. Evidence was also called to prove (1) the reality of the distress; (2) that the workhouse was full; and (3) that no other practical method existed for granting relief except by means of the stoneyards.

Romer, J., declined to make any of the orders, or to grant the declaration asked for.

From this decision the plaintiff now appealed.

*Neville, Q.C., Upjohn, Q.C.*, and *S. G. Lushington*, for the appellant.—(1) The relief given in this case was clearly unlawful, and, as such, cannot be covered by any subsequent sanction, even in those cases in which sanction has been duly applied for and granted. Sanction under section 52 of the Act of 1834 can cover only cases of irregularity, not of initial unlawfulness. (2) That the relief given was unlawful is clearly shown by the whole tenor of the Poor Law statutes from Hen. 8 down to the Act of 1834. All these statutes are collected in a learned note to *Rex.* v. *Collett*, 2 B. & C., 324, at p. 326. None of these statutes contemplated giving relief to those who were able, but unwilling, to work; Lambard's Eirenarcha, bk. 2, ch. 7, p. 207; Blackstone's Commentaries, vol. 1, p. 360 (11th ed.); *Rex.* v. *Hyghworth*, 1 Stra. 9; *Rex.* v. *North Riding of Yorkshire Justices*, 3 Dow. & Ry. 510, 2 B. & C., 286; *Rex.* v. *Collett*. (3) As to wives and children under sixteen years of age, who were, no doubt, innocent victims, relief granted to them is equivalent under section 56 of 4 & 5 Vict. c. 76 to relief granted to the husbands and fathers. A wife is entitled to no separate relief when living with her husband. The case of children, moreover, is duly provided for by sections 1 and 5, sub-section 4, of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41). [VAUGHAN WILLIAMS, L.J., directed attention to *Rex.* v. *St. Mary, Islington*, 6 L. T. Rep. 606, 10 W. R. C. L. Dig. 64.] (4) As to the form of the present action (i.) the alternative remedy before the auditor provided by sections 32–36 of the Act of 1834 is an inconvenient one, because (*a*) the auditor has no proper power to investigate the accounts; (*b*) the appeal provided to the Local Government Board is an appeal to a non-judicial body; (*c*) the alternative appeal to the Queen's Bench is possible only by the cumbersome method of a *certiorari*. One of the objects of the Judicature Act was to render possible such a course as the one now taken. Moreover, we allege a breach of trust, which is entirely a matter for the Chancery Division. We do not now press for the injunctions, unless the court is unable to make the declaration in their absence. (ii.) It is perfectly competent for the Chancery Division to interfere with the discretion of overseers: *Attorney-General* v. *Wilkinson*, 7 W. R. 301, 28 L. J. Ch. 392, at p. 395; *Attorney-General* v. *Southampton*, 17 Sim. 6; *Attorney-General* v. *Compton*, 1 Y. & C. Ch. Cas. 417, at p. 426, 427, and 429; *Attorney-General* v. *West Hartlepool Improvement Commissioners*, 18 W. R. 695, L. R. 10 Eq. 152, *per* James, V.C., at 158.

*Sir Edward Clarke, Q.C., Swinfen Eady, Q.C.*, and *Alexander Glen*, for the respondents.—(1) The policy of the whole series of Poor Law statutes from Hen. 8 to the Act of 1834 was that relief must be given in every case of immediate physical necessity, quite apart from the question of the character of the recipient. If the recipient come on the rates through his own wilful act, he is subsequently punishable under section 3 of the Vagrants Act, 1824 (5 Geo. 4, c. 83). But at the moment of necessity relief must be given him. If the relieving officer refused to grant relief he would be criminally liable: *Clark* v. *Joslin*, 21 W. R. 294. Even under the Vagrants Act, 1824, the question would arise, Did these men wilfully refuse or neglect to work? And in answering this question one would have to consider whether, having regard to

all the circumstances of the case, they were justified in so refusing. Further, we deny that any single individual could have gone back and got work for himself. As to the phrase in statute 43 Eliz. c. 2, s. 1, "having no means to maintain them," that does not mean "not being able to go and get the means." It means, on the contrary, the actual, present non-possession, in money or money's worth, of the means of living: *Reg.* v. *Chandler*, 3 W. R. 404, 6 Cox C. C. 519; *Reg.* v. *Mabbett*, 5 Cox C. C. 339. (2) As to the form of the action, (i.) *certiorari* is a perfectly convenient remedy; (ii.) *Attorney-General* v. *Wilkinson*, *Attorney-General* v. *Southampton*, and *Attorney-General* v. *Compton*, were all of them cases of extraneous expenditure; whilst *Attorney-General* v. *West Hartlepool Commissioners* was not a Poor Law case at all. [VAUGHAN WILLIAMS, L.J., called attention to *Rex.* v. *Bartholomew Winship*, 5 Burr. 2677.] (3) A declaration of the kind now asked for ought not to be lightly made: *Barraclough* v. *Brown*, [1897] A. C. 615, per Lord Davey, at p. 623, 46 W. R. Dig. 64; *Grand Junction Water Co.* v. *Hampton Urban District Council*, 46 W. R. 644, [1898] 2 Ch. 331, per Stirling, J., at p. 344.

*Neville, Q.C.*, in reply.—The fact that the guardians' powers are limited is shown by section 105 of the Act of 1834: *Reg.* v. *Stewart*, 12 A. & E. 773, at p. 777.

*Cur. adv. vult.*

LINDLEY, M.R.—Under the Poor Law statutes passed before 1834 the only persons entitled to relief out of the poor rates were those described in the 43 Eliz. c. 2, under three heads—namely (1) the children of parents unable to keep and maintain them; (2) such persons who, having no means to maintain themselves, used no ordinary and daily trade of life to get their living by; (3) the lame, impotent, old, blind, and such others as were poor and not able to work. The first two of these classes were to be relieved by being set to work; the third alone were to be relieved without work. Omitting children, and speaking only of adults, the older statutes drew a broad distinction between, first, the impotent poor, that is, poor unable to work and who were to be relieved without work; and secondly, the able-bodied poor, that is, poor able to work but unable to maintain themselves. These were to be relieved, but only by being set to work. If a poor person able to work, and for whom work was found by the parish authorities, would not work, he became liable to imprisonment under section 2 of the statute of Elizabeth and the subsequent Vagrants Acts; but I can find nothing in the statutes before 1834 which entitled an able-bodied person having the means of supporting himself to obtain relief from the parish authorities by being set to work or otherwise. On the other hand, orders for the relief of poor persons were constantly quashed on the ground that they were not stated to be impotent. A poor person able to work and able to procure work might become chargeable to the parish by refusing to work so long as to become physically unable to work or by reducing his wife and children to such a state as to render them chargeable to the parish. If he did this he would force himself and them on the rates and be punishable under the Vagrants Acts. This is the true explanation of the language used in the Vagrants Act of 5 Geo. 4, c. 83, s. 3. It says: "Every person being able wholly or in part to maintain himself or herself or his or her family by work or by other means and wilfully neglecting or refusing so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish," &c., shall be deemed to be an idle and disorderly person and be liable to imprisonment. The penalty here inflicted is for a wrong done by the person imprisoned; and the wrong done is by becoming chargeable or by rendering others whom he ought to support chargeable on the rates when he had no justification for so doing. It would be an entire perversion of this statute to construe it as entitling an able-bodied man who could support himself if he would to relief of any kind by the parish authorities. He could demand no relief in food or work from them if he could obtain work and could support himself and family without their assistance. This conclusion as to the effect of the older Poor Laws is based upon a careful perusal of them, and upon what is to be found in digests and treatises, and, in particular, upon the resolutions of the judges in Lambard's Eirenarcha 8, 9, and 10, which I regard as an extremely valuable exposition of the law by persons thoroughly well acquainted with it and its working in and shortly after the reign of Elizabeth. I have not succeeded in finding any judicial interpretation of the words "Such persons, married or unmarried, having no means to maintain them, as use no ordinary and daily trade of life to get their living by." These are the words used in section 1 of the statute of Elizabeth to describe the class of able-bodied poor able to procure work. It must be borne in mind that the Poor Laws have nothing to do with the regulation of labour. That was provided for by other statutes relating to labourers and artificers. The Poor Laws impose on the comparatively well-to-do the duty of supporting those who by reason of their poverty cannot maintain themselves. This being so, the inability to maintain himself which justifies an able-bodied man in requiring relief from the Poor Law authorities must, I apprehend, be a real actual inability to support himself on any terms which he can in fact comply with, and which, as between him and the ratepayers, do not justify him in refusing to support himself. He cannot, in my opinion, lawfully justify such refusal on the ground that he cannot obtain work on terms which, as between him and his employer, he does not consider reasonable. What is a reasonable agreement for a man to enter into is one thing; what is a reasonable justification for a man compelling others to support him is quite another thing. But it is the latter alone which the Poor Law authorities ought to consider. This is a matter of the utmost importance in the present case, and, indeed, in all cases in which work can be got on terms which will enable a man to support himself and family, but which he will not accept because he prefers to stand out in the hope of obtaining better terms than those offered him. The short effect of the Poor Laws before 1834 I understand to have been as follows: (1) No one who was starving could be lawfully refused relief, whether he was in that state by his own fault or not; (2) poor persons physically unable to work were entitled to relief out of the rates without being set to work; (3) poor persons physically able to work, but who could not obtain work, were entitled to relief by having work found for them at the expense of the ratepayers if no other work could be found; (4) poor persons physically able to work were not entitled to relief in any other way; (5) but poor persons able to work and able to procure it might, by refusing to work, become so weak as to be no longer able to work, in which case they became entitled to relief out of the rates and at the same time liable to imprisonment. This was an anomaly, for it enabled a person to obtain a legal advantage by his own wrongdoing. The anomaly was justified on grounds of humanity. The penalty for refusing to work was imprisonment, not death by starvation. Under

various statutes passed in the reign of George III.—viz., 22 Geo. 3, c. 83, ss. 29-35 (Gilbert's Act); 36 Geo. 3, c. 23, s. 1; 55 Geo. 3, c. 137, s. 3; 59 Geo. 3, c. 12, s. 2, outdoor relief was authorized to be given to able-bodied poor who could not support themselves and families. But even when these Acts were in force, and abused as they were, I do not find that they, or any decisions upon them, authorized relief to able-bodied poor who could support themselves and their families if they chose to do so. *Rex.* v. *Hyworth* shows that before these Acts no relief could be lawfully given to such persons, and *Rex.* v. *Collett*, decided in 1823, proceeded on the supposition that the law in this respect remained unaltered, though the mode of relieving able-bodied poor who could not obtain work was left undecided. In 1834 the Poor Law was very greatly improved. Boards of guardians were formed and a Central Poor Law Board was created with very large powers of administration (see 4 & 5 Will. 4, c. 76). But large as those powers are, I cannot find anything in the Act of 1834 or in any later Act which has enlarged the class of persons entitled to relief under the former statutes. I can find no section which entitles able-bodied persons to support out of the rates if they can obtain work and support themselves and their families, if they choose to do so. Section 54 of the Act of 1834 authorizes overseers to give temporary relief, but not money, in cases of sudden and urgent necessity. The object of this section is to enable overseers to act without reference to the guardians in cases which admit of no delay. The same section authorizes justices to order medical relief in case of sudden and dangerous illness. This section has no immediate bearing on the question which has to be decided on this appeal; and would not require further notice, except for the contention that the case before us was one of urgent necessity. I will examine this contention presently. Having ascertained the classes of persons entitled to relief under the Poor Law statutes, it is necessary to discover whether the Local Government Board can authorize relief to be given to persons not entitled to demand it, and to what extent this power, if it exists, can be exercised. The powers of the Local Government Board (who now represent the Poor Law Commissioners) are very large and must be carefully examined. The enactments which confer special powers upon them relating to this subject are 4 & 5 Will. 4, c. 76, ss. 15, 42, 52, and 105, and 11 & 12 Vict. c. 91, s. 4, amended by 29 & 30 Vict. c. 113, s. 5. Section 15 of 4 & 5 Will. 4, c. 76, clearly confers no power to grant relief to any person not entitled to relief under the Poor Law statutes. It is in express terms confined to the administration of relief according to those statutes, and there is a remarkable provision at the end of the section to guard against the supposition that anything in the Act itself should enable the commissioners to interfere in any individual case for the purpose of ordering relief. Section 42 of the same Act relates to regulations to be observed in workhouses, and has no direct bearing on this case. This section in no way authorizes relief to be given to persons not entitled to it by law. Section 52 is more important, for it relates to outdoor relief and gives the commissioners very wide powers. But here, again, they are restricted to making regulations declaring "to what extent and for what period the relief to be given to able-bodied persons or to their families in any particular parish or union may be administered out of the workhouse." This language assumes that the persons referred to are entitled to relief; and enables rules to be made for their relief out of the workhouse, instead of in it. But I cannot read this section as empowering the commissioners to order relief to be given to persons not entitled to relief at all under the statutes relating to the poor. Section 52, like the others already noticed, gives powers of administering those laws, but no power to alter them. That section enacts that relief given contrary to the regulations shall be deemed unlawful and shall be disallowed in the accounts, but the section contains a proviso enabling the local authorities to depart from the regulations of the commissioners in cases of emergency, and authorizes the commissioners to approve of such departure, and any relief so given and approved "if otherwise lawful" is not to be deemed unlawful or be disallowed. So that even in cases of emergency no relief can be lawfully given except to persons entitled to it under the Poor Law statutes. The recital at the commencement of section 52 of 4 & 5 Will. 4, c. 76, refers to the abuse of the powers to grant outdoor relief conferred by the statutes of Geo. 3, to which I have already referred. But, bearing them in mind and attending as we ought to the recital (which, I am sorry to say, is omitted from the last edition of the revised statutes), I cannot arrive at the conclusion that the commissioners appointed under 4 & 5 Will. 4, c. 76, to carry out the improvements made by it are empowered to extend the scope of the Poor Law statutes, and to extend their application to persons not entitled to relief under them. This general conclusion, arrived at from a study of the language of the sections referred to, is strengthened by section 105, which prohibits the removal of illegal rules by a *certiorari* into any court except the Queen's Bench. This shows that the commissioners have no legislative as distinguished from administrative power. If further authority for this proposition is wanted it is to be found in *Waddington* v. *Guardians of the London Union*, 6 W. R. 599, E. B. & E. 370, at pp. 399, 400, where a retrospective rate, alleged to have been authorized by regulations made by the commissioners, was held illegal. I pass now to another statute, which goes further than any I have yet referred to; I mean the 11 & 12 Vict. c. 91, s. 4, relating to the audit of poor law accounts. Under this Act an unlawful expenditure properly disallowed by the auditor may, nevertheless, be allowed by the commissioners on appeal from his decision. If the commissioners find the subject-matter of the disallowance was incurred "under such circumstances as to make it fair and equitable that such disallowance shall be remitted" they have the power to remit it—*i.e.*, to authorize the allowance of the unlawful and properly disallowed expense. This is a very large power, which is now entrusted to the Local Government Board, and with the exercise of which, when it arises, this court cannot interfere. But the remission of the disallowance of an expense unlawfully incurred no more renders lawful the incurring of the expense than a pardon for a crime renders lawful the past criminal conduct of the person pardoned. The power of the commissioners to allow an unlawful expense does not arise until such expense has been incurred and been disallowed; and if the High Court has jurisdiction to prevent the improper expense, that jurisdiction is not taken away by the power given to the commissioners to allow the expense if it has been illegally made. So, if the illegal payment is a ground for indictment, its allowance by the commissioners will afford no legal answer to the indictment. At the same time, the existence of this power ought to make the court very careful in granting injunctions relating to Poor Law relief. Having now examined all the statutory enactments which have to be considered, I pass to those regulations made by the commissioners which are applicable to the Merthyr Tydfil Union. They are dated the 1st of October, 1870, and the 29th of October, 1870. As might be expected, they relate to the mode of administering relief to

poor persons in the union. They are purely administrative orders; they in no way (inadvertently or otherwise) purport to authorize the granting of relief to persons not entitled to it. Article 1 of the order of the 1st of October, 1870, says that "every able-bodied person requiring relief" shall be relieved wholly in the workhouse, except in certain specified cases, the first of which is "where such persons shall require relief on account of sudden and urgent necessity." The expression "every person requiring relief" in the first article cannot mean every person asking for relief whether entitled to it or not. The regulations relate to the working of the Poor Laws, and the expression in question must in reason be confined to those persons who are entitled to relief under the Poor Laws, and require such relief. Again, the first exception refers only to such emergencies as require outdoor relief instead of indoor relief. It has reference to the necessities of those entitled to relief. It in no way enlarges the class of persons entitled to relief under the Poor Law statutes. If the workhouse is full, the exception justifies giving outdoor relief to poor persons entitled to relief who cannot be received into the workhouse; and if the workhouse is not full a poor person entitled to relief may need it so urgently as to entitle him to outdoor relief before he can reach the workhouse. But to construe the exception as justifying relief in any shape to persons, few or many, who are not entitled to any relief at all is entirely to mistake the object of the exception and to put upon its language a meaning which it will not bear. The order or regulation of the 29th of October, 1870, is again a merely administrative order directing how outdoor relief is to be given to the poor entitled to it. As I understand the order, outdoor relief is only to be given to the able-bodied poor who are entitled to relief and who will do a certain amount of work. But if they comply with that condition they are entitled to such relief for themselves and their families, partly in food, clothing, and articles of necessity, and partly in money, as stated in the order. I now proceed to consider what has been done in this case. There is no conflict of evidence; all the material facts are admitted. Relief has been given: (1) To wives and children reduced to destitution by the strike; (2) to able-bodied men thrown out of work by the strike and unable to obtain work and maintain themselves whilst it lasted. Both of these classes of persons were entitled to relief under the statute of Elizabeth, and there has been no unlawful expenditure of the poor rates in supporting them. It is true that the wives and children of the strikers were not themselves applicants for relief and were relieved indirectly through the strikers, but this only amounts to an impropriety in the mode of relieving them. This impropriety is not a matter for this court's interference. It is unimportant in considering whether the wives and children were entitled to relief or not. But the colliers who struck work were able-bodied men who might have obtained work and who might have maintained themselves and their families. These men when relieved were not so reduced by want as to be unable to keep themselves and their families off the rates, and it was their clear duty to do so if they could. In my opinion these persons had no right to be relieved when they applied for relief, and the authorities were not justified either by the Poor Law statutes or by any regulations made under them in affording such relief. The evidence does not show that the colliers were physically too weak and ill to work, nor that any of them were prevented by fear of violence from accepting work within their reach. They are described as destitute, and in one sense they were so; they had neither food nor money. But they were able-bodied men physically well and able to work; and the answer to the fourth interrogatory shows that they might, if they had chosen, have obtained work at wages sufficient to support themselves and families. It was contended that this was only true if they all went to work in a body; and that it was not true of them individually. I cannot read the answer to the fourth interrogatory as open to this construction. No one of the colliers was willing to accept work unless the others did the same; and no one could have worked the colliery without others. But the admissions show, in my opinion, that each and every collier could, if he had chosen, have kept himself and his family off the rates. I draw no distinction between strikers and other able-bodied men who can support themselves, but who will not. There is no difference, so far as the Poor Law is concerned, either for better or for worse between men on strike and other men who can, but will not, support themselves. To use the rates to support strikers or any other persons able to support themselves is, in my opinion, illegal; although rather than let even such persons starve, relief may be given to them when physically unable to work. This anomaly I have already alluded to. As I understand Romer, J.'s, judgment, we do not differ in holding that, speaking generally, it is wrong to grant relief to able-bodied persons who can obtain work and support themselves and families. But he has treated this case as one of urgent necessity, and as consequently justifying the guardians in granting relief as they did. Here I am unable to follow him. I have already pointed out that the guardians were justified in relieving the wives and children even of the colliers and in granting relief to non-strikers thrown out of employment by the strike. These persons were all entitled to relief without reference to any question of sudden emergency. The numbers of them might, and very likely did, create a sudden emergency entitling them to outdoor as distinguished from indoor relief. But that is a comparatively immaterial matter, and one which the court ought not to concern itself about. But if a poor person physically able to work can obtain work and so support himself and family there is no urgent necessity, nor any necessity at all, for granting him relief. Moreover, numbers do not give a right to relief to persons not individually entitled to relief. The sense in which the colliers were destitute I have explained already. They were not so weak as to be unable to work, and they were not relieved on the ground that they were physically in that condition. They were relieved before they were entitled by law to relief, and, I suppose, from fear of a disturbance and of violence. I quite agree with Romer, J., that it is not the province of the High Court to administer the Poor Laws, nor to interfere with guardians in the performance of their very difficult duties, the performance of which demands great judgment, sympathy, and discretion. Still less can the High Court interfere with the exercise by the Local Government Board of their powers to make regulations for the relief of persons entitled thereto by the Poor Law Acts. Moreover, the allowance by the board of expenses unlawfully incurred cannot be controlled by the court. This prevents the court from ordering the guardians to make good any expense which has been incurred, and which the Local Government Board may, in their judgment, think it right to allow. But this information was filed to restrain the guardians from misapplying the rates by granting relief at a great expense to persons not entitled thereto. *Certiorari* is no adequate remedy in such a case, nor is there any other. The jurisdiction of the High Court to grant an injunction to restrain an unlawful application of rates cannot be

doubted, and the observations in the *Grand Junction Waterworks Co.* v. *The Hampton District Council* are not applicable to such a case as the present. The guardians, taking, in my opinion, an erroneous view of their power and duty to grant relief in such a case as this, contended that it was competent for them, and indeed their duty, to grant relief on the ground of emergency. In my opinion they were wrong so far as the colliers themselves were concerned, and, as the defendants from first to last have maintained that they were in the right throughout, I think the court ought to make a declaration to show that the information was properly filed and to prevent any misconception as to the illegality of the conduct of the guardians. Such a declaration is not open to the objection against making abstract declarations on matters not within the court's jurisdiction as in *Barraclough* v. *Brown*, which objection was forcibly pointed out by Lord Davey at p. 623. The declarations asked by the information are much too wide and might be misunderstood. Labour yards may well have been wanted for persons entitled to relief, because, although able to work, they were unable to obtain work and could not have been taken into the workhouse. The proper order will be as follows: Allow the appeal and discharge the judgment appealed from. Declare that the payment by the defendants out of the poor rates of any money for setting to work or for the relief of able-bodied men who were at the time able to obtain and perform work at wages sufficient to support themselves (and their wives and families, if any) was unlawful, and ought to be disallowed by the auditor on auditing the defendants' accounts. But this declaration does not include relief given to or for the wives and children of such men, and the said declaration is without prejudice to and is in no way to affect the power of the Local Government Board to remit such disallowed payments, although unlawfully made, under the statute 11 & 12 Vict. c. 91, s. 4, or any other statute enabling them so to do. The defendants must pay the costs of the appeal, but the relief claimed by the information and action was so much too wide that each party must bear his own costs of the information and action.

RIGBY, L.J.—I have had an opportunity of reading the judgment of the Master of the Rolls, and agree with what he has said.

VAUGHAN WILLIAMS, L.J.—I agree.

*Appeal allowed.*

Solicitors, *Bell, Brodrick, & Gray*, for *Linton & C. & W. Kenshole*, Aberdare; *Wrentmore & Son*, for *Frank James & Sons*, Merthyr Tydfil.

---

Appeal.
(A. L. Smith, Collins, and Romer, L.JJ.) March 5.

LYSONS v. ANDREW KNOWLES & SONS (LIMITED). (*a*.)

*Master and servant—Employment—Accident—Compensation—Average weekly earnings—Workman in employment for less than two weeks—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (1).

*No workman is entitled to the benefit of the Workmen's Compensation Act*, 1897, *who has not, at the time of the accident, been for at least two weeks in the service of his employer.*

Appeal from an award of the judge of the Salford County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a pitman. The employers were the owners of a colliery. The applicant was engaged as a piece-worker at wages of six shillings a day, and he commenced to work on Tuesday, the 18th of July, 1899, when he went into the pit and did a day's work. The next day, Wednesday, was a holiday, and the pit was closed. On Thursday, the 20th of July, he again went into the pit to do a day's work, and while he was working he was injured by the fall of a piece of coal. On Friday, the 21st of July, he was paid six shillings for his first day's work, and on Friday, the 28th, he was paid six shillings for his second day's work. The colliery week ended on Tuesday evening.

The county court judge held that, as the applicant had earned twelve shillings within a period of seven days, that sum must be taken to be his "average weekly earnings" within the meaning of section 1 (*b*) of the first schedule to the Workmen's Compensation Act, and he made an award for a weekly payment of half that sum—viz., 6s.

*F. H. Mellor*, for the employers.—The Act does not provide any machinery for awarding compensation in such a case as this; and therefore the case does not come within the Act at all. By section 1 (*b*) of the first schedule, the amount of compensation under the Act shall be—"Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound." The basis of compensation is average weekly earnings, and average implies plurality. The Act contemplates that, before any compensation can be awarded, the relation of master and servant must have existed for a period of at least two weeks.

*Joseph Walton, Q.C.*, and *W. T. Postlethwaite*, for the applicant.—The applicant's employment is an employment to which the Act applies, and there is nothing in the Act which shows that its operation is confined to workmen who have been in employment for two weeks. Section 1, sub-section 1, of the Act gives the right to compensation, which is to be in accordance with the first schedule. Then the first schedule says that, in a case like the present, the amount of compensation is to be a weekly payment not exceeding fifty per cent. of the workman's weekly earnings for the period during which he has been in the employment of the same employer. The words "not exceeding fifty per cent." and all the words that follow put a limit on the amount of the weekly payment. The maximum which is not to be exceeded is half the man's average weekly earnings during the time of his employment. The intention of the Legislature is that, in cases where a man has been in employment for less than twelve months, the basis of compensation shall be arrived at by taking the total sum of money earned during the actual period of employment and reducing that total sum to the terms of a weekly payment. The word "average" only applies when there is more than one weekly payment to average. In cases where a man has been in employment less than a full week, the maximum which is not to be exceeded is half of what he actually earned during the time of his employment.

A. L. SMITH, L.J.—The question in this case is one of importance, and is simply this—whether a work-

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

man, who has been accidently injured a day or two after he has entered into his employment, comes within the purview of the Workmen's Compensation Act? The applicant went into his employment on Tuesday, the 18th of July, and did a day's work. At the end of the day he was entitled to go away, and, if he chose, not to come back again or do any more work for his employers. The only arrangement between him and his employers was that, so long as he worked for them, he was to receive wages at the rate of 6s. a day. On the next day, Wednesday, the pit was not at work, and the applicant did not go there at all. On Thursday he went to do a day's work and while he was down in the pit he was injured by an accident. Is he entitled to compensation under the Act? It is asked on his behalf, why should he not be within the Act? I cannot answer that question; but what we have to ask ourselves is whether, on the true construction of the words used by the Legislature, he is within the Act. By section 1, sub-section 1, "If in any employment to which this Act applies" — it is admitted that this employment is one to which the Act applies—"personal injury by accident arising out of and in the course of the employment is caused to a workman"—all that was so here—"his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." That brings us to the first schedule, which is headed, "Scale and conditions of compensation." Section 1 begins with the words, "The amount of compensation under this Act shall be —." Then sub-section (*a*) says that where death results from the injury, and if the workman leaves dependants, it shall be "a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, . . . and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer." If this workman had been killed, to what compensation would he have been entitled? How should we find out what was 156 times his average weekly earnings? In this case there would have been nothing to average. Then we come to sub-section (*b*), which says that, where incapacity for work results from the accident, the amount of compensation shall be "a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound." Then section 2 says: "In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity." Now, do these sections of the schedule embrace the case of a man who has only been at work in his employment for a day or two, or do they contemplate that the man shall have been at work for such a time that his weekly earnings may be averaged? The argument on the part of the applicant cuts the word "average" out of the schedule. In my opinion the court is driven to say that a workman, in order to come within the Act, must have been, at the time of the accident, in his employment for at least two weeks. If he has not been in the employment in which he was injured for at least two weeks, it is impossible to give any signification to the words "average weekly earnings." I therefore think the appeal must be allowed.

COLLINS, L.J.—I am of the same opinion. It seems to me almost impossible to give any decision on this Act which shall be logical and free from anomalies. The Legislature have not brought every workman within the Act, and we cannot speculate on the reasons why certain classes of workmen have been left out. All that we can do is to judge in each particular case what the Legislature meant from a consideration of the words they have used. The Act itself gives a right to compensation to be ascertained in accordance with the schedule. I think the schedule *primâ facie* deals with the case of a man who has been in the service of his master for a considerable period of time. It is true that the accident causing the injury may be the same, and the loss the same, whether the man has been in his employment for a day, or a month, or three months. But I think that the fact that the schedule certainly excludes, in the calculation of compensation, any time spent in employment other than that of the master in whose service the workman has been injured, affords some indication as to how we should decide the question before us. I have come to the conclusion that the schedule, when read according to its natural meaning, contemplates that the relation of master and servant shall have existed for not less than two weeks. I think we should be straining the language of the schedule if we were to hold that a workman who at the time of the accident had been only two or three days in his employment was within the ambit of the Act.

ROMER, L.J.—I have felt great doubt as to this case, but I do not differ from my learned brethren.

*Appeal allowed.*

Solicitors for the employers, *Rowcliffes & Co.*, for *Fullagar & Hulton*, Bolton.

Solicitors for the applicant, *Radford & Frankland*, for *Bowden & Widdowson*, Manchester.

## High Court of Justice.

Chan. Div. Byrne, J. — Dec. 14, 19; Jan. 17.

*In re* THOMAS.
WEATHERALL *v.* THOMAS. (*a*.)

*Drainage expenses—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss* 21, 25, *and* 26—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 13, 15—*Improvement without scheme—Incidental expenses and outgoings—Income or capital.*

*A testator gave his residuary estate to trustees on trust for conversion and investment, then to pay the income in the manner therein directed to three persons as tenants for life, then to hold the estate for the children of one of them. The investment clause contained a power to invest on freehold ground-rents, and power was given to the trustees to postpone the sale of any part of the estate. Part of the estate retained by them unsold consisted of three leasehold houses held for the residue of long terms, and upon these large sums had to be expended by the trustees in putting in modern systems of drainage.*

*Held, that the drainage expenses were improvements*

(*a*.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Edmund Law, who had been tried before Bucknill, J., and a jury at the autumn assizes of 1899, holden at Cardiff, and acquitted at the direction of the learned judge, on an indictment preferred by a private prosecutor under the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), charging him with "treating" at a municipal election, was entitled to recover from the prosecutor his costs sustained by him by reason of such indictment.

At the trial, counsel for the defendant, after the latter's acquittal, asked for an order giving him his costs, but the learned judge, if it was a matter within his discretion, declined to do so, but he reserved the question whether the defendant was entitled to his costs as a matter of right for further consideration as there was no opportunity at the time to consider the statutes relating to the subject.

*B. F. Williams, Q.C.* (*Ivor Bowen* and *Bowen Davies* with him), for the defendant.—Section 30 of Municipal Elections (Corrupt and Illegal Practices) Act, 1884, provides that "the procedure for the prosecution of a corrupt or illegal practice, or any illegal payment, employment, or hiring committed in reference to a municipal election . . . and all other proceeding in relation thereto . . . shall be the same as if such offence had been committed in reference to a parliamentary election, and sections 45 and 46 and sections 50 to 57 (both inclusive), and sections 59 and 60 of the Corrupt and Illegal Practices Prevention Act, 1883, shall apply accordingly as if they were re-enacted in this Act." This Act of 1883, which applies to parliamentary elections, provides by section 53 that section 12, among other sections, of the Corrupt Practices Prevention Act, 1854, which Act also applies to parliamentary elections, "shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act." Section 12 of the Act of 1854 provides as follows: "In any case of any indictment or information by a private prosecutor for any offence against the provisions of this Act, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, such costs to be taxed by the proper officer of the court in which such judgment shall be given." The defendant in the present case is therefore clearly entitled under section 12 to have an order for the costs incurred by him.

*S. T. Evans*, for the prosecutor.—The defendant is not entitled to his costs. No doubt if this had been a parliamentary election he would have been entitled; but this was a municipal election, and the provisions of section 12 of the Act of 1854 are not by section 30 of the Act of 1884 made to apply to municipal elections, because section 30 of the Act of 1884 only applies the procedure of the Act of 1883 with regard to parliamentary elections to municipal elections; and section 53 of the Act of 1883 only provides the application of section 12 of the Act of 1854 to prosecutions for the offence of corrupt practices in relation to parliamentary elections.

*Cur. adv. vult.*

Feb. 14.—BUCKNILL, J., read the following judgment: The question I have to decide is whether in this prosecution of Edmund Law, which was tried before me at the last assizes holden at Cardiff, the defendant, who was acquitted, is entitled to recover from the prosecutor his costs sustained by him by reason of such indictment. The indictment was preferred by a private prosecutor under the Municipal Elections (Corrupt and Illegal Practices) Act (47 & 48 Vict. c. 70) for treating at a municipal election, and after the case for the prosecution was closed I directed the jury to find a verdict of acquittal. Application was then made to me by the learned counsel for the defendant that I should make an order giving him his costs, but, for reasons which I need not now repeat, I declined to exercise such a discretion if it was open to me to do so, but I reserved the question whether the defendant was entitled to his costs for further consideration as there was no opportunity at the time to consider the statutes relating to the subject. The matter has now been argued before me and my attention has been drawn to those Acts of Parliament which govern the question. They are three in number. I will first refer to the latest of them. It is the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70). By section 30 it is enacted that "subject to the other provisions of this Act, the procedure for the prosecution of a corrupt or illegal practice or any illegal payment, employment, or hiring committed in reference to a municipal election, and the removal of any incapacity incurred by reason of a conviction or report relating to any such offence, and the duties of the Director of Public Prosecutions in relation to any such offence (including the grant to a witness of a certificate of indemnity) shall be the same as if such offence had been committed in reference to a parliamentary election, and sections 45 and 46 and sections 50 to 57 (both inclusive) and sections 59 and 60 of the Corrupt and Illegal Practices Prevention Act, 1893, shall apply accordingly as if they were re-enacted in this Act with the necessary modifications." Now one of these sections so applied to that Act is the 53rd, and that section is in the following terms: "Sections 10, 12, and 13 of the Corrupt Practices Prevention Act, 1854, and section 6 of the Corrupt Practices Prevention Act, 1863 (which relate to prosecutions for bribery and other offences under those Acts), shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act, and to any action for any pecuniary forfeiture for an offence under this Act, in like manner as if such offence were bribery within the meaning of those Acts, and such indictment or action were the indictment or action in those sections mentioned, and an order under the said section 10 may be made on the defendant; but the Director of Public Prosecutions, or any person instituting any prosecution on his behalf or by the direction of an election court, shall not be deemed to be a private prosecutor, nor required under the said sections to give any security." It is therefore clear that section 12 of the Corrupt Practices Prevention Act, 1854, is to be read into the Act of 1884, and that its provisions extend to any private prosecution on indictment for the offence of any corrupt practice within the meaning of that (the 1884) Act. The 12th section is as follows: "In case of any indictment or information by a private prosecutor for any offence against the provisions of this Act, if judgment shall be given for the defendant he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, such costs to be taxed by the proper officer of the court in which such judgment shall be given." Now, going back to the 30th section of the 1884 Act, we see by reference to the Acts of 1883 and 1854 that section 12 of the 1854 Act applies to the procedure for prosecutions under the 1884 Act, and all other proceedings in relation thereto with the necessary modifications. It was argued by counsel for the prosecution that section 30 of the Act of 1884 applies only to the procedure for the prosecution of a corrupt or illegal practice, and not to a question of costs, but that cannot be so for two reasons, the first of which is that the section

provides that the incorporated sections of the Act of 1883 apply not only to the procedure for the prosecution in such cases, but to all other proceedings in relation thereto, and the second reason is that section 12 of the Act of 1854 deals only with costs, and the right of a defendant who has had judgment given in his favour to recover them from the private prosecutor. That section deals with nothing else. It is, therefore, clear to me that the defendant in this prosecution is entitled to recover from the private prosecutor the costs sustained by him by reason of the indictment which was preferred against him, such costs to be taxed by the proper officer of the court in which the judgment of acquittal was given.

*Judgment for the defendant.*

Solicitors for the prosecutor, *T. J. Hughes*, Bridgend.

Solicitors for the defendant, *Riddell, Vaizey, & Co.*, for *Viner, Leeder, & Morris*, Swansea.

---

Q. B. Div.
(Darling and Channell, JJ.) Dec. 11.

ATTORNEY-GENERAL *v.* DOBREE AND ANOTHER. (*a.*)

*Inland revenue—Life policy—Policy brought into settlement—Estate duty—Finance Act*, 1894 (57 & 58 *Vict.* c. 30), *s.* 2 (1) (d).

*By the Finance Act it is enacted that estate duty shall be payable upon property passing on the death of any person dying after the commencement of the Act, and by section* 2 (1) (d) *it is provided that property passing on the death of the deceased shall be deemed to include "any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."*

*A. effected a policy of assurance on his own life, payable on his death to his wife, and in pursuance of an agreement on his marriage assigned the policy to the trustees of his marriage settlement upon trust to hold the proceeds thereof for the benefit of his wife for life, he, A., covenanting to keep up the policy and pay the premiums during his life.*

*Held, that on A.'s death estate duty was payable under section* 2 (1) (d) *on the proceeds of the policy.*

This was an information by the Attorney-General against H. H. Dobree and J. L. Tomlin, the defendants.

In September, 1866, a marriage was duly solemnized between Falconer John Atlee and Mary Dobree MacCall. Shortly before the marriage Falconer John Atlee effected a policy of assurance in La Nationale Insurance Office of France on the 25th of September, 1866, for the sum of 37,537 francs (£1,501 10s.) on his own life, and payable on his death to Mary Dobree MacCall, subject to a yearly premium of £50 payable by him during his life.

By an indenture dated the 19th of September, 1867, Falconer John Atlee assigned the policy to four persons, of whom the defendants are the survivors, as trustees, for the purposes of an indenture of settlement of the 20th of September, 1867, made between Falconer John Atlee of the first part, Mary Dobree, his wife, of the second part, J. F. Atlee of the third part, George MacCall of the fourth part, and R. O. Maughan, E. S. Claremont (both since deceased), and the defendants of the fifth part, whereby, in pursuance of an agreement made previous to the said marriage, the said Falconer John Atlee assigned the policy of assurance to the parties thereto of the fifth part upon the trust thereinafter declared concerning the same.

By that settlement Falconer John Atlee covenanted with the trustees to keep up the policy and pay the premiums thereon during his life, and he did in fact duly keep up the same, and all premiums thereon were paid by him, and the moneys payable under the policy at his death were duly received by the defendants as the surviving trustees of the settlement of the 26th of September, 1867.

It was declared by the settlement that the money to be received under the policy should be held by the trustees upon trust for Mary Dobree Atlee for life; and the settlement contained a joint power of appointment by Falconer John Atlee and Mary Dobree Atlee in favour of their children over the trust funds, including the proceeds of the policy.

By a joint appointment dated the 30th of January, 1871, Falconer John Atlee and Mary Dobree Atlee appointed that part of the trust funds, including the proceeds of the policy, should be held in trust for their son George G. F. Atlee, subject to the life interest of Mary Dobree Atlee.

Falconer John Atlee died on the 2nd of October, 1894, leaving Mary Dobree Atlee him surviving.

Under these circumstances it was alleged by the Crown that estate duty became payable under section 2 (1) (*d*) (or if not then under the other provisions of sections 1 and 2) of the Finance Act, 1894, in respect of moneys received under the policy of assurance as property passing on the death of Falconer John Atlee, within the meaning of those sections.

*Sir R. Webster, A.G.* (*Sir R. Finlay, S.G.*, and *Vaughan Hawkins* with him), appeared on behalf of the Crown.—The Crown is entitled to claim estate duty under section 2 (1) (*d*) of the Finance Act, 1894. If the policy had not been brought into settlement estate duty would clearly have been payable under section 2, sub-section (1) (*a*) as being property of which the deceased was competent at the time of his death to dispose. Section 15, which provides for certain exemptions from estate duty—such as annuities not exceeding £25—throws some light on the construction of section 2 (1) (*d*) if necessary, but the words of that part of this sub-section are quite clear.

*Haldane, Q.C.* (*Danckwerts* with him), for the defendants.—On the death of F. J. Atlee no beneficial interest passed. The property had already passed at the time of his death, the trustees acquiring the property at the date of the deed of settlement, so that the deceased had no property to pass. Section 3 of the Act shows that is so. That section deals with exceptions from payment of estate duty in the case of transactions for a money consideration: *Earl Cowley* v. *Commissioners of Inland Revenue*, 47 W. R. 525, [1899] A. C. 198. If you pay an insurance company a lump sum down in consideration of being paid a larger sum at death, no property passes and no duty is payable. Why should there then be duty payable in the case where you pay by means of premiums?

Counsel also cited *Lord Advocate* v. *Fleming*, 45 W. R. 674, [1897] A. C. 145.

*Sir R. Webster, A.G.*, replied.

DARLING, J.—I think in this case our judgment must be for the Crown. The matter arises in this way: Upon a marriage in September, 1866, between a Mr. Atlee and a Miss MacCall, Mr. Atlee effected a policy of assurance, and he kept up that policy by means of paying a premium of £50 a year during his lifetime. In the next September, 1867, Mr. Atlee assigned that policy to four trustees, and they were the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

trustees for the purposes of an indenture of settlement dated September, 1867. He, by that assignment, covenanted to do what he had already been doing to keep up the premiums so as to keep the policy alive, and that he did during his lifetime. Owing to an appointment in 1871, the policy became a policy held in trust for a son of this marriage, a Mr. George Falconer Atlee, subject to a life interest which remained in Mrs. Atlee, who survived her husband who created the policy. Now, in those circumstances, the Crown say that estate duty is payable in respect of something which Mrs. Atlee has received in respect of this policy owing to the death of her husband, and it is said that the case comes within the Finance Act, 1894, s. 2, sub-section (1) (*d*). Section 2 says: "Property passing on the death of the deceased shall be deemed to include—"Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." Now, omitting the words which cannot apply to this, what one has to consider is whether what Mrs. Atlee got, or what the trustees got, upon the death of Mr. Atlee can be described as "any interest purchased or provided by the deceased, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." It is said by Mr. Haldane that no beneficial interest passes at all upon the death of Mr. Atlee, that all that he ever had was in the hands of trustees by virtue of the earlier settlement and that really he never had a "benefical interest," that something passed to Mrs. Atlee on his death, but it was not a beneficial interest; that what passed was, it is true, a benefit, an advantage; but then that is not taxed by the Act. Nothing is taxed unless it comes within the words "beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Now, I think it is material, to see exactly what this means, to look at section 15 of the Act. In this sub-section (*d*) not only interests are dealt with but annuities are dealt with, and section 15 enacts this: "Estate duty shall not be payable in respect of a single annuity not exceeding £25 purchased or provided by the deceased either by himself alone or in concert or arrangement with any other person, for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person." Now, this is not an "annuity," and all that is excepted there is an annuity, and not every annuity but only an annuity of the value of not more than £25. But supposing everything in this case had been the same, every circumstance the same, except that the amount payable by the insurance company upon the death of Mr. Atlee was not a lump sum. What would have been the difference? Everything would have been precisely what it is in section 15, except that the amount would probably, or possibly, have been more than £25. Then if section 2 (1) (*d*) applies, provided the annuity had been stipulated, what is there to show that that sub-section (*d*) does not apply if an annuity has not been stipulated for but a lump sum, all the other words being the same? I must say I can see nothing. It appears to me that section 15 does show that exactly what was done here results in a taxable beneficial interest arising upon the death of the person who has insured his life for the benefit of his widow in the circumstances in which Mr. Atlee has done it, and that section 2 (1) (*d*) would certainly have attached if the money paid by the insurance company had been secured to be paid in the way of an annuity, and that it will attach whenever that is done, provided the annuity is not taken out of the operation of the statute by virtue of section 15 because it amounts to not more than £25. I cannot see anything here which shows that this is not a beneficial interest arising on the death of Mr. Atlee simply because it was payable as a lump sum, whereas it apparently was considered by the Legislature that it would be a beneficial interest arising on the death of Mr. Atlee if it had been not a lump sum, but an annuity. But now, further, Mr. Haldane contends that however this might have been, even if it would have been within sub-section (*d*), upon the kind of reasoning that I have tried to use, it is taken out of sub-section (*d*), and, indeed, altogether excused from taxation by virtue of section 3 of the Finance Act, 1894. Now, that section says that "Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made or such lease or annuity granted for full consideration in money or money's worth paid to the vendor or grantor for his own use and benefit."

I do not think this case does come within that proviso. It seems to me that what was aimed at there was not the kind of thing that has happened here at all. What was aimed at was this: If a person, insurance office, or whatever it may be, has bought from another something and has paid for that a price—a "consideration in money or money's worth"—but has not got the immediate benefit of his purchase and is not to get the immediate benefit of his purchase, except upon the death of his vendor, then it is perfectly clear that he gets no benefit at all, but only gets that which he has bought and paid for, and the delivery of which to him has been postponed. But he has bought and paid for it a "full consideration in money or money's worth"; and there I think the Legislature has simply said that in such a case as that it would be very unjust to make a man pay duty upon that which he gets because the man of whom he has bought it has died, where he has paid the full value of it to that person it may be years and years ago. I do not think it is at all intended to include such a transaction as that. That is not "property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes." It seems to me really Mr. Haldane's way of reading this and applying it to this case would be to read the word "from" in that section precisely as though it were the word "by," to turn the section about and give it an operation which I cannot think it was ever intended to have; and for these reasons I think our judgment must be for the Crown.

CHANNELL, J.—I am of the same opinion. I think our judgment must be for the Crown on the ground that the duty which they claim is given by the Finance Act, 1894, s. 2 (1) (*d*), and I think that it is not prevented becoming due under the facts of the particular case by section 3 of the same Act. Now I confess there is, to my mind, a little difficulty in fully following the exact literal words of Lord Macnaghten's judgment in the *Cowley case* as to cases falling within section 1 and section 2. It is quite true that if you can arrive at the conclusion that the case falls within section 1, then section 2 may be said to be exclusive; you do not want section 2. But one of the operations of section 2 seems to me

clearly to be to sweep into section 1 some cases which might be doubtful upon the construction of section 1, but as to which section 2 includes clear words and therefore brings them in to be subject to the duty whether they were in section 1 upon the true interpretation of that section or not. The result of it is, if you take the trouble to decide in that case the academical question whether they were in section 1 or not, if you come to the conclusion that they were in section 1 you would not want section 2. I think that is what Lord Macnaghten must have meant. At any rate it was not necessary to express any opinion contrary to that in the case before him. In the present case the difficulty as to whether or not a policy of insurance at all (I am not dealing at all with any particular policy, but any policy) would come within section 1 of the Finance Act, is that upon the death the property which the deceased had becomes more or less changed. He has got a policy which no doubt carries with it a right for somebody to receive at his death a certain sum of money. When his death happens the sum of money is payable, and consequently that is a case in which two doubts may arise; firstly, whether it was within section 1 at all, and secondly, if it was, whether what was supposed to pass and be subject to the duty would be the value of the property which the deceased had—that is, the policy—which means, I suppose, the surrender value of the policy, or the principal value of the money. Upon those matters doubts might be entertained. Now, it seems to me that section 2 does contain by reference to the incorporated Acts a distinct provision in reference to policies of insurance, that is, by incorporating section 11 of the Customs Inland Revenue Act of 1889, which expressly deals with policies of insurance. The 11th section of the Act of 1889 was an amendment of the 38th section of the Act of 1881, and the 38th section of the Act of 1881 was one dealing with gifts. It contained provisions with respect to "property passing under Voluntary settlements," and so forth. A doubt must have arisen between 1881 and 1889 as to what was the effect of a person giving policy moneys accruing on his death to somebody by keeping up the policy for that person's benefit, and it was considered that that was a case which would come in and be liable to duty as a gift, and accordingly the 4th clause of section 11 (1) was passed, and it provides that where the policy of insurance is wholly kept up for the benefit of a donee it is to be liable to the account duty. Now, "donee" is a word which conveys a somewhat similar meaning to "volunteer," which is in the previous portion of the section, and that is how the legislation stood with reference to the account duty. Then there comes the Finance Act, 1894, which gives a different kind of duty, called the estate duty, but it gives it, at any rate, and it is intended to give it by sub-section (c), in respect of property as to which the account duty would be payable, and accordingly sections 38 of the Act of 1881 and 11 of the Act of 1889 are incorporated into section 2 so as to bring the property referred to in those sections into the category of property which is to be deemed to pass upon the death for the purposes of estate duty; and at the same time a further amendment is made in those sections, and a further amendment is by cutting out the word "voluntary," the word "volunteer," and the reference to a "voluntary settlement." Now, that being so, one would expect, when the Legislature was doing that, that they should also alter the word "donee" in the portion of section 11 of the Act of 1889 which specially dealt with policies of insurance, because there would be no reason why, when they were making duty payable in cases where the person receiving the benefit was not merely a volunteer, they should keep in the word "donee" in the other section. We find that they do not expressly enact that, but they do enact a new section or sub-section—namely, this sub-section (d) which deals with any annuity. An annuity, of course, was one of the things which had been to a certain extent defined in those other sections, and it had been dealt with in the case of joint annuities—namely, annuities passing by survivorship. And the Legislature goes on to bring in other interests, and it seems to me that sub-section (d) practically has the result—so far as regards policies of insurance—of taking away the effect of that word "donee" in the incorporated section. One would think that they might have done it, and I should think they would have done it, by express words if it had not been intended to sweep in not merely policies of insurance, but other interests besides; and accordingly you find apt words used for bringing in a policy of insurance which had been kept up for the benefit of the person who was not the donee because there was some kind of consideration—the thing had been kept up for his benefit—to bring in such a policy, as that and also something else. Accordingly it seems to me one would have no difficulty so far in saying that this sub-section (d) applied, and applied to such cases as the one before us; and of course section 15 of the same Act throws very great light on it, and greatly assists that construction. Then that brings us round to this: that in this particular case the policy moneys are made subject to duty by this section 2, sub-section (1) (d), provided only there is nothing else which exempts them. Then we have to consider the question of the true construction of section 3 which Mr. Haldane contends takes this particular policy out of the operation of the previous section. Now that reads: "Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bonâ fide* purchase from the person under whose disposition the property passes." Now suppose you apply that to the case of the policy of insurance, then, if you look upon the word "property" as referring to the policy of insurance, undoubtedly the right to this policy of insurance did not pass on the death of the deceased at all, it passed on the settlement a good many years before. If, however, you read the word "property" as referring to the £1,500 payable under it, then that passed on the death of the deceased; because it then became payable, and in that sense it passed; and it passed also on the death of the deceased, partly, at any rate, by reason of a contract with the insurance company. Of course, if no contract had been made with the insurance company to insure the life of the deceased, and if the transaction had merely been a purchase, by the payment of premiums of £1,500 to be paid on the deceased's death, that transaction would have been one to which section 3 applied. Now, I am not sure that there may not be some policies of insurance and policy moneys which might come within this. If a person insured the life of somebody else (he must, of course, have an insurable interest) and paid his premiums, and that someone else died, that money might possibly be supposed to come within some of the other sections.

I do not know whether it would, I do not myself think it would, but if it did, I think that section 3 would prevent the duty being payable, and in that case one would have to read the words "the person under whose disposition the property passes" as covering the insurance company; but there it would pass only by reason of the policy of insurance; and in the case before us I think it is quite impossible to say it passed only by reason of the contract with the insurance company. It passes by reason of a considerable

number of other circumstances. It seems to me that this is a general section which cannot be read so as to alter the effect of the specific sections which precede it, and which deal with policy moneys and policies of insurance, and, as I think, deal with them because they would have been of an ambiguous character if not specially dealt with. On these grounds it seems to me that we are bound to say that this duty is given by section 2, sub-section (1) (*d*), and that it is not prevented being given by section 3.

*Judgment for the Crown.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendants, *J. L. Tomlin & Son.*

---

Prob. Div. & Adm. Div. } Admiralty. } Dec. 6.

"THE JOHN HOLLWAY." (*a.*)

*Ship—Collision—Damage—Vessel turning in the Thames not a crossing vessel—Bye-laws for the Navigation of the River Thames,* 1898, *art.* 48.

*A steam vessel partly athwart the River Thames, and not in motion through the water or moving ahead or astern over the ground, but slowly swinging to her anchor in the act of turning round, is not a vessel crossing the river within the* 48*th article of the Thames Bye-laws,* 1898, *which provides that steam vessels and steam launches crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river.*

This was an action of damage *in rem* instituted on behalf of the owners of the steamship *Dalmatia* against the steam tug *John Hollway* and her owners intervening as defendants to recover the damages arising out of a collision which occurred between *The Dalmatia* and a barge in tow of *The John Hollway* on the River Thames, off the Surrey Commercial Dock entrance, on the afternoon of the 23rd of June last, in the circumstances stated in the judgment.

Dec. 4, 5.—On these days the suit was heard before Bucknill, J., assisted by two of the Elder Brethren of the Trinity House.

*Aspinall, Q.C.,* and *Stubbs,* for the plaintiffs.

*Laing, Q.C.,* and *Lauriston Batten,* for the defendants.

*Cur. adv. vult*

Dec. 6.—BUCKNILL, J.—The evidence in this case is conflicting. The story told by the witnesses for the plaintiffs is that *The Dalmatia* had been navigating up the Thames on the south side of the river withal, and when a little below the entrance to the Surrey Commercial Dock her helm was put to port in order to turn her round and take her into the dock, which is on the south side of the river; that when she had answered about ten points under her port helm, which means that her head would then be about two points more than right across the river, she was dead in the water, her anchor having previously been let go, partly for the purpose of checking her way, on account of a barge which was anchored ahead, and partly to help her to swing, the anchor having told of the ground, as I find as a fact, and not what is called dredging. When in this position, and with a water space between the stern of *The Dalmatia* and a Russian barque, according to the plaintiff's witnesses, too narrow for *The John Hollway,* with her four barges in tow, to pass through, the tug is said to have attempted to accomplish the impossible, and so to have caused the collision between the first barge on her starboard rope and the rudder of *The Dalmatia.* The case set up by the defendants, shortly stated, is that *The Dalmatia,* having blown a four-blast signal, had got into a position of about athwart the river, just as the tug and her barges were passing between her stern and the Russian barque, and that *The Dalmatia* came astern and so caused the collision, there being plenty of room for the tug and her barges to pass safely if *The Dalmatia* had not come astern. It is admitted that nothing was done by *The Dalmatia* to keep out of the way of the tug and her barges; but the charge made against the tug is that she might have avoided the collision by reasonable care. It is not proved to my satisfaction that any steps could, in the circumstances, have been successfully taken on board the tug, except easing her way and so allowing *The Dalmatia* to swing more up and down, and thus increase the waterway between herself and the Russian barque. On the question of fact whether *The Dalmatia* did, at the critical time, move astern, I am satisfied, after hearing the witnesses on both sides, that she did not, and I find as a fact that she was making no movement through the water at the time of the collision, but that her stern was swinging slowly round, so that if the collision had not occurred when it did she would safely swing round head on tide, when I suppose the anchor would have been lifted, and she would have proceeded into dock. On the question of law, whether a vessel turning in the Thames, as *The Dalmatia* was, on the same side as that on which she is being navigated, so far as that is possible having regard to her length, is a crossing ship within the meaning of article 48 of the Thames Bye-laws, the case of *The River Derwent,* 7 Asp. Mar. Law Cas. 37, 39 W. R. Dig. 211, has been cited. That case turned on the construction to be placed on articles 24 and 25 of the old bye-laws corresponding with articles 48 and 53 of the bye-laws now in force, and which are to be read together. These bye-laws provide as follows: Article 48, "Steam vessels and steam launches crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river"; and article 53, "Where, by the above bye-laws, one of two vessels is to keep out of the way, the other shall keep her course and speed."

The facts in the case of *The River Derwent* differ from those in the case now before me. In the case of *The River Derwent, The Allendale* was in the act of crossing the Thames from the south to the north side, and, whilst still performing that manœuvre, the collision happened. She was held to be a crossing vessel within the rule. The Lord Chancellor in his judgment pointed out that it was "undoubtedly a fact that *The Allendale* did cross from one side of the river to the other." He also said that when a vessel has left the south shore and is going towards the north shore she is in the act of crossing. In this case *The Dalmatia* did not leave the south side of mid-river, although by reason of her great length, when she was athwart the river, some part of her hull was on the north side of mid-stream; but she never, in fact, crossed the river, and it was never intended that she should do so. The manœuvre intended was simply that of turning round in the river, on the south side of mid-channel so far as that was possible.

It is true that she was not proceeding up or down the river, but was being turned round in it, and this is the only difficulty that I feel on the construction of the

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

bye-law—that is, whether the rule applies to all such steam vessels as are not proceeding up or down river, but are crossing from one side to the other, or are turning round, as this vessel was. If such a construction is to be given to the bye-law, it applies to small and short vessels as well as to the largest and longest.

I cannot construe the rule to mean more than it seems to me to state, and I think I should be doing so if I held that it applies to every steamer which is being turned round in the river, although I do not say that a vessel so turning might not at some time, whilst in progress of turning, be crossing towards the other side. It would depend upon the facts of each case, and it seems to me to be very hard as against steam vessels if such vessels, when athwart the tide, in the act of turning round for the purpose of getting into dock, were held in all cases when in such a position to be bound to keep out of the way of vessels navigating up and down the river. Such vessels, in obeying the rule, would necessarily have to put themselves sometimes in positions of extreme difficulty and danger.

On the facts of this case I find that *The Dalmatia* was, at the time of the collision, partly athwart the river, and not in motion through the water, or moving ahead or astern over the ground, but was slowly swinging to her anchor in the act of turning round, and was not a vessel crossing the river within the rule; but, even if she were, I find as a fact that her omission to keep out of the way of the tug in no way caused or contributed to the collision. Those in charge of the tug had heard the four-blast signal from the *Dalmatia* which, under article 40 of the bye-laws, indicated that she was turning round. The article in question states that "When a steam vessel (in circumstances other than those mentioned in bye-law 36) is turning round, or for any reason is not under command, and cannot get out of the way of an approaching vessel . . . she shall signify the same by four blasts of the steam whistle." It is admitted that that signal was sounded by *The Dalmatia*. The master of the tug thought that by the time he reached *The Dalmatia* she would have swung head to tide, but he miscalculated his speed and distance, and as he approached *The Dalmatia* he put on his engines full speed and made a dash for it, with the result, that although he passed through in safety so far as the tug was concerned, one of his barges collided with the rudder of *The Dalmatia*. If he had eased his engines sooner, and kept them eased longer, there would have been no collision, and in my judgment it was by his negligence alone that the casualty occurred. The view is confirmed by the advice I have received from the Elder Brethren of the Trinity House who are assisting me. The result of the evidence enables me to find that the actual distance between the stern of *The Dalmatia* and the Russian barque was not as great a distance as was alleged by the defendants. With regard to certain entries in the engine-room log of the steamship, believing as I do the evidence from *The Dalmatia*, that the engines had been stopped for a few minutes before the collision, I disregard the entry in the log as affording positive proof that the engines were moving astern at the time of the collision. I find as a fact that there was not a bad look-out on board *The Dalmatia*, and, in the circumstances of the case, I pronounce the defendants' tug *The John Hollway* alone to blame for the collision.

Solicitors for plaintiffs, *Stokes & Stokes*.

Solicitors for defendants, *William Hurd & Son*.

## Court of Appeal.

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — March 27.

PAYNE v. HOGG. (*a*.)

*Prohibition—Salford Hundred Court—Jurisdiction—"Cause of action"—Plea to the jurisdiction—Want of—Salford Hundred Court of Record Act*, 1868 (31 & 32 *Vict. c. cxxx.*), *ss.* 6, 7.

*The expression "the cause of action" in section 6 of the Salford Hundred Court of Record Act*, 1868, *means the whole cause of action.*

Whitehead *v.* Butt, 7 *Times L. R.* 609, *approved.*

*By section 7 of the Act, "Save and except as aforesaid, no defendant shall be permitted to object to the jurisdiction of the court otherwise than by special plea, and if the want of jurisdiction be not so pleaded, the court shall have jurisdiction for all purposes."*

*Held, that a defendant, against whom judgment had been signed in default of appearance in an action in the Salford Hundred Court, where the claim did not exceed £50, could not get a writ of prohibition on the ground that the cause of action did not arise within the jurisdiction of the court, as section 7 conferred jurisdiction on the court in such a case in the absence of a plea to the jurisdiction.*

Chadwick *v.* Ball, 14 *Q. B. D.* 855, 33 *W. R. Dig.* 172, *followed.*

Appeal from an order of the Divisional Court, affirming the decision of the judge at chambers, directing a writ of prohibition to issue to the high steward and bailiff of the Court of Record for the Hundred of Salford, and to the plaintiff, restraining them from further proceeding on a judgment obtained in that court.

The action was brought in the Salford Hundred Court to recover £16 0s. 9d. principal and interest due on a promissory note signed by the defendant as the maker at Buxton, outside the jurisdiction of the court, and made payable to the plaintiff at Manchester, within the jurisdiction of the court. The writ of summons in the action on its face commanded the defendant, within eight days after service thereof, to cause an appearance to be entered, and it gave notice that in default of the defendant so doing the plaintiff might proceed therein and judgment might be given in her absence. The defendant did not enter an appearance, and judgment was accordingly signed against her, and execution was issued. The defendant thereupon applied for a writ of prohibition as above, on the ground that the Salford Hundred Court had no jurisdiction to entertain the action.

The Divisional Court held that, as the cause of action arose out of the jurisdiction of the court, the court had no jurisdiction to entertain the action, section 7 of the Salford Hundred Court of Record Act, 1868,* only giving the court jurisdiction in such

* Section 6 of the Salford Hundred Court of Record Act, 1868, gives the court authority to try (1) personal actions, if "the cause of action" arises within the Hundred, provided that the debt or damages sought to be recovered do not exceed £50, except by consent; (2) actions of ejectment between landlord and tenant where the land sought to be recovered is situate in the Hundred, and the annual rent or the annual value thereof does not exceed £50; (3) any action whatsoever, with certain exceptions,

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

a case where the defendant has appeared, and, the time for pleading having come, has not pleaded the want of jurisdiction. They accordingly affirmed the order of the judge at chambers granting a writ of prohibition.

The plaintiff appealed.

*C. A. Russell, Q.C.*, and *Walter R. Warren*, for the plaintiff.—The "cause of action" arose within the jurisdiction of the Salford court, and therefore a writ of prohibition cannot issue. This point was not argued in the Divisional Court, as that court were bound by the decision in *Whitehead* v. *Butt*, 7 Times L. R. 609, purporting to follow *Cooke* v. *Gill*, 21 W. R. 334, L. R. 8 C. P. 107, and *Read* v. *Brown*, 37 W. R. 131, 22 Q. B. D. 128. The decision in *Whitehead* v. *Butt* is wrong. "Cause of action" in section 6 of the Salford Hundred Court of Record Act, 1868, does not mean the whole cause of action. At common law "cause of action" means every fact material to be proved to entitle the plaintiff to succeed. But in a particular statute the meaning may be different. The words occurred in section 18 of the Common Law Procedure Act, 1852, and they were held to mean the act on the part of the defendant which gives the plaintiff his cause of complaint: *Jackson* v. *Spittall*, 18 W. R. 1162, L. R. 5 C. P. 542; *Vaughan* v. *Weldon*, 23 W. R. 138, L. R. 10 C. P. 47. That is the meaning of the words in this Act. The act in the present case which gave the plaintiff his cause of complaint was the non-payment of the note at Manchester. That is sufficient to give the court jurisdiction. They also referred upon this point to section 50 of the Act of 1868. Secondly, if the "cause of action" means the whole cause of action, section 7 of the Salford Hundred Court of Record Act, 1868, gave the court jurisdiction over the action as there was no plea to the jurisdiction. Section 7 does not apply to the cases mentioned in the proviso in section 6, and in those cases a writ of prohibition can be issued. But as the claim does not exceed £50 section 7 applies, and the effect is to give the court jurisdiction subject to be defeated by a special plea being put upon the record. In *Chadwick* v. *Ball*, 14 Q. B. D. 855, 33 W. R. Dig. 172, the Court of Appeal, overruling *Oram* v. *Brearey*, 25 W. R. 695, 2 Ex. D. 346, held that the words at the end of section 7, "and if the want of jurisdiction be not so pleaded the court shall have jurisdiction for all purposes," extended the jurisdiction of the court. As the defendant did not appear and plead the want of jurisdiction, the court had jurisdiction. The decision of the Divisional Court, that section 7 only applies where the time has arrived for pleading and no plea to the jurisdiction is put in, cannot be supported. As was pointed out by Baggallay, L.J., in *Chadwick* v. *Ball*, there is no distinction drawn in the section between a stranger and a party to the suit. A stranger could never put in a plea in the action. There is no difficulty in holding that the court has a defeasible jurisdiction between the issue of the writ and the time for putting in a defence. In *Chapman* v. *Mattison*, Andr. 191, at p. 198, it was said that where a County Palatine had jurisdiction and the action was brought in one of the superior courts at Westminster, the latter should hold plea thereof if there was no plea to the jurisdiction. That recognized a jurisdiction in the courts at Westminster defeasible by a plea being subsequently put on the record. The Divisional Court were therefore wrong. As the want of jurisdiction, if any, was not apparent on the face of the proceedings, the court in its discretion should refuse, in the circumstances, to grant a prohibition. They referred upon this point to *Broad* v. *Perkins*, 37 W. R. 44, 21 Q. B. D. 533; *Farquharson* v. *Morgan*, 42 W. R. 306, [1894], 1 Q. B. 552.

*Pickford, Q.C.*, and *Le Riche*, for the defendant, were not called upon to argue the first point. The second question depends upon the true meaning of section 7 of the Act of 1868. That section means that in a case like this until the time for pleading comes the court has no jurisdiction. When the time for pleading has arrived the section makes the omission to plead the want of jurisdiction equivalent to a consent to give the court jurisdiction. The jurisdiction is thus extended by the omission to put in a special plea. If the contention of the plaintiff is correct, the court has an anomalous jurisdiction liable to be ousted by plea. Such a jurisdiction is unknown. In *Chapman* v. *Mattison* it was not said that the superior courts at Westminster had jurisdiction liable to be ousted by plea. There the superior courts had no jurisdiction at all, but as prohibition would not lie to a superior court, the only mode of taking the objection to the jurisdiction was by plea. The construction contended for by the plaintiff would have the effect of putting an end to objections to the jurisdiction, because defendants in these small cases will not care to go to the expense of pleading the want of jurisdiction when, if the plea is successful, they cannot get any costs. They will prefer to pay the claim, and the practical result will be the extension of the jurisdiction of the court. In *Chadwick* v. *Ball* the court merely held that section 7 meant that a defendant cannot take his chance of success in the inferior court, and then turn round and apply for a prohibition.

They also referred to *Mayor of London* v. *Cox*, 16 W. R. 44, L. R. 2 H. L. 239; Mayor's Court Procedure Act (20 & 21 Vict. c. clvii.), s. 15.

*C. A. Russell, Q.C.*, was not called upon to reply.

A. L. SMITH, L.J.—This is an appeal from the decision of the Divisional Court affirming the order of the judge at chambers directing a writ of prohibition to issue. The plaintiff brought an action in the Salford Hundred Court to recover £16 0s. 9d. due upon a promissory note signed by the defendant at Buxton and made payable to the plaintiff at Manchester. The writ of summons which was served upon the defendant required her within eight days after the service thereof to enter an appearance, and gave her notice that in default of her doing so judgment might be given in her absence. That was a distinct intimation to the defendant that unless she entered an appearance to the action judgment might be given against her. She did not enter an appearance. It is not suggested that she does not owe the money. After the time limited for appearance the plaintiff signed judgment and execution was issued. I may observe that everything appeared to be regular on the face of the proceedings. The defendant then took out a summons for a writ of prohibition to restrain all further proceedings in the action, which the judge at chambers granted, his decision being affirmed by the Divisional Court.

The first point taken by the plaintiff in this court

---

by consent: provided that if in the course of any action (except where a consent has been signed) it shall appear upon oath to the judge or registrar that the debt or damages sought to be recovered, or the annual rent or value of the land exceeds £50, &c., then the judge or registrar shall order all proceedings in the action to be stayed.

Section 7: "Save and except as aforesaid, no defendant shall be permitted to object to the jurisdiction of the court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the court shall have jurisdiction for all purposes."

raises the question as to what is the meaning of the words "the cause of action" in section 6 of the Salford Hundred Court of Record Act, 1868. The law is well settled that, in the case of these courts of limited jurisdiction, "the cause of action" means all matters which together make up the cause of action. All those matters must take place within the area of the jurisdiction. The promissory note was signed by the defendant at Buxton, outside the area of the jurisdiction of the Salford court, and as that is a material ingredient in the cause of action, a fact necessary to be proved to entitle the plaintiff to succeed, the Salford Hundred Court had, apart from section 7 of the Act of 1868, which I will next consider, no jurisdiction to entertain the action.

The next question is whether the defendant can now set up the objection to the jurisdiction of the Salford court. Section 6 of the Act of 1868 shows that the Salford court is a court of limited jurisdiction. It is admitted that if the judge of the Salford court were to try an action dealing with a matter beyond the pecuniary limits of his jurisdiction, a prohibition would lie to restrain him from doing so. Then comes section 7, which provides that "save and except as aforesaid, no defendant shall be permitted to object to the jurisdiction of the court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the court shall have jurisdiction for all purposes." The Divisional Court have held that the section only requires the objection to the jurisdiction to be taken by special plea when the time for pleading has come. That seems to me to be adding to the section words which are not there, and for which there is no necessity. The defendant did not think fit to enter an appearance and put in a plea to the jurisdiction. If a defendant in such a case as this wishes to object to the jurisdiction he must appear and plead the want of jurisdiction. If he does not do that the court "shall have jurisdiction for all purposes." The very point was brought before this court in *Chadwick* v. *Ball*. The difference between section 7 of the present statute and section 15 of the Mayor's Court Procedure Act, 1857, was there pointed out. Baggallay, L.J., after pointing out that a provision was introduced into section 7 of the Salford Court Act which was not in section 15 of the Mayor's Court Act—namely, that if the want of jurisdiction be not so pleaded, the court shall have jurisdiction for all purposes—said that by reason of that provision the omission to plead to the jurisdiction conferred jurisdiction on the Salford Hundred Court for all purposes. In that case, no doubt, the defendant had put in a statement of defence, and had not pleaded to the jurisdiction. To my mind, however, that makes no difference. The section seems to me to set up, in cases to which it applies, an absolute prohibition against raising the objection to the want of jurisdiction except by plea. Lindley, L.J., took the same view, for he said that section 7 does not touch the question of the jurisdiction of the superior court to prohibit where there is no jurisdiction in the inferior court, because the words at the end of section 7 extend the jurisdiction of the inferior court. In my opinion that case covers the present, and I entirely agree with it. I do not feel the difficulty which Channell, J., felt as to the court having a defeasible jurisdiction between the issue of the writ and the time for putting in a plea. That difficulty seems to me to have been answered by the case of *Chapman* v. *Mattison*, cited to us in the argument. So here, until the defendant chooses to come in and set up by his plea that the cause of action arose out of the jurisdiction, everything being in order on the face of the record, I do not see why the court should not proceed with the action and give judgment in it. With regard to the question of the exercise of the discretion of the court in granting a writ of prohibition, if it were necessary to decide the case upon that ground, I should not be at all inclined to grant a prohibition in the circumstances of this case.

COLLINS, L.J.—I am of the same opinion. With regard to the first question, it seems to me to be quite clear that the words "the cause of action" mean the whole cause of action as explained in *Cooke* v. *Gill*, and have not the same meaning as the court in *Jackson* v. *Spittal* placed on the special words, "a cause of action," in section 18 of the Common Law Procedure Act, 1852. I now come to the second question—namely, the construction of section 7 of the Salford Court Act of 1868. I must say that I have felt some misgiving upon this, but upon the whole I think that we are concluded by authority. Two alternative views were open. One was that section 7 was merely a rule of pleading in the Salford Hundred Court, and did not enlarge the jurisdiction of the court; merely, in fact, defining the mode in which the objection to the jurisdiction could be taken in the court itself. That was the view taken by the Divisional Court in *Oram* v. *Brearey*. The other view was that the section enlarged the jurisdiction of the court. This last view was that taken by this court in *Chadwick* v. *Ball*. Though I can see a possible middle view between those two, it is too fine to accept, and if we loyally accept the decision in *Chadwick* v. *Ball*, we must hold that in such a case as the present section 7 confers jurisdiction on the Salford Hundred Court. It was urged that this is a very curious kind of jurisdiction, which depends upon a contingency happening subsequently—namely, the contingency of the defendant not putting upon the record a special plea to the jurisdiction. For myself I see no difficulty in holding that the court has, in cases where the claim does not exceed £50, and in cases other than those specified in the proviso to section 6 of the Act of 1868, what has been called a defeasible jurisdiction, which can only be ousted by a special plea to the jurisdiction. Whether this court in *Chadwick* v. *Ball* had before their minds all the consequences of their decision, I do not know; but from what I know of those local courts I should have had some misgiving in holding that they had an unlimited territorial jurisdiction, leaving it to the defendant to oust the jurisdiction by a special plea. However that seems to me to be a matter for the Legislature to consider. This court has so decided, and that decision seems to me to be in accordance with the natural meaning of the words of the section. As pointed out by Baggallay, L.J., the section draws no distinction between a stranger and a party to the suit, which tends to show that the section does not merely lay down a rule of pleading in the court itself. I also agree with my lord upon the question of discretion.

ROMER, L.J.—I am of the same opinion. I do not see how to get over the plain words of section 7. That section provides that, except in the cases specified in the proviso at the end of section 6, no defendant shall be permitted to object to the jurisdiction of the court except by special plea, and if the want of jurisdiction be not so pleaded the court shall have jurisdiction for all purposes. The meaning of the section is that when the action comes on to be heard, if there is no plea to the jurisdiction upon the record, and if the case does not fall within the proviso to section 6, the court has jurisdiction to entertain the action and to deliver judgment. After judgment it is too late to

raise the question of want of jurisdiction. To oust the jurisdiction of the court in such a case there must be a special plea to the jurisdiction. The defendant in this case did not choose to appear. Upon the expiration of the time limited for entering an appearance, the court was bound to give judgment for the plaintiff, as in the absence of a plea to the jurisdiction, it had by section 7 jurisdiction over the action. There is another ground upon which the appeal should succeed. The want of jurisdiction did not appear on the face of the record, and, therefore, the court had a discretion as to granting a prohibition. If ever there was a case in which the court in its discretion should refuse to grant a prohibition, it is this case. I also agree with what my brethren have said upon the point as to the meaning of "the cause of action."

*Appeal allowed.*

Solicitor for the plaintiff, *W. T. Harvey*, for *J. E. Jones*, Manchester.

Solicitors for the defendant, *Sims & Syms*, for *W. Burton*, Manchester.

---

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 27, 28; March 5, 19.

STOCK v. MEAKIN. (a.)

*Local government—Private street work—Charge of expenses on frontager's premises—Date from which charge takes effect—"Completion of works" or "final apportionment" — Vendor and purchaser — "Outgoings"—Implied covenant against incumbrances—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 1, 12, 13.

*The apportioned expenses of private street works executed under the Private Street Works Act*, 1892, *become a charge on the premises affected thereby as from the date of the completion of the works, and not merely as from the date of the final apportionment.*

*If, therefore, the premises are sold free from incumbrances after the completion of the works, but before the date of the final apportionment, the sum finally apportioned thereon is payable by the vendor.*

*Decision of* Kekewich, J. (ante, *p.* 6), *affirmed.*

This was an appeal against a decision of Kekewich, J. (*ante*, p. 6), and raised a question under the Private Street Works Act of 1892 (55 & 56 Vict. c. 57)—viz., whether the sum finally apportioned as payable by the owner of premises fronting a street, in respect of works (such as sewers) executed in the street by the local authority, becomes a charge upon the premises as from the date of the completion of the works, or only as from the date of the final apportionment of the expenses of the works among the various owners of premises abutting on the street.

The land to which the action related, which was situated at West Ham and abutted on Queen's-road, had changed hands between the date of the completion of works executed under the Act by the council of the county borough of West Ham, and the date of the final apportionment of the expenses among the property owners.

The works were commenced on the 4th of April, 1898, and were completed on the 26th of July, 1898.

On the 10th of October, 1898, the defendant Meakin, who was the then owner of the piece of land in question, entered into an agreement to sell it to the plaintiff Stock for £1,000. The purchase was to be completed on the 11th of November then next, and up to that day all "outgoings" were (if necessary) to be apportioned.

On the 22nd of November, 1898, the defendant "as beneficial owner," conveyed the land to the plaintiff.

On the 29th of November, 1898, the final apportionment of expenses was made by the council, and on the 29th of December, 1898, they gave notice to the plaintiff that his premises were liable to be charged with the sum of £130 14s. as his proportion of the expenses of the works, and that, unless this sum was paid within one month, interest at 4 per cent. would be charged.

The plaintiff called on the defendant to pay this amount, and on his declining to do so the plaintiff paid it himself, and this action was brought to enforce repayment by the defendant.

The questions also arose, whether this apportioned sum was an "outgoing" which the vendor was under his contract for sale bound to discharge; whether the amount was an "incumbrance" on the property, and, if so, whether it was an "incumbrance" which after conveyance came within the vendor's covenant against incumbrances, which, under the Conveyancing Act of 1881, is implied from the use of the words "as beneficial owner" in a conveyance.

Kekewich, J., held, upon the construction of the Private Street Works Act, 1892 (as distinguished from the Public Health Act, 1875), that the apportioned sum became a charge upon the land as from the date of the completion of the works, and that consequently it was an incumbrance existing at the date of the conveyance to the plaintiff, and that the defendant was, under his implied covenant against incumbrances, bound to discharge it.

The defendant appealed.

*Warrington, Q.C.*, and *Vaughan Hawkins*, for the defendant.—The question arises under the Private Street Works Act, 1892. The charge in this case, which did not become a charge before final apportionment, was not an outgoing, though it might be an incumbrance: *In re Boor, Boor* v. *Hopkins*, 37 W. R. 349, 40 Ch. D. 572. It is not an incumbrance within section 7 of the Conveyancing Act, 1881. The charge does not arise before final apportionment: *Tubbs* v. *Wynne*, [1897] 1 Q. B. 74, 45 W. R. Dig. 168. This does not come within the covenant against incumbrances. This is not suffered by a person conveying, which imports something over which the vendor has control: *Hobson* v. *Middleton*, 6 B. & C. 295; Vendors and Purchasers, by Lord St. Leonards (13th ed.), p. 491. There was no charge at all until the final apportionment was made. Sections 13 and 14 of the Private Street Works Act, 1892, are substituted for section 257 of the Public Health Act, 1875. Under section 257 of the Public Health Act, 1875, the charge is a charge upon the "premises": *Corporation of Birmingham* v. *Baker*, 17 Ch. D. 782, 30 W. R. Dig. 121. This is not an incumbrance; if it is an incumbrance it is not one the vendor was bound to discharge. Until the date of final apportionment there was nothing to go out: *Batchelor* v. *Bigger*, 60 L. T. Rep. 416, 37 W. R. Dig. 99; *Plumstead Board of Works* v. *Ingoldby*, 21 W. R. 77, 817, L. R. 8 Ex. 63, 174. In *In re Boor, Boor* v. *Hopkins*, Kay, J., held it was not an outgoing. The plaintiff cannot recover: *Barraud* v. *Archer* (1831), 2 Sim. 433, 9 L. J. Ch. O. S. 173.

*Ogden Lawrence, Q.C.*, and *P. F. Wheeler*, for the plaintiff, referred to *Hornsey Local Board* v. *The Monarch Investment Building Society*, 38 W. R. 85, 24 Q. B. D. 1; *In re Betteswortb and Richer*, 36 W. R.

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

544, 37 Ch. D. 535; *In re Furtado and Jeffries*, 27 SOLICITORS' JOURNAL, 466; *Egg* v. *Blayney*, 36 W. R. 893, 21 Q. B. D. 107.

*Warrington, Q.C.*, in reply, referred to *Barraud* v. *Archer*.

VAUGHAN WILLIAMS, L.J., delivered the judgment of the court as follows: The question in this case is whether the vendor of a piece of land at West Ham is liable to indemnify the purchaser against the sum of £130 14s. claimed by the urban sanitary authority as expenses of works executed by such authority under the Private Street Works Act, 1892. The agreement for sale and purchase was made on the 10th of October, 1898. The day fixed for the completion of the purchase was the 11th of November, 1898, and the purchase-money was paid by the plaintiff (the purchaser) and the conveyance completed on the 22nd of November, 1898. The works in question were completed on the 26th of July, 1898. The resolution authorizing the execution of the works was dated the 27th of July, 1897, which was prior to the acquisition of the property by the defendant, the vendor. The defendant conveyed as beneficial owner; the conveyance recited that the defendant had agreed to sell to the plaintiff free from incumbrances; and the conveyance was by a mortgagee, at the request and the direction of the defendant as beneficial owner, to hold the said land in fee simple freed and discharged from the claims of the said mortgagee. The notice of final apportionment was on the 29th of December, 1898.

If the charge had been a charge for expenses incurred by the local authority under the Public Health Act, 1875, there is no doubt but that such a charge would, having regard to the dates of the agreement to purchase and the conveyance on the one hand and the date of the execution of the works on the other, have been a charge against which the vendor would have had to indemnify the purchaser. The charge under the Public Health Act, 1875, however, is a charge which can only arise on failure of the owner of the land to comply with the notice of the urban authority and the execution by the urban authority of such works by reason of such default by the landowner, and is, moreover, a charge taking effect from the date of the completion of the works, whereas the charge under the Private Street Works Act, 1892, certainly is not a charge arising on default of the landowner, and it is argued is not a charge from the date of the completion of the works. It becomes necessary, therefore, to consider from what date the charge under the Act of 1892 takes effect, and whether the fact that the charge does not arise on default of the landowner makes any difference in the obligations of the vendor towards the purchaser; and this makes it necessary to consider the terms of the material sections of the Acts of 1875 and 1892. Under section 257 of the Public Health Act, 1875, the expenses incurred by the local authority, for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable by that Act (*i.e.*, by section 150), may be recovered from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery such expenses are made a charge on the premises in respect of which they were incurred, and it was held in *In re Betteworth and Richer* that the expenses became a charge upon the completion of the works, and that this was so notwithstanding the fact that the owner could not be compelled to pay until the cost had been made out and apportioned. In other words, the charge was held to be subsisting although it could not be enforced until the provision in the last paragraph but one of section 257 had been worked out—*i.e.*, until the apportionment of the expenses had become binding by the lapse of three months after notice of apportionment without any written notice of dispute being given by the owner. This decision turned entirely on the words of sections 150 and 257, which plainly gave a charge so soon as the works had been completed and the expenses incurred by the local authority on the failure of the owner of the land to execute the works in compliance with a notice served in pursuance of the powers given by section 150.

The charge which has to be considered in the present case is given by section 13 of the Private Street Act, 1892, and we have to determine if this charge, like the charge under the Public Health Act, 1875, takes effect from the time of the completion of the works. We think it does. The Act of 1892 is by section 1 to be read as one with the Public Health Acts, of which the Act of 1875 is the principal Act, and the charge created by section 13 of the Act of 1892 is to be a charge to the like extent and effect as under section 257 of the Act of 1875. It seems to us to follow, unless there is in section 13 or some other section of the Act of 1892 something clearly to the contrary, that the charge under section 13 will take effect, like a charge under the Act of 1875, from the time of the completion of the works the expenses of which are charged. But it is said that section 13 itself makes express provision to the contrary, because it says, "any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged . . . with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the rate of 4 per cent. per annum." It is said that the effect of these words is that there is no charge until the date of the final apportionment, and therefore not from the date of the completion of the works. We cannot agree with this contention. We think that the effect of these words is, first, to provide that the amount of the charge shall be that fixed by the final apportionment or in case of objection by the determination of the objection; and, secondly, interest is to run on the sum ultimately fixed from the date of the final apportionment. In other words that the owner of the land is not by his objection to the final apportionment to escape interest on the sum finally fixed between the date of the final apportionment and the date of the final determination of the objection. We think, therefore, that there is nothing in section 13 to prevent the charge taking effect from the completion of the works, and when the whole Act of 1892 is considered we find a great deal to lead to the conclusion that the Act means that the charge shall date from the completion of the works, and not from the final apportionment. In the first place, there is the general consideration that it is not likely that the Legislature should have intended the charge to date from the final apportionment, because the final apportionment is an event the date of which can be fixed quite arbitrarily by the officers of the local authority. Moreover, to make the charge commence with the completion of the works is to make the charge coincide with the benefit. In the next place, the whole scheme of the Act points to a charge being intended prior to the final apportionment. First, there is the provisional apportionment of the estimated expenses on the premises liable to be charged. This, subject to objections to be made within a month, fixes the premises to be charged and the proportions to be borne. All this has to be done before the works are

raise the question of want of jurisdiction. To oust the jurisdiction of the court in such a case there must be a special plea to the jurisdiction. The defendant in this case did not choose to appear. Upon the expiration of the time limited for entering an appearance, the court was bound to give judgment for the plaintiff, as in the absence of a plea to the jurisdiction, it had by section 7 jurisdiction over the action. There is another ground upon which the appeal should succeed. The want of jurisdiction did not appear on the face of the record, and, therefore, the court had a discretion as to granting a prohibition. If ever there was a case in which the court in its discretion should refuse to grant a prohibition, it is this case. I also agree with what my brethren have said upon the point as to the meaning of "the cause of action."

*Appeal allowed.*

Solicitor for the plaintiff, *W. T. Harvey*, for *J. E. Jones*, Manchester.

Solicitors for the defendant, *Sims & Syms*, for *W. Burton*, Manchester.

---

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 27, 28; March 5, 19.

STOCK v. MEAKIN. (a.)

*Local government—Private street work—Charge of expenses on frontager's premises—Date from which charge takes effect—"Completion of works" or "final apportionment"—Vendor and purchaser—"Outgoings"—Implied covenant against incumbrances—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 1, 12, 13.

*The apportioned expenses of private street works executed under the Private Street Works Act*, 1892, *become a charge on the premises affected thereby as from the date of the completion of the works, and not merely as from the date of the final apportionment.*

*If, therefore, the premises are sold free from incumbrances after the completion of the works, but before the date of the final apportionment, the sum finally apportioned thereon is payable by the vendor.*

*Decision of* Kekewich, J. (ante, *p.* 6), *affirmed.*

This was an appeal against a decision of Kekewich, J. (*ante*, p. 6), and raised a question under the Private Street Works Act of 1892 (55 & 56 Vict. c. 57)—viz., whether the sum finally apportioned as payable by the owner of premises fronting a street, in respect of works (such as sewers) executed in the street by the local authority, becomes a charge upon the premises as from the date of the completion of the works, or only as from the date of the final apportionment of the expenses of the works among the various owners of premises abutting on the street.

The land to which the action related, which was situated at West Ham and abutted on Queen's-road, had changed hands between the date of the completion of works executed under the Act by the council of the county borough of West Ham, and the date of the final apportionment of the expenses among the property owners.

The works were commenced on the 4th of April, 1898, and were completed on the 26th of July, 1898.

On the 10th of October, 1898, the defendant Meakin, who was the then owner of the piece of land in question, entered into an agreement to sell it to the plaintiff Stock for £1,000. The purchase was to be completed on the 11th of November then next, and up to that day all "outgoings" were (if necessary) to be apportioned.

On the 22nd of November, 1898, the defendant "as beneficial owner," conveyed the land to the plaintiff.

On the 29th of November, 1898, the final apportionment of expenses was made by the council, and on the 29th of December, 1898, they gave notice to the plaintiff that his premises were liable to be charged with the sum of £130 14s. as his proportion of the expenses of the works, and that, unless this sum was paid within one month, interest at 4 per cent. would be charged.

The plaintiff called on the defendant to pay this amount, and on his declining to do so the plaintiff paid it himself, and this action was brought to enforce repayment by the defendant.

The questions also arose, whether this apportioned sum was an "outgoing" which the vendor was under his contract for sale bound to discharge; whether the amount was an "incumbrance" on the property, and, if so, whether it was an "incumbrance" which after conveyance came within the vendor's covenant against incumbrances, which, under the Conveyancing Act of 1881, is implied from the use of the words "as beneficial owner" in a conveyance.

Kekewich, J., held, upon the construction of the Private Street Works Act, 1892 (as distinguished from the Public Health Act, 1875), that the apportioned sum became a charge upon the land as from the date of the completion of the works, and that consequently it was an incumbrance existing at the date of the conveyance to the plaintiff, and that the defendant was, under his implied covenant against incumbrances, bound to discharge it.

The defendant appealed.

*Warrington, Q.C.*, and *Vaughan Hawkins*, for the defendant.—The question arises under the Private Street Works Act, 1892. The charge in this case, which did not become a charge before final apportionment, was not an outgoing, though it might be an incumbrance: *In re Boor, Boor* v. *Hopkins*, 37 W. R. 349, 40 Ch. D. 572. It is not an incumbrance within section 7 of the Conveyancing Act, 1881. The charge does not arise before final apportionment: *Tubbs* v. *Wynne*, [1897] 1 Q. B. 74, 45 W. R. Dig. 168. This does not come within the covenant against incumbrances. This is not suffered by a person conveying, which imports something over which the vendor has control: *Hobson* v. *Middleton*, 6 B. & C. 295; Vendors and Purchasers, by Lord St. Leonards (13th ed.), p. 491. There was no charge at all until the final apportionment was made. Sections 13 and 14 of the Private Street Works Act, 1892, are substituted for section 257 of the Public Health Act, 1875. Under section 257 of the Public Health Act, 1875, the charge is a charge upon the "premises": *Corporation of Birmingham* v. *Baker*, 17 Ch. D. 782, 30 W. R. Dig. 121. This is not an incumbrance; if it is an incumbrance it is not one the vendor was bound to discharge. Until the date of final apportionment there was nothing to go out: *Batchelor* v. *Bigger*, 60 L. T. Rep. 416, 37 W. R. Dig. 99; *Plumstead Board of Works* v. *Ingoldby*, 21 W. R. 77, 817, L. R. 8 Ex. 63, 174. In *In re Boor, Boor* v. *Hopkins*, Kay, J., held it was not an outgoing. The plaintiff cannot recover: *Barraud* v. *Archer* (1831), 2 Sim. 433, 9 L. J. Ch. O. S. 173.

*Ogden Lawrence, Q.C.*, and *P. F. Wheeler*, for the plaintiff, referred to *Hornsey Local Board* v. *The Monarch Investment Building Society*, 38 W. R. 85, 24 Q. B. D. 1; *In re Bettesworth and Richer*, 36 W. R.

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

544, 37 Ch. D. 535; *In re Furtado and Jeffries*, 27 SOLICITORS' JOURNAL, 466; *Egg* v. *Blayney*, 36 W. R. 893, 21 Q. B. D. 107.

*Warrington, Q.C.*, in reply, referred to *Barraud* v. *Archer*.

VAUGHAN WILLIAMS, L.J., delivered the judgment of the court as follows: The question in this case is whether the vendor of a piece of land at West Ham is liable to indemnify the purchaser against the sum of £130 14s. claimed by the urban sanitary authority as expenses of works executed by such authority under the Private Street Works Act, 1892. The agreement for sale and purchase was made on the 10th of October, 1898. The day fixed for the completion of the purchase was the 11th of November, 1898, and the purchase-money was paid by the plaintiff (the purchaser) and the conveyance completed on the 22nd of November, 1898. The works in question were completed on the 26th of July, 1898. The resolution authorizing the execution of the works was dated the 27th of July, 1897, which was prior to the acquisition of the property by the defendant, the vendor. The defendant conveyed as beneficial owner; the conveyance recited that the defendant had agreed to sell to the plaintiff free from incumbrances; and the conveyance was by a mortgagee, at the request and the direction of the defendant as beneficial owner, to hold the said land in fee simple freed and discharged from the claims of the said mortgagee. The notice of final apportionment was on the 29th of December, 1898.

If the charge had been a charge for expenses incurred by the local authority under the Public Health Act, 1875, there is no doubt but that such a charge would, having regard to the dates of the agreement to purchase and the conveyance on the one hand and the date of the execution of the works on the other, have been a charge against which the vendor would have had to indemnify the purchaser. The charge under the Public Health Act, 1875, however, is a charge which can only arise on failure of the owner of the land to comply with the notice of the urban authority and the execution by the urban authority of such works by reason of such default by the landowner, and is, moreover, a charge taking effect from the date of the completion of the works, whereas the charge under the Private Street Works Act, 1892, certainly is not a charge arising on default of the landowner, and it is argued is not a charge from the date of the completion of the works. It becomes necessary, therefore, to consider from what date the charge under the Act of 1892 takes effect, and whether the fact that the charge does not arise on default of the landowner makes any difference in the obligations of the vendor towards the purchaser; and this makes it necessary to consider the terms of the material sections of the Acts of 1875 and 1892. Under section 257 of the Public Health Act, 1875, the expenses incurred by the local authority, for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable by that Act (*i.e.*, by section 150), may be recovered from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery such expenses are made a charge on the premises in respect of which they were incurred, and it was held in *In re Betteworth and Richer* that the expenses became a charge upon the completion of the works, and that this was so notwithstanding the fact that the owner could not be compelled to pay until the cost had been made out and apportioned. In other words, the charge was held to be subsisting although it could not be enforced until the provision in the last paragraph but one of section 257 had been worked out—*i.e.*, until the apportionment of the expenses had become binding by the lapse of three months after notice of apportionment without any written notice of dispute being given by the owner. This decision turned entirely on the words of sections 150 and 257, which plainly gave a charge so soon as the works had been completed and the expenses incurred by the local authority on the failure of the owner of the land to execute the works in compliance with a notice served in pursuance of the powers given by section 150.

The charge which has to be considered in the present case is given by section 13 of the Private Street Act, 1892, and we have to determine if this charge, like the charge under the Public Health Act, 1875, takes effect from the time of the completion of the works. We think it does. The Act of 1892 is by section 1 to be read as one with the Public Health Acts, of which the Act of 1875 is the principal Act, and the charge created by section 13 of the Act of 1892 is to be a charge to the like extent and effect as under section 257 of the Act of 1875. It seems to us to follow, unless there is in section 13 or some other section of the Act of 1892 something clearly to the contrary, that the charge under section 13 will take effect, like a charge under the Act of 1875, from the time of the completion of the works the expenses of which are charged. But it is said that section 13 itself makes express provision to the contrary, because it says, "any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged . . . with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the rate of 4 per cent. per annum." It is said that the effect of these words is that there is no charge until the date of the final apportionment, and therefore not from the date of the completion of the works. We cannot agree with this contention. We think that the effect of these words is, first, to provide that the amount of the charge shall be that fixed by the final apportionment or in case of objection by the determination of the objection; and, secondly, interest is to run on the sum ultimately fixed from the date of the final apportionment. In other words that the owner of the land is not by his objection to the final apportionment to escape interest on the sum finally fixed between the date of the final apportionment and the date of the final determination of the objection. We think, therefore, that there is nothing in section 13 to prevent the charge taking effect from the completion of the works, and when the whole Act of 1892 is considered we find a great deal to lead to the conclusion that the Act means that the charge shall date from the completion of the works, and not from the final apportionment. In the first place, there is the general consideration that it is not likely that the Legislature should have intended the charge to date from the final apportionment, because the final apportionment is an event the date of which can be fixed quite arbitrarily by the officers of the local authority. Moreover, to make the charge commence with the completion of the works is to make the charge coincide with the benefit. In the next place, the whole scheme of the Act points to a charge being intended prior to the final apportionment. First, there is the provisional apportionment of the estimated expenses on the premises liable to be charged. This, subject to objections to be made within a month, fixes the premises to be charged and the proportions to be borne. All this has to be done before the works are

executed. Then section 12 provides: "When any private street works have been completed, and the expenses thereof ascertained, the surveyor shall make a final apportionment by dividing the expenses in the same proportions in which the estimated expenses were divided in the original or amended provisional apportionment (as the case may be)." These words are, in our judgment, strong to show that on the completion of the works the expenses become a charge on ascertained premises in ascertained proportions. There is no appeal against this, and the final apportionment is a mere arithmetical process for the purpose of dividing these expenses in these proportions. The final apportionment is not a condition precedent to the obligation to bear these expenses in these proportions. The obligation exists before the final apportionment is made. The final apportionment merely works out the division of these expenses in these proportions amongst the premises charged. The objections which, by clause 2 of section 12, can be taken after final apportionment are not objections to the proportions or to the inclusion or exclusion of particular premises amongst those charged (all those objections have to be made before the works are executed), but are either objections that the proportions have not been followed or are objections to the totals of the expenses to be divided. All this statutory machinery seems to us to point to the charge taking effect from the completion of the works. The charge takes effect under the Act of 1875 before the apportionment is made, and in our judgment it is intended that it shall be so under the Act of 1892. If this view is right, we have no doubt but that this charge is an outgoing which the vendor was bound by his contract to discharge. We also have no doubt but that the charge is an incumbrance, claim, or demand suffered by the vendor, notwithstanding the fact that the expenses were incurred without any default on his part, and that the time for payment had not arrived before the conveyance was executed; nor have we any doubt but that this charge is inconsistent with the express terms of the conveyance. We think, therefore, that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors, *Farrer & Co.; George Brown, Son, & Vardy.*

---

From Prob. Div. & Adm. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 12.

BAGSHAW v. PIMM. (a.)

*Practice—Costs—Probate action—Three wills—Severance in defence.*

*In a probate action the validity of the earliest of three wills was established. Of the four defendants in the action, who were all beneficiaries under the first will, the two who were executors of the first and second wills received the same benefits under the second will, while the other two were cut out under the second will. All four were cut out under the third will.*

*Held, that there was such a divergence of interests between the two pairs of defendants that the latter pair was justified in appearing separately, and was therefore entitled to have a separate taxation and payment of costs.*

This was an appeal as to costs arising out of the decision by Barnes, J., of a probate action heard in the Probate Division in the following circumstances:

The testator Timothy Pimm, who died the 25th of April, 1898, had made three wills, dated respectively the 10th of August, 1895, the 17th of March, 1898, and the 2nd of April, 1898, which were the subject of the said probate action.

The result of that action, which was heard before the judge and a common jury in March, 1899, was that the first will was admitted to probate, it being found by the jury that the two wills of 1898 had been obtained without the knowledge of the testator of their contents and by the undue influence of Frederick Pimm, the testator's brother.

The two plaintiffs in the action were the executors of the two wills of 1898, one of them being a solicitor of many years' experience, who had taken an active part in their preparation and execution.

Of the four defendants, who were all beneficiaries under the will of 1895, two were James and George Pimm, brother and nephew of the testator, and executors under that will, and the remaining two, Mrs. Jackson and Mrs. Furniss, were sisters, and children of another brother deceased.

The will of the 17th of March, 1898, cut out the two latter defendants, but made no substantial difference to the two former defendants.

The will of the 2nd of April, 1898, which revoked that of the 17th of March, cut out these two former defendants also, and practically gave the whole property to Frederick Pimm.

The defendants in the action having been successful in establishing the force and validity of the will of 1895, no special order was made as to costs, which followed the event.

The two defendant Pimms brought in their bill for taxation and it was taxed and had been paid.

The two other defendants, who had appeared separately, also brought in a bill for £167 16s. 4d. for fees and expenses incurred; the registrar declined to tax this on the ground that they raised no new point, and that their interests were fully protected by the other defendants.

Appeal from this decision of the registrar was made to the judge in chambers, but was dismissed on the ground that the rule was only to allow defendants one set of costs unless it could be shown that certain interests would suffer or that new points had been raised.

Mrs. Jackson and Mrs. Furniss now appealed from that decision.

*W. G. Clay*, for the appellants.—The rule is only to deprive successful defendants of costs where there is some special demerit on their part or some special merit on the part of the unsuccessful party; this is a long established practice in the Queen's Bench Division which should be followed in the Chancery or Probate Division. Here, if there had been only one will in dispute, the appellants could not have properly appeared separately from the executor defendants; but the appellants, who took no interest under either of the two 1898 wills, were the only parties injured by the former of the same, so that their interests were not necessarily protected by the other two defendants, who had only to upset the last will. The respondents should be made to pay the appellants' costs because their uncertainty arose out of the respondents' fault in having by undue influence procured the existence of the two wills.

*F. A. Inderwick, Q.C.*, and *W. B. Hextall*, for the respondents.—The protection of the two executors was sufficient for the appellants, who ought not to have been made parties, and certainly not to have appeared separately: *Stevenson* v. *Abington*, 11 W. R.

---

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

936, 8 L. T. Rep. 719, and *In re Isaac, Cronbach* v. *Isaac*, 45 W. R. 262, [1897] 1 Ch. 251. This is not a case like *Rayson and Wife* v. *Parton*, 18 W. R. 232, L. R. 2 P. & D. 38, where there was a distinct advantage in confining the litigation to one occasion. This was a question of *quantum* and not of law: *In re Gilbert*, 33 W. R. 832, 28 Ch. D. 549.

LINDLEY, M.R.—This case is a little out of the ordinary. It is clear that the respondents by setting up, as they did, two bad wills, have brought all this controversy on themselves. At first I was inclined to think that the validity of the will of 1895 could and would have been properly fought out by the two executors without the two appellants appearing separately. But the result has not been conclusive as to this. The question is, were they justified in appearing separately to defend their own interests? I have come to the conclusion that they were. There was such a divergence of interests between the two Pimms and the two ladies, having regard to the March will, that if anything had gone wrong, the two Pimms might have consented to a compromise disadvantageous to the two ladies. That justified the latter in separately appearing by counsel. Their separate appearance was cautious and not oppressive, and, my sympathy not being with the respondents, Mr. Clay has convinced me that there was no sufficient cause for depriving his clients of their costs.

RIGBY, L.J.—I agree. It might have suited the two Pimms to set up one will and not the other.

VAUGHAN WILLIAMS, L.J.—I am not at all prepared here to say that the solicitor for the ladies did not exercise a very wise discretion in advising them to appear separately, and if that is so, how can we say that their separate appearance occasioned unnecessary litigation to these respondents?

*The appeal was allowed with costs, and an order made for taxation of the bill.*

Solicitors, *M. L. B. Braund*, for *F. J. Walmsley*, Derby; *Few & Co.*, for *J. & W. H. Sale & Son*, Derby.

---

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — March 8.

ELLIS v. ROWBOTHAM. (*a*.)

*Landlord and tenant—Rent—Instalments payable in advance—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *s.* 2.

*The Apportionment Act*, 1870 *only applies to sums accruing due, and not to sums accrued due at the time of the event which necessitates the apportionment.*

Appeal from a judgment of Kennedy, J., at the trial of an action without a jury.

The action was brought to recover rent.

By an agreement in writing the plaintiff let a house and premises to the defendant for a year, from the 10th of June, 1898, at a rent of 340 guineas, payable as follows:—viz., £189 5s. on taking possession; £55 18s. 4d. on the 10th of September, 1898; £55 18s. 4d. on the 10th of December, 1898, and £55 18s. 4d. on the 10th of March, 1899.

The agreement provided that if any rent reserved thereby should be in arrears for fourteen days, the landlord might, after giving one week's notice, retake possession of the premises; but this was to be without prejudice to any other remedies which the landlord might have.

The defendant went into possession and duly paid the sum of £189 5s., and he also paid the instalment of £55 18s. 4d. which became due on the 10th of September, but he made default in payment of the instalment which became due on the 10th of December.

On the 7th of February, 1899, the writ in this action was issued, and on the 21st of February it was served on the defendant. By it the plaintiff claimed £55 18s. 4d., the instalment of rent which became due on the 10th of December.

On the 24th of February the plaintiff gave notice to the defendant in pursuance of the clause in the agreement as to re-entry, and on the 2nd of March the plaintiff re-took possession of the premises.

The defendant contended that, by the virtue of the Apportionment Act, 1870, the plaintiff was only entitled to apportioned rent up to the date of re-entry, and he brought into court the sum of £15 14s. 5d., which he said was sufficient to satisfy the plaintiff's claim.

Kennedy, J., gave judgment for the plaintiff.

The defendant appealed.

*C. A. Russell, Q.C.*, and *Frank Dodd*, for the defendant.

*Rawlinson, Q.C.*, and *Woodfin*, for the plaintiff.

A. L. SMITH, L.J.—I am of opinion that the judgment of Kennedy, J., is right. The plaintiff let a house to the defendant for a year for the rent of £357, but it was expressly agreed that the rent was to be paid in advance by instalments—viz., an instalment of £189 5s. to be paid down when the tenant entered into possession, then an instalment of £55 18s. 4d. in advance on the 10th of September, then another instalment of £55 18s. 4d. in advance on the 10th of December, and then a similar instalment in advance on the 10th of March. The agreement contained an express stipulation, independent of the terms as to rent, that if the rent should be in arrear for fourteen days the landlord might after notice in writing retake possession of the premises. This condition was to be without prejudice to any other remedies which the landlord might have. The instalment which became due on the 10th of December was not paid, and the landlord after giving notice re-entered and took possession, and he then resorted to his other remedy of suing for rent due. The defendant seeks to rely on the Apportionment Act, section 2 of which is as follows: "From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." By the common law, if a tenant, who was liable to pay rent every quarter day in respect of the past quarter, went out of possession before the last day of a quarter, the landlord received no rent for the current quarter. The effect of the Act is that now rent accrues due *de die in diem*, and the tenant who goes out of possession in the middle of a quarter is liable to payment of rent for the time during which he has been in occupation. How does that apply to the present case? This rent accrued due long before the tenant was turned out of possession. By the terms of the agreement the instalments of rent fell due in advance as the quarters arrived. The defendant points out that the section applies to "all rents," and he contends that all rents—that is to say, rents which have already accrued due

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

as well as rents which have not yet accrued due—are now apportionable. But what the section says is that all rents shall be considered as accruing from day to day, and shall be apportionable accordingly. In my opinion that does not apply to a case where rent has accrued due before the date up to which it is suggested that it should be apportioned.

COLLINS, L.J.—In this case I am not free from doubt, for I feel the weight of the argument on the part of the defendant. But I do not differ from my learned brethren.

ROMER, L.J.—I think that the Act only applies to sums accruing, not accrued, due at the time when the apportionment is said to be required, and that it does not apply to any sums duly and properly paid or accrued due before the happening of the incident which is said to necessitate the apportionment. To hold otherwise would lead to extraordinary results not contemplated by the Legislature, and would put a forced and unsound construction on the Act. I would add that it seems to me, with regard to this particular agreement, that the landlord was entitled to retain the rent reserved and paid in advance, though he subsequently became entitled to re-enter, and did re-enter.

*Appeal dismissed.*

Solicitor for the plaintiff, *C. D. Travers Wire.*

Solicitor for the defendant, *George Trenam.*

---

App. Bankruptcy.
(Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 28.

*In re* A. B. & Co. (*a*.)

*Bankruptcy—Foreigner—Trading in England—Resident abroad—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 4 (a), 6 (d).

*A foreigner trading in England, but resident abroad, is not a debtor within the meaning of the Bankruptcy Act,* 1883, *s.* 6 (d). *A petition in bankruptcy cannot, therefore, be presented against him on his committing what amounts to an act of bankruptcy.*

*Bankruptcy effects an alteration of* status, *and the court ought not to alter the* status *of foreigners unless the jurisdiction to do so has been conferred on it by Parliament in unmistakeable terms.*

This was an appeal from a decision of Mr. Registrar Linklater.

The appellants were creditors of certain traders who were citizens of the United States resident in Baltimore, where they carried on business. They also carried on business in London by means of a manager. In carrying on their business in London they had incurred debts, and they also had assets of value there. In December, 1899, they executed in the United States a deed by which they assigned all their property to their manager at Baltimore as trustee for their creditors. English creditors presented in England a bankruptcy petition against the traders, alleging the execution of the deed as an act of bankruptcy. It was also alleged that the traders had in January, 1900, given notice in England to one of their English creditors that they had suspended or were about to suspend payment of their debts.

By section 4 of the Bankruptcy Act, 1883, "a debtor commits an act of bankruptcy . . . (*a*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally."

By section 6 "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . (*d*) the debtor is domiciled in England, or within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England."

The registrar held that the debtors being foreigners not resident in England were not subject to the Act.

The creditors appealed.

*Herbert Reed, Q.C.,* and *Muir Mackenzie,* for the appellants.—The question is whether an assignment which would be an act of bankruptcy if executed in this country is one when executed by a debtor who is domiciled abroad. A debtor cannot carry on business in this country and when proceeded against assert that he is not resident here. From the earliest times aliens have been subject to the bankruptcy laws. A person is a debtor within the meaning of the Act who carries on business here, contracts debts here, and commits an act of bankruptcy by dealing with his property in England in a way to defeat his creditors. *In re Pearson,* 40 W. R. 532, [1892] 2 Q. B. 263, does not apply to persons who are in this country in the sense that they are carrying on business here. Besides, what was considered in that case was the effect of bankruptcy in itself, and not the effect of a voluntary act of bankruptcy on the part of the debtor.

They also referred to *In re Hecquard,* 38 W. R. 148, 24 Q. B. D. 71; *In re Clark, Ex parte Beyer, Peacock, & Co.,* 45 W. R. 118, [1896] 2 Q. B. 476; *In re Clark, Ex parte Clark,* 46 W. R. 103, [1898] 1 Q. B. 20.

*C. A. Russell, Q.C.,* and *A. H. Carrington,* for the respondents, were not called upon.

LINDLEY, M.R.—I will not say what view I might have been inclined to take if it were not for the previous decisions of this court which are binding upon us. But, having regard to those decisions, I think this appeal must fail. It must be borne in mind that bankruptcy is a very serious matter. It alters the *status* of the bankrupt. This cannot be overlooked or forgotten when we are dealing with foreigners. What authority or right has the court to alter in this way the *status* of foreigners who are not subject to our jurisdiction? If Parliament had conferred this power in express words then, of course, the court would be bound to exercise it. But the decisions go to this extent, and rightly, I think, in principle, that, unless Parliament has conferred upon the court that power in language which is unmistakable, the court is not to assume that Parliament intended to do that which might so seriously affect foreigners who are not resident here, and might give offence to foreign Governments. Unless Parliament has used such plain terms as show that they really intended us to do that, we ought not to do it. That is the principle which underlies the decisions in *Ex parte Blain,* 28 W. R. 334, 12 Ch. D. 522, and *In re Crispin,* 21 W. R. 491, L. R. 8 Ch. App. 374. Nothing can be more plain than the language of James, L.J., in *Ex parte Blain,* and the language used by Cotton, L.J., is to the same effect. *Ex parte Blain* was a case under the Bankruptcy Act, 1869. But when in *In re Pearson* the effect of the Bankruptcy Act, 1883, was considered, the court, consisting of Lord Esher, M.R., and Fry and Lopes, L.JJ., said that the language of section 6 was not plain enough to override that general principle. I can see the difficulty in construing section 6. It might possibly be thought that the word "debtor" is so plain as to confer jurisdiction over foreigners. But the Court of Appeal has said that it is not, and I am unable to distinguish

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the present case from *In re Pearson*. The point about the other act of bankruptcy really involves the same question. The appeal must be dismissed with costs.

RIGBY, L.J.—I agree.

VAUGHAN WILLIAMS, L.J.—I agree.

Solicitors, *Bentwich & Co.; J. H. Moggridge.*

---

## High Court of Justice.

Chan. Div. } Stirling, J. } March 7, 31.

*In re* GOY & CO. (LIMITED).
FARMER *v.* GOY & CO. (LIMITED). (*a.*)

*Company—Debentures—Winding up—Debenture-holder's action—Judgment—Transfer—Right of transferee to registration—Cross-claim by company against transferor—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 131.

*Where debentures are issued subject to the condition that the principal and interest were to be paid without regard to any equities between the company and the original or any intermediate holder thereof, a transferee for value in good faith, after judgment in a debenture-holder's action, is entitled to payment of dividends in respect of his debentures, although the company had an equitable claim against the transferor.*

This was a question in a debenture-holders' action as to whether a Mr. Robey, who, since the judgment in the action, had become the transferee of certain debentures in the company, was entitled to receive anything in respect thereof until payment had been made of a sum which his transferor had been ordered to pay to the liquidator of the company. The debentures in question formed part of an issue of sixty debentures of £100 each made in October, 1897. By each debenture the company charged its undertaking and all its property, both present and future, including its uncalled capital.

On the 12th of May, 1898, a resolution was passed for the voluntary winding up of the company, and a Mr. Doggett was appointed liquidator. Upon the passing of this resolution the principal sums secured by the debentures became payable. On the 9th of June, 1898, Mr. Doggett was appointed receiver in the action, and on the 11th of June, 1898, the usual judgment in a debenture-holder's action was pronounced.

In August, 1898, J. H. Chandler, who was a debenture-holder and had been a director of the company, applied to Mr. Robey for an advance on his debentures. On the 1st of September, 1898, Mr. Robey's solicitor wrote to Mr. Doggett, the liquidator and receiver, making inquiries about the debentures and asking whether there were any cross-claims by the company against Mr. Chandler. On the 2nd of September Mr. Doggett sent a letter answering some of the inquiries, but taking no notice of that as to cross-claims.

On the 14th of September, 1898, Mr. Robey made an advance to Chandler on the security of a mortgage and transfer of the debentures. On the 22nd of September, 1898, Mr. Robey's solicitor sent the transfer to Mr. Doggett for registration. Mr. Doggett referred the matter to the solicitor acting in the proceedings, but that gentleman thought that, having regard to the judgment in the action, there was a difficulty as to registration, and after some correspondence Mr. Robey's solicitor gave Mr. Doggett formal notice requiring him to register the transfers. Ultimately the matter was brought before the master, who directed that the receiver should enter a note of the transfers on the register, but should not enter the transferee's name thereon.

In October, 1898, Mr. Doggett discovered that Mr. Chandler had been guilty of misfeasance in respect of a sum of £300, which had come to his hands as a director of the company, and on the 16th of March, 1899, Chandler was ordered to pay that sum to the liquidator.

*Upjohn, Q.C.*, and *C. T. Mitchell*, for the receiver.

*C. E. Jenkins, Q.C.*, and *A. à B. Terrell*, for Mr. Robey, the claimant.

STIRLING, J., in giving judgment, said: Mr. Robey had clearly become transferee for value and in good faith, and was fully entitled to whatever benefit might accrue from that position. If Chandler had remained the owner of the debentures he would, on the one hand, have been entitled to receive out of the property comprised in his debentures a dividend thereon, and on the other he would have been liable to contribute to that same property a sum of £300. It had been repeatedly held inequitable that a person entitled to a share of a fund should receive anything in respect of that share without paying what he might be bound to contribute to the same fund. In such circumstances the court said in effect to the person claiming to be paid: "You have in your own hands, that which is applicable to the payment, pay yourself out of that." That had been done on the distribution of the residuary estate of a testator, where a person entitled to a share was also indebted to the estate: *Willes* v. *Greenhill*, 10 W. R. 33, 29 Beav. 376; *In re Akerman*, 40 W. R. 12, [1891] 3 Ch. 212; *In re Watson*, 44 W. R. 571, [1896] 1 Ch. 925. Where two companies were in liquidation and one held shares in the other, and was at the same time a creditor, it was held that the creditor could not take any dividend until all calls due on the shares were paid: *In re Auriferous Properties*, 47 W. R. 75, [1898] 2 Ch. 428, and *In re Milan Tramways Co.*, 32 W. R. 601, 25 Ch. D. 587, where Cotton, L.J., said that probably the principle was applicable to the distribution of a fund to which debenture-holders were entitled. I am of opinion it is applicable to the present case, so that Chandler could not have claimed payment of a dividend until he had paid the £300. Then was his transferee in a better position? As a general rule the transferee of a *chose in action* stood in no better position than his transferor. There was nothing, however, to prevent a debtor from contracting with his creditor that he would not avail himself against a transferee of any rights which he might possess against the creditor, or any assignee of his: see *In re Agra and Masterman's Bank*, 15 W. R. 414, L. R. 2 Ch. App. 391, and *In re Blakeley Ordnance Co.*, 16 W. R. 533, L. R. 3 Ch. App. 154. It was contended that such a contract existed in the present case. [His lordship then referred to the conditions of the debentures, which provided, *inter alia* (4), that every transfer must be delivered at the registered office of the company with a fee of 2s. 6d. and such evidence of identity or title as the company might reasonably require, and thereupon the transfer would be registered and a note of such registration would be indorsed thereon. Condition 6 provided that the principal and interest secured by the debentures would be paid without regard to any equities between the company and

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

the original or any intermediate holder thereof.] It seems to me that condition 4 imposed an absolute obligation on the company to register a transfer upon the requirements of the condition being fulfilled. It was suggested that, that only applied while the company was a going concern, but having regard to section 131 of the Companies Act, 1862, I think that the right to transfer and to have the transfers registered was not affected by the winding up. It was said, however, that the equity which was set up was not that of the company but of the other debenture-holders; and that the right to transfer could not be insisted on after judgment had been given in a debenture-holder's action, at all events to their prejudice. The title of the debenture-holders to the £300 was derived from the fact that that sum was part of the property of the company. The debenture-holders all held their debentures under the same conditions, one of which was that the moneys secured by any debenture were to be paid without regard to any equities between the company and the original or any intermediate holder. That was a stipulation for the benefit of the debenture-holders, and was one to which debenture-holders attached great importance. The debenture-holders took this piece of property subject to the same obligations as the company, and they no less than the company were precluded by the conditions from asserting this equity against a transferee. I cannot see that the judgment in the action affected the right to transfer, and I hold that Mr. Robey was entitled to receive the dividend payable in respect of Mr. Chandler's debentures.

Solicitors, *T. Lamartine Yates; S. J. R. Stammers.*

---

Chan. Div. } March 22.
Kekewich, J. }

*In re* LEWIS.
LEWIS *v.* SMITH. (*a.*)

*Inland revenue—Will—Settlement estate duty—Incidence of duty—Settled legacy—General estate—Construction—Finance Act,* 1896 (59 *&* 60 *Vict. c.* 28), *s.* 19.

*A testatrix by her will directed that "my debts and funeral and testamentary expenses, including all duties payable by law out of my estate," and including the duties payable on certain annuities and legacies which she had bequeathed duty free, should be paid out of a fund which constituted her residuary general estate.*

*Held, that the words "all duties payable by law out of my estate" meant "duties payable by law out of my residuary general estate," and did not include settlement estate duty on a settled legacy, and were not "an express provision to the contrary" within the meaning of section* 19 *of the Finance Act,* 1896.

Adjourned summons.

The testatrix, Teresa Lewis, who died on the 2nd of September, 1899, by her will dated the 11th of February, 1896, gave a fund of £9,907 Consols, to which she had become absolutely entitled under the provisions of her marriage settlement, to trustees, upon trust to pay out of the income three small annuities, and subject to these annuities to pay the income to her brother for life and then to her sister if she survived him, and upon the decease of the survivor, and subject to the payment of the three annuities, she directed the trustees to stand possessed of the fund upon the trusts declared in her will for the benefit of certain settled estates.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

The testatrix possessed other property which she disposed of by clause 9 in her will, which was as follows: "Whereas in addition to my settlement trust fund" (being the above-mentioned fund in Consols) "I am also possessed of a sum of 2¾ Consolidated Stock at present amounting to £3,271, and there will also be a certain balance at my bankers at the time of my decease, now I direct that my debts and funeral and testamentary expenses, including all duties payable by law out of my estate and including the duties on the annuities hereinbefore charged on the income of my said settlement trust fund and the duties on any other annuities, and on all legacies hereby or by any codicil hereto bequeathed duty free shall first be paid thereout"; and the testatrix, after providing for the payment thereout, subject as aforesaid, of certain legacies, bequeathed the residue to her niece absolutely.

Testatrix was possessed of no other estate.

The executor duly paid estate duty on the settled trust fund as part of the estate of the testatrix; but in addition to this the Crown claimed settlement estate duty.

This summons was consequently taken out by the executor as plaintiff against the trustees of the settled fund and the residuary legatee as defendants to have the question determined whether the settlement estate duty leviable on the settlement trust fund settled by the will was payable out of that fund in exoneration of the rest of the estate of the testatrix or out of the sum of Consolidated Stock and bank balance mentioned in clause 9 of the will.

Section 19 of the Finance Act, 1896 (59 & 60 Vict. c. 28), provides: "(1) The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contain an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate."

The real question was whether the will contained sufficient directions to take the incidence of the duty out of the general rule that it should fall on the settled legacy.

*J. Howard Wright,* for the executor.—The question is simply whether settlement estate duty on the settled legacy shall be paid out of that legacy or out of the funds comprised in clause 9 of the will.

*H. Warlters Horne,* for the trustees of the settled legacy.—There is sufficient "contrary intention" expressed in this will to make the settlement estate duty payable out of the funds comprised in clause 9 and not out of the settled legacy itself. It has been held that such contrary intention need not be specifically expressed if it can be sufficiently gathered from the general provisions of the will—*e.g.*, cases of jointure have been held to be sufficient. Even if the word "estate" is to be read "general estate," the duty is to be borne by the "special funds," —*i.e.*, the funds comprised in clause 9 of the will. The *dictum* of the Master of the Rolls in *In re Sir Spencer Maryon-Wilson,* 16 Times L. R. 256, is in conflict with the decision of the Court of Appeal in *Attorney-General* v. *Clarkson, ante,* p. 216, [1900] 1 Q. B. 156. [KEKEWICH, J.—That was on another Act and has nothing to do with this case.] Testatrix has directed that all duties payable by law out of her estate should be paid out of residue, and this would include settlement estate duty, which is called in the Finance Act, 1894, s. 5 (*a*), a further duty.

*Austen Cartmell,* for the residuary legatee under clause 9 of the will.—Testatrix had not expressed "contrary intention" within the meaning of the

Finance Act, 1896, s. 19. She has divided the duties into two classes—first, those payable on death *simpliciter*; and second, those arising from the particular character of the persons taking; she draws a distinction and says the first class are to be paid out of residue, and the second class only out of residue where she has expressly stated the legacies or annuities are to be duty free.

KEKEWICH, J.—This testatrix, by her will, settled personal property, and the result is that the settlement estate duty leviable in respect of that personal property, which was hers to do as she pleased with, must be payable out of that settled property in exoneration of what is called the rest of the deceased's estate (that means what we generally call the residue) unless the will contains an express provision to the contrary. Therefore, now that we have had the case threshed out, the point comes back to that which Mr. Howard Wright told me it was in the opening—namely, a question whether this testatrix has expressed "a provision to the contrary." That depends, of course, simply upon the construction of the will. It matters very little whether she had a power of appointment over this fund which she settled or not, for as a matter of fact this settled fund, I understand, was her own to deal with, as I have said, as she pleased. At any rate, she dealt with it by her will, and she dealt with it in this way: she directed the trustees to pay certain annuities thereout, and she directed them to pay those annuities free of duty. It was assumed in argument rather than proved in any way that that meant that the duty which otherwise would have been payable by the annuitant was to be paid out of the settled fund. I do not myself see that at all. Perhaps it does not really call for decision, but I do not see myself how giving an annuity free of duty is an intimation or an expression of the will of the testatrix that that duty should be paid out of the fund of which she is disposing. Supposing it was a legacy, or an annuity standing alone not given out of the settled fund, but simply a bequest of £100 or an annuity of £100 free of duty, the duty would be payable out of the residuary estate, or, as Mr. Cartmell said, as one of the testamentary expenses, and the executor would have to account to the Crown, and he would not be able to make a deduction from the legacy or annuity, and the result would be he would have to bring it into the general account of the estate. Why should any different view be followed when she is dealing with a settled fund in this way? I cannot myself see here any direction that their duties should be paid out of the settled fund. I have not heard whether she has exhausted the settled fund or not; but it matters not. All she says is, the annuitant shall not pay it; she has not said the settled fund shall pay, and the result, it seems to me, is that if it rested there, the duty would have to be paid out of her general estate.

We go on to clause 9 of her will, where she deals with the general estate; and there is a very carefully framed and specific direction as to the duties which are to be paid. I do not follow Mr. Cartmell there. I do not think he is right in the construction of this clause as dividing the duties into two classes. I do not think he is right because I think there is only one class in which the testatrix has thought fit by express direction to include all the duties which she has mentioned. She says, "I direct that my debts and funeral and testamentary expenses, including all duties payable by law out of my estate"—that is what she says are to be paid out of this residue—"all debts and funeral and testamentary expenses, including all duties payable by law out of my estate"—some day we may have to consider whether duties are testamentary expenses without any such direction; but she says clearly, "all duties payable by law out of my estate" are to be included and paid in this way. Then she goes on to enumerate some duties which are to be paid, "duties on the annuities hereinafter charged on the income of my said settlement trust funds"—which, as I have already said, would have to be paid out of her residuary estate, even if she had not said so—"and all the duties on any other annuities and on all legacies hereby, or by any codicil herto, bequeathed, duty free." Those duties also would have to be paid out of the general estate, and the only reason for mentioning them here is to remove any question if it occurred to the executor, or those advising the executor, as to what duties ought to be paid. They are all included in the general phrase "debts and funeral and testamentary expenses," and she says, "By testamentary expenses I mean to include all these." I do not think she classifies them. It is only a means of enumerating what is to be treated as falling under that head. What, therefore, is the meaning of "all the duties payable by law out of my estate"? The duties on the annuities, no doubt, would be paid as coming within that category by the express provision in the will, but the question is whether the "duties payable by law out of my estate" would include the duty payable in respect of this legacy. "The duties payable by law out of my estate" means (according to our ordinary phraseology) the duties which are thrown upon the residuary estate. "Duties and funeral and testamentary expenses" are for the purpose of this will to include those particular duties. The law has said that settlement estate duty shall be payable out of the settlement fund. Those are the words of the Act with which we are dealing. How can I therefore, in those circumstances, read the will as saying that that particular duty shall be payable out of the general estate? It is not by law so payable, but it is payable out of something else. It is payable out of the settled fund. Therefore, far from expressing a provision to the contrary, she seems to me in language (and I can only treat the language as it is) to say that the settlement estate duty is to be left to be payable out of the settled estate; that seems to me to be the true construction of the document.

Whether the point was thought of or not is another thing. It seems to me she has given no direction to the contrary, she has left that to fall as the Legislature has said it shall fall. Consequently the settled fund must bear the burden of the duty in exoneration of the rest of the estate.

Solicitors, *Pollock & Co.; Freshfields.*

---

Chan. Div.
Byrne, J. } April 10.

LLOYDS BANK (LIMITED) v. PRINCESS ROYAL COLLIERY CO. (LIMITED) (NO. 2). (a.)

*Practice—Summons in chambers—Adjournment into court—Costs of adjournment—Ord. 55, rr. 15, 15a—Ord. 26, r. 1—"The court or a judge"—Right of suitor to take an order from the judge personally.*

*A party to a summons in chambers in the Chancery Division has a right to have the summons adjourned into court, but his right, in cases where the rules do not make an order by the judge in person necessary, is subject to the discretion of the court as to the costs of the adjourn-*

(a.) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

*ment, which will not be exercised against him merely because his application has failed.*

*The words "the court or a judge" in ord. 26, r. 1, do not mean only the judge in person, and an order made by a master in the Chancery Division is an order made by the court or a judge.*

Lambton *v.* Parkinson, 35 *W. R.* 545, *and* In re Watts, 31 *W. R.* 262, 22 *Ch. D.* 5, *distinguished.*

The plaintiffs had brought an action against the defendants, and upon their applying under ord. 26, r. 1, for leave to discontinue the action a question arose as to whether the plaintiffs should be ordered to pay certain sums of money which the defendants contended ought to be treated as costs in the action.

A summons was taken out in chambers, and the master intimated that he was prepared to make an order, but the defendants desiring that the summons should be heard by the judge personally, the master made no order and adjourned the summons into court.

The summons was heard in due course, and Byrne, J., decided against the defendants and ordered them to pay the costs of the adjournment.

*Levett, Q.C.*, for the defendants, contended that they had a right to come to the judge in person. It was not an appeal from the master's decision, because the master had made no order. The defendant was not bound to accept a master's decision.

He referred to ord. 55, rr. 15, 15*a*; *In re Rigg*, 10 W. R. 365.

*Rowden, Q.C.*, for the plaintiffs.—A party has a right to adjourn to the judge, but it is at his risk as to costs. This right would be abused—*e.g.*, for the purpose of gaining time, unless the court had some power to check it. The only power it has is by inflicting costs. This question could have been decided by the master. There was no necessity to bring it before the judge in person. In ord. 26, r. 1, the words "the court or a judge" do not mean only the judge in person.

He referred to *Scott* v. *Homer*, 60 L. J. Ch. 238, 39 W. R. Dig. 158; *In re Watts*, 31 W. R. 262, 22 Ch. D. 5; and *Lambton* v. *Parkinson*, 35 W. R. 545; and also to ord. 55, rr. 15 and 15*a*.

The court took time to consider.

April 10.—BYRNE, J., stating that he had made inquiries from judges and others of greater experience in these matters than himself, held that the right of every suitor in the Chancery Division to have any question determined by the judge personally was beyond question, and that an adjournment to the judge was not in the nature of an appeal. All orders made in chambers are orders of the judge, though taken without the parties actually going before him. Some orders must be made by the judge in person (see ord. 55, rr. 15, 15*a*), but in other cases, and especially when the master is prepared to make a proper order, the costs of an adjournment are in the discretion of the judge. If this were not so it might lead to grave abuses, *e.g.*, summonses for time. Special care should be taken as to the costs of an adjournment in cases where, from the nature of the application, it is clear that the proper necessary costs of the application must be borne by the applicant. On the other hand judges are careful not to check reasonable and proper adjournments to themselves by visiting the party at whose instance the adjournment is taken with costs simply because he is unsuccessful. No general rule can be laid down, but judges have to use their discretion carefully. In this case the master's order would have been the judge's order.

The question whether a particular summons should be adjourned to the judge in chambers or into court is regulated by the nature of the case and other circumstances as to which the master, subject to general directions by the judge, exercises his discretion. The opposition to the order asked for by the plaintiffs was not reasonable, and it will not be right that the plaintiffs should suffer in consequence of the adjournment. The defendants will get the costs of the summons, but they must pay the costs of the adjournment.

It was urged that an order of the kind asked for must be made by the judge personally, because discontinuance could not have taken place without the leave of "the court or a judge"; but, as before explained, the order would have been the order of the judge though not personally pronounced by him. All orders in the Chancery Division are made by the court or by a judge either personally or through a master. The case of *Lambton* v. *Parkinson*, cited in the argument, does not apply here, as the duties of the masters in the Chancery Division and the Queen's Bench Division are quite different. *In re Watts*, also cited, was between mortgagee and mortgagor, and did not lay down any general rule as to costs of adjournments different from that which has been universally followed for many years.

Solicitors for the plaintiffs, *Blyth, Dutton, Hartley, & Blyth*, for *M. F. Carter*, Newnham.

Solicitors for the defendants, *Wood, Bigg, & Nash*, for *Winterbotham & Sons*, Stroud.

---

Chan. Div. Byrne, J. } April 3.

*In re* LORD CLIFDEN.
ANNALY *v.* AGAR-ELLIS. (*a.*)

*Mortgage—Life policy—Personal covenant—Power of sale—Statute of Limitations* (37 & 38 *Vict.* c. 57), *s.* 8—*Moneys received on surrender of policy by mortgagee—Payment or acknowledgment—"In the meantime."*

*Where a mortgagee, having received neither payment nor acknowledgment in respect of his mortgage for twenty-two years, at the end of that time surrenders to the insurance office a policy on the life of the mortgagor in order to realize part of his security, the surrender value of the policy so paid by the insurance company to the mortgagee will not operate as a payment or acknowledgment of the mortgage debt so as to take the case out of the Statute of Limitations.*

*The words "in the meantime" in section 8 of 37 & 38 Vict. c. 57, mean the period between the time at which the action or suit is brought and the time at which the debt or the remedy for it would have been barred.*

Adjourned summons.

The plaintiff was the legal personal representative of Henry George Viscount Clifden.

The defendants were the executors of Leopold Viscount Clifden.

By an indenture of the 13th of February, 1871, Leopold mortgaged certain property, together with a policy of assurance on his own life in the Sun Life Office for the sum of £2,500. The mortgage contained the usual personal covenant for payment, and also the usual power of sale, and it was specially provided that the policy of assurance might be surrendered to the office by which the same had been

(*a.*) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

granted by the mortgagee without the further consent of the mortgagor.

The mortgage in 1884 became vested absolutely in Henry George as mortgagee.

The mortgagor never paid any sum for principal, interest, or the premiums on the policy; but the latter was kept on foot throughout by the mortgagee.

In 1893 Henry George realized the policy by surrendering it to the insurance office for £1,463 14s.; but no notice was given to the mortgagor of this.

The plaintiff took out an originating summons to have it determined amongst other things whether the mortgage of 1871 could be enforced against the estate of the mortgagor on the personal covenant.

*G. Lawrence*, for the plaintiffs.—The Statute of Limitations (37 & 38 Vict. c. 57), s. 8, has not run against the mortgagee. The payment of the surrender value of the policy was a payment or acknowledgment within the statute made in pursuance of an obligation created by the mortgage contract, which for that purpose constituted the insurance company the agents of the mortgagor. The payment made by the company was not a gift made by a stranger. The company was bound to pay the money to the mortgagee, who was bound to apply it in accordance with the provisions in the mortgage deed. There is no English case exactly in point, but the case is covered by the Irish case of *In re Conlan*, 29 L. R. Ir. 199.

He also cited *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539; *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511; *Chinnery* v. *Evans*, 13 W. R. 20, 11 H. L. Cas. 115; *Gregson* v. *Hindley*, 10 Jur. 383; *Allison* v. *Frisby*, 38 W. R. 65, 43 Ch. D. 106; *Lewin* v. *Wilson*, 11 App. Cas. 639, 35 W. R. Dig. 123; *In re Hale*, 47 W. R. 579, [1899] 2 Ch. 107.

*Prior*, for the defendants.—The Statute of Limitations has run against the mortgagee. There was no compulsion upon the insurance company to accept a surrender of the policy. The company was not the agent of the mortgagor. There was no privity between the company and the parties to the mortgage. In any case the words "in the meantime" in the statute had operated because the policy was not surrendered until twenty-two years after the mortgage was created.

*G. Lawrence* replied.

BYRNE, J., after reviewing the cases, held that the words "in the meantime" in section 8 of 37 & 38 Vict. c. 57 meant the period between the time at which the action or suit is brought and the time at which the debt or the remedy for it would have been barred and that the mortgagee was therefore barred by the statute and could not enforce the mortgage.

Solicitors for the plaintiffs, *Foyer & Hordern*.

Solicitors for the defendants, *Norton, Rose, Norton, & Co.*

---

Chan. Div.
Cozens-Hardy, J. } Jan. 31; Feb. 6.

D. v. A. & Co. (*a*.)

*Practice—Breach of undertaking in an order—Attachment—Service of order on solicitors—Motion for committal—Rules of Supreme Court*, 1883, *ord.* 42, *r.* 7; *ord.* 44, *r.* 2.

*Where defendants in an action committed a breach of an undertaking given by them and embodied in an order of the court which was not served on them personally, plaintiffs asked for leave to issue a writ of attachment.*

*Held, that the order might be enforced by committal without service, and that the proper remedy for the breach of an undertaking is by committal, and not by attachment.*

This was a motion by the plaintiffs for leave to issue a writ of attachment against the defendants for breach of an undertaking contained in an order made on the 26th of January, 1900.

The facts of the case were these:

On the 4th of December, 1899, an action was commenced against the defendants, who were a firm of solicitors practising in Paris, for an injunction to restrain them from delivering up, communicating, or disclosing, except to the plaintiffs, certain documents in the possession of the defendants, and for delivery up to the plaintiffs of such documents, and for inspection with power to take copies thereof.

On the 26th of January, 1900, a motion was made by the plaintiffs for an *interim* injunction to the above effect.

The defendants undertook not to part with or disclose the contents of the documents in question, and also to deposit them at the Central Office on or before the 29th of January, 1900.

No order was therefore made, except that the motion should stand over till the trial of the action without prejudice to any question as to costs, and the undertaking of the defendants was inserted in the order.

Certain documents were thereupon deposited by the defendants at the Central Office on the 30th of January, but their affidavit of documents did not show that they were not in possession of others demanded by the plaintiffs.

The order of the 26th of January had not been served on the defendants, nor was the notice of motion for attachment served on the defendants personally, but on their solicitors.

*Hon. E. C. Macnaghten, Q.C.*, and *Vaughan Hawkins*, for the motion.

*Vernon R. Smith, Q.C.*, and *F. H. Maugham*, for the defendants.—The order of the 26th of January should have been served on the defendants: *Halford* v. *Hardy*, 44 SOLICITORS' JOURNAL 90, [1899] W. N. 243. The notice of motion should have been served on the defendants personally: *Mander* v. *Falcke*, 40 W. R. 31, [1891] 3 Ch. 488; Annual Practice for 1900, pp. 599, 603, 604. The application should have been for committal, not for attachment. The remedy for breach of an undertaking is by committal: *In re Evans*, 41 W. R. 230, [1893] 1 Ch. 252.

*Hon. E. C. Macnaghten, Q.C.*, replied.

COZENS-HARDY, J., stated the facts, and then said: The defendants object (1) that the order of the 26th of January, which contained the undertaking, was not served upon them; (2) that the notice of motion was not personally served upon them; (3) that the proper remedy for the breach of their undertaking is by committal and not by attachment.

As to the first objection, I think it is not well founded. It is settled law that an order granting an injunction may be enforced by committal, although the order has not been served. It is sufficient if it be shown that the defendant had notice of the order. Service of the order is a convenient mode of giving notice, but that is all. Notice may be given by telegram or otherwise: *United Telephone Co. v. Dale*, 32 W. R. 428, 25 Ch. D. 778. If this holds good where a hostile order has been made, it must equally hold good where th

(*a*.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

defendant has voluntarily given an undertaking. Indeed in such a case I think no notice at all is requisite, for in the words of Chitty, J., in *Callow* v. *Young*, 55 L. T. Rep. 544, 35 W. R. Dig. 11: "It is not necessary to show that the person sought to be attached had knowledge of his undertaking. He must be presumed to have known that he had given his undertaking." Having regard to the settled practice of giving an undertaking in the terms of a notice of motion, it would be highly dangerous to hold that a defendant who had given an undertaking could disregard it unless and until the order was served. I do not think Kekewich, J., intended to intimate a contrary opinion in *Halford* v. *Hardy*.

As to the second objection, it is conceded that if committal is the proper remedy personal service of the notice of motion is necessary.

It remains to consider the third objection. According to the old law an order of the court for the committal of the defendant was the proper remedy for the breach of an order to abstain from doing a certain thing. On the other hand, the non-compliance with an order to do a certain thing was punished by attachment, which was issued at the instance of the party aggrieved and at his own risk. The applicant had to prove personal service of the order on the party required to do the act and also that default had been made. On production of the order, and on proof to the satisfaction of the proper officer that there had been due service and default made, the writ issued. It was not due service unless the order had a special indorsement which contained the words, "If you neglect to obey this order you will be liable to be arrested under a writ of attachment": see Braithwaite's Record and Writ Practice (ed. 1858), pp. 166-7. This, which was the old law, has been materially altered by ord. 42, r. 7, which provides in effect that a judgment, whether its form be negative or affirmative, may be enforced either by attachment or by committal; and by ord. 44, r. 2, which provides that no writ of attachment shall be issued without leave to be applied for on notice. In the present case, however, ord. 42, r. 7, does not apply, for there was no judgment or order upon the defendants to deposit documents. Their liability rested upon their undertaking. It is somewhat strange that there is no express authority as to what is the proper mode of enforcing an undertaking as distinct from an order. The question arose in *Callow* v. *Young*. In that case a motion was made before Chitty, J., on the 19th of November, 1886, for leave to issue an attachment for breach of a negative undertaking, and leave was granted. It appears, however, that the order was stopped on the ground that committal was the proper remedy, not attachment—a point which had not been taken in argument: 31 SOLICITORS' JOURNAL 77, [1886] W. N. 209. The motion was brought on again on the 11th of February, 1887 (31 SOLICITOR'S JOURNAL 269, 56 L. T. Rep. 147). Chitty, J., after argument, gave leave to amend the notice of motion by asking in the alternative for committal, and directed the motion to be served again. I think this amounted to a decision that, where the undertaking is in form negative, attachment is not the proper remedy. Had there been an injunction instead of an undertaking, committal would, under the old law, have been the only remedy, and the decision may have proceeded on that ground. It does not seem necessary to cover the case of an undertaking which is positive in form. On principle, however, I think that except in a case falling within ord. 42, r. 7, attachment can only issue for breach of an order of the court commanding the respondents to do a certain act, and that in the numerous cases where there is a contempt, not arising from non-compliance with such an order of the court, the only remedy is by committal. This is the view expressed in Mr. Lavie's memorandum, printed in a note to the report of *In re Evans*, which is stated by Bowen, L.J., to represent the practice accurately. I adopt that view, and hold that an undertaking, whether positive or negative, must be enforced by committal, and not by attachment. The result is, that in my opinion the third objection prevails. The notice of motion was wrong in asking for attachment instead of committal. The plaintiffs must pay the costs of the motion.

Solicitors for the plaintiff, *Cheston & Sons*.

Solicitors for the defendants, *Dixon, Weld, & Dixons*.

---

Chan. Div. Buckley, J. } Feb. 8.

STEPHENSON v. YORKE. (a.)

*Practice—Middlesex Registry—Middlesex deed—Rectification of register—Jurisdiction to order—Land Registry (Middlesex Deeds) Act* (54 & 55 *Vict. c.* 64), *s.* 1—*Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *s.* 95—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 7.

*The court now has power to order the Register of Middlesex deeds to be rectified, and, in exercise of this jurisdiction, ordered the registration of certain forgeries purporting to be assignments of leaseholds in Middlesex, dated in* 1887, *and also the registration of certain mortgages, dated in* 1898, *of the same property, to be vacated.*

Gibbs *v.* Sidney, 49 *L. T. Rep.* 132, 31 *W. R. Dig.* 210, *not followed.*

Action.

The plaintiff, who was owner of leasehold premises in the county of Middlesex, in 1883 deposited the title deeds for safe custody with her solicitor. The solicitor absconded. It was then discovered that he had forged documents under seal purporting to be assignments on sale by the plaintiff to him of the leasehold premises aforesaid, dated in 1887, and by several indentures, dated in 1898, mortgaged the same to the defendant Yorke. Both the forged deeds of assignment and the mortgages were registered in the Middlesex Registry. The plaintiff brought the above action against Yorke and the solicitor, for the recovery of the property free from Yorke's charges, and Yorke having submitted to judgment in the terms of agreed minutes, the only question was whether the court had jurisdiction to order the registration of the above deeds to be vacated.

*J. K. Young*, for the plaintiff.—The Land Transfer Act, 1875, provides for rectification of the register by sections 95-97, and the provision so made is extended by the Land Transfer Act, 1897: see section 7. Then section 1 of the Land Registry (Middlesex Deeds) Act, 1891, enacts that the Middlesex Registry shall be transferred to the Land Registry, and form part of that office, and all powers and indemnities subsisting, and all penalties imposed for the purposes of the Land Transfer Act, 1875, are to be available for the purpose of the Middlesex Registry Acts. That makes the machinery of the Land Registry Acts available here, and the court can therefore order the registration to be vacated. In *Gibbs* v. *Sidney*, 49 L. T. Rep. 132, 31 W. R. Dig. 210, Seton, vol. 3, 1921, 1922, North, J.,

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

cause to a contrary conclusion, but that was prior to the Act of 1891.

*Northcote*, for the defendant.

BUCKLEY, J.—Having regard to the case of *Gibbs* v. *Sidney*, I certainly have power to make a declaration that the registration of these deeds ought to be vacated, but the question is, Can I go on and order that the register be rectified accordingly? I think the effect of section 1 of 54 & 55 Vict. c. 64, section 95 of the Land Transfer Act, 1875, and section 7 of the Land Transfer Act, 1897, is that I have power to make the order, and I order the register to be rectified accordingly.

Solicitors, *Pasco Daphne*, for *Leonard Hill*, Margate; *W. H. Hudson*.

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 30.

STEAD v. TILLOTSON AND ANOTHER. (a.)

*Salmon Fishery Acts — Unlawful taking—Trout, apparently poisoned, but still alive, taken from river by the hand—Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 22—*Freshwater Fisheries Act*, 1878 (41 & 42 *Vict. c.* 39), *s.* 7.

*Taking dying salmon, trout, or char from a river or stream by hand, or otherwise than by a properly-licensed instrument is an offence within section* 22 *of the Salmon Fishery Act*, 1873.

This was an appeal by case stated on behalf of the Yorkshire Fishery Board from a decision of the justices for the West Riding of Yorkshire, who had dismissed an information preferred by the appellants' chief water bailiff against the two respondents, for illegally taking trout contrary to section 22 of the Salmon Fishery Act, 1873, as extended to trout and char by section 7 of the Freshwater Fisheries Act, 1878. The case stated that the men were charged with taking twenty trout out of the tributary of the River Aire with their hands, that when the fish were taken out of the water by the respondents they had apparently been poisoned, and although alive were in a dying condition. The respondents subsequently sold some of the fish, which were found unfit for food. There was not sufficient evidence to prove how the fish had become in a dying condition, or that apart from taking the fish from the river with their hands, the respondents had in any way been concerned in killing them.

The justices held that the respondents had in the circumstances committed no offence within the meaning of the Act, as there was no evidence that the respondents had poisoned the fish, and they accordingly dismissed the summons.

The fishery board appealed.

*H. T. Waddy*, for the appellants.—The Act makes it an offence to take live fish by any means other than a properly licensed instrument from a river or stream, and therefore taking these trout out of the river by the hand while alive was an offence, and the justices should have convicted. If the Act is not strictly enforced, then persons who take poisoned fish that are not dead out of the river cannot be prosecuted unless it can also be proved that they were the persons who put the poison into the river. I rely on the case of *Gazard* v. *Cooke*, 55 J. P. 102, the head-note of which is as follows: "C. was charged with unlawfully taking a salmon by means other than a licensed instrument, contrary to 36 & 37 Vict. c. 71, s. 22. A salmon of 27lbs. was one day left on the tide retiring, and C. picked it up and took it home. There was no evidence whether the fish was dead or alive when picked up, but before picking it up it had been attacked by gulls. Held, that the justices were right in holding that the section only applied to live fish." [BUCKNILL, J.—Would you say that if you hooked a salmon a mile up stream and it got away in an injured condition and drifted down to where I was fishing, and I took it out with my hand when it was dying, but not quite dead, I should be guilty of an offence? *Waddy*.—Certainly; but the justices would have discretion to say that the offence was a trivial one.]

*Walter Stewart*, for the respondents.—At most these respondents were guilty of a merely technical offence. The statutes were passed to increase the number of fish, and the removal of dying fish from a stream would be beneficial to the fish left in the water. The justices had a discretion and used it rightly.

CHANNELL, J.—I think this appeal should be allowed and the case remitted to the justices to convict. If the magistrates find that the respondents who took these twenty dying and poisoned fish had in fact nothing to do with the poisoning of the fish, they might, under the Summary Jurisdiction Act, treat the offence as a merely technical one and impose no penalty. We think, however, that taking of dying fish from the river by hand is an offence within the Act. The appellants do not ask for costs and therefore we make no order.

BUCKNILL, J., concurred.

*Case remitted.*

Solicitors for the appellants, *Richard Smith & Sons*, for *Charlesworth & Wilson*, Skipton.

Solicitors for the respondents, *Turner, Smith, & Crowle*, for *W. Thompson*, Skipton.

---

Prob. Div. & Adm. Div.
Admiralty. Dec. 18.

"THE PHILADELPHIAN." (a.)

*Ship — Damage — Vessel exceeding* 150 *feet in length required to exhibit when at anchor two anchor lights, one "at or near the forward part of the vessel"— Regulations for Preventing Collisions at Sea, art.* 11 *—Canadian Navigation Act*, 1886 (49 *Vict. c.* 79), *s.* 4—44 *Vict. c.* 20, *s.* 2, *Canadian—Order of Governor in Council, Feb.* 9, 1897, *art.* 11—*Want of look-out—Infringement of regulations by no possibility contributory to collision.*

*A vessel of* 313 *feet in length was lying at anchor at night in the River St. Lawrence, off Quebec, with two anchor lights exhibited—the after light on the flagstaff at the stern, and the forward light in the starboard fore rigging about sixty to seventy feet abaft the stem—when she was run into by a steamship. The defendants, the owners of the steamship, raised the defence, in an action of damage* in rem *against the steamship, that the vessel run into by the steamship did not, at the time of the collision, exhibit any proper or visible anchor lights properly carried and showing, as required by the Regulations for Preventing Collisions on the Rivers within Canada, of which article* 11 (*in terms the same as article* 11 *of the regulations for preventing collisions at sea*) *provides that a vessel*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

*of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel one such light (a white light) in a lantern so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile, and at or near the stern of the vessel another such light.*

*The court found that there had been a bad look-out on board the steamship, and that any failure on the part of the vessel at anchor to properly exhibit an anchor light "at or near the forward part of the vessel" within the meaning of the 11th article of the Regulations for Preventing Collisions at Sea and of the Canadian River Regulations, could not by any possibility have contributed to the collision, and that, therefore, the steamship was alone to blame for the collision.*

*Held, also, that the forward anchor light on the vessel at anchor had not been exhibited in accordance with the regulations "at or near the forward part of the vessel."*

This was an action of damage instituted on behalf of the owners of the steamship *Ella Sayer*, of 2,549 tons gross and 1,618 tons net register, and 313 feet in length, against the vessel *Philadelphian*, of 5,120 tons gross and 3,322 tons net register, and her owners intervening as defendants.

The action was brought to recover for the damages occasioned by a collision between the two vessels on the night of the 10th of August, 1897, when *The Ella Sayer* was at anchor in the River St. Lawrence, off Quebec, with two anchor lights exhibited, and was run into by *The Philadelphian* and damaged.

The defendants pleaded that a good anchor watch was not being kept on board *The Ella Sayer*; that she was not exhibiting any anchor lights, or any proper or visible anchor lights properly carried and showing as required by the regulations, and that those on board her failed to comply with (*inter alia*) article 11 of the Regulations for Preventing Collisions at Sea, and of the regulations set forth in chapter 79, section 2, of the Canadian Navigation Act as amended by Order in Council (of the Governor of Canada) of the 9th of February, 1897.*

Dec. 14, 15.—The case was now heard before the judge in court (Bucknill, J.) assisted by two of the Elder Brethren of the Trinity House.

*Laing, Q.C*, *Miller*, and *Roche* appeared for the plaintiffs.

*Aspinall, Q.C.*, and *Glynn*, for the defendants.

Reference was made to the case of *The Gannet*, [1899] P. 230.

*Cur. adv. vult.*

Dec. 18.—BUCKNILL, J.—In this case the steamship *Philadelphian* collided with the steamship *Ella Sayer* in the River St. Lawrence, off Quebec, at about 11 p.m. on the 10th of August last, whilst *The Ella Sayer* was at anchor. There was nothing in the weather to account for the casualty, as it was a fine and clear night, and the excuse set up is that the anchor lights of *The Ella Sayer* were not burning, or, if burning, were giving such a poor light that it was impossible to see them in time to avoid the collision. [After reviewing the evidence the court found as facts that at the time of the collision both the lights of *The Ella Sayer* were properly burning; that there had been a want of proper look-out on board *The Philadelphian*; and that she had been navigated at too great a speed. The judgment then proceeded as follows:] *The Philadelphian* must, therefore, be found to blame. That being the case, is *The Ella Sayer* to blame? She is not to blame unless there is a breach by her of article 11. Now, the forward light was in the starboard forerigging, abaft the stem, and the after light was on the flagstaff. Article 11 of the regulations applicable to this collision provides: "A vessel under 150 feet in length when at anchor shall carry forward where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile. A vessel of 150 feet or upwards in length when at anchor shall carry in the forward part of the vessel at a height of not less than 20 feet and not exceeding 40 feet above the hull one such light, and at or near the stem of the vessel and at such a height that it shall not be less than 15 feet lower than the forward light another such light. The length of the vessel shall be deemed to be the length appearing in her certificate of registry."

The Legislature has decided that a vessel under a certain length need only carry one light, but that a vessel of 150 feet or upwards shall carry two lights. The forward light is to be "in the forward part of the vessel." What does that mean. It may mean one of three things. It may mean a light fixed forward of the middle length of the ship, because directly you get forward of the middle length of the ship you are in the forward part of the vessel. It may mean that you are to put it as far forward as possible—right forward, which it does not say—or it may mean that it may be put in any spot between just forward of mid-length and the stem. I think, speaking under the advice of the Elder Brethren as to what may be reasonably called the forward part of the ship, that it may be put on one of the forward stays. If it is hung at the proper height on the forestay, it would necessarily have to be somewhere abaft the stem, or it might be put on the fore-topmast stay, but it must be abaft the stem. Now, in a case in the Court of Appeal, that of *The R. L. Alston*, 8 P. D. 5, 31 W. R. Dig. 176, I find a passage which appears to give me some assistance. There Brett, L.J., says, in effect, that where you find a rule or article which is capable of two constructions, as I find that this article 11 is, you ought to put upon the language that which you believe in the particular case to be the reasonable construction. It is quite clear that this article is capable of more than one construction. "In the forward part" may mean two or three different places, and I have to construe it in this case, and, if it is necessary, to decide the point. I hold that to put a light in a vessel, 313 feet in length, as this vessel was, 60 or 70 feet abaft the stem, is not to place it in the forward part of the vessel, and if it was important in this case I should find that what was done was not in compliance with the article. The object of the rule probably is, that where you have a vessel exceeding 150 feet in length, at anchor, those navigating the river should have good information as to her length; that when she is swinging in the river the vessels approaching her from astern or ahead should have an opportunity of knowing the length of the ship. How could that be given if the forward light is 60 or 70 feet from the stem? But whilst I am putting this construction

* Article 11 of the Regulations for Preventing Collisions at Sea is in identical terms with article 11 of the Order in Council of the Governor of Canada of the 9th of February, 1897, and is set out in the judgment. The Governor of Canada obtained power to make the Order in Council in question under the provisions of the Canadian statute of 44 Vict. c. 20, s. 2 (Canadian), which section again is incorporated in the revised Canadian statutes as section 14 of the Canadian Navigation Act, 1886 (49 Vict. c. 79). The Order in Council in question is applicable "to all the rivers, lakes, and other navigable waters within Canada or within the jurisdiction of the Parliament thereof.

upon the rule, it will not in this particular case affect the judgment of the court with regard to the responsibility of *The Ella Sayer*, because, although I find that the light was not placed in accordance with article 11, on my construction of it, I find, also, that that could not by any possibility have contributed to the collision. I say that for this reason, that the defendant's witnesses never saw the light at all. They swear that there was no light, but, as it is not suggested that the light was not hung skilfully and properly in the shrouds, it was therefore throwing an unbroken light all round the horizon, and it is clear to my mind that such breach of the article could not possibly have contributed to the collision. In this case, therefore, my judgment is that *The Philadelphian* is solely to blame.

I may add that the Elder Brethren who are assisting me have suggested to me that article 11 is a very puzzling rule for any seaman to understand, and I agree with them that the language is so ambiguous that I think, speaking for myself, it might very properly be changed. How is a master to know where to put a light if he is only told to put it in the forward part of the vessel

Solicitors for plaintiffs, *Botterell & Roche.*

Solicitors for defendants, *Thomas Cooper & Co.*

---

## Court of Appeal.

From Q. B. Div. (A. L. Smith and Romer, L.JJ.) March 17.

KNOWLES & SONS *v.* MAYOR, &c., OF BOLTON. (*a.*)

*Arbitration—Award—Enlargement of time—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 9, 24—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 180, *sub-section* 9.

*The court has power, under section* 9 *of the Arbitration Act*, 1889, *to enlarge the time for making an award under the Public Health Act*, 1875, *at any time.*

*Section* 9 *of the Arbitration Act is not inconsistent with section* 180, *sub-section* 9, *of the Public Health Act*

Warburton *v.* Haslingden Local Board, 48 *L. J. Q. B.* 451, 27 W. R. Dig. 11, *approved.*

In re Mackenzie and the Ascot District Gas Co., 34 *W. R.* 487, 17 *Q. B. D.* 114, *overruled.*

Appeal from the refusal of Kennedy, J., to make an order, under section 9 of the Arbitration Act, 1889, extending the time for making an award.

The Corporation of Bolton, having made a sewer through premises belonging to the plaintiffs, became liable, under section 308 of the Public Health Act, 1875, to make compensation for the damage done thereby, and proceedings for determining the amount of compensation were taken under sections 179 and 180. Each of the parties appointed an arbitrator, and the arbitrators appointed an umpire, who made an award giving the plaintiffs £40 compensation; but the award was made more than two months from the date of the reference to the umpire, and was therefore out of time.

The plaintiffs having applied for an extension of time for making the award, Kennedy, J., refused to extend the time, on the authority of *In re Mackenzie and the Ascot District Gas Co.*, 34 W. R. 487, 17 Q. B. D. 114.

The plaintiffs appealed.

*Danckwerts, Q.C.*, and *Horridge*, for the plaintiffs.—By section 9 of the Arbitration Act, 1889: "The time for making an award may from time to time be enlarged by order of the court or a judge, whether the time for making the award has expired or not." By section 24: "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorized or recognized by that Act." Section 180 of the Public Health Act, 1875, lays down regulations to be observed in all arbitrations under that Act. Sub-section 9 is as follows: "The time for making an award by arbitrators under this Act shall not in any case be extended beyond the period of two months from the date of the submission, and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the reference of the matter to him." This sub-section deals only with the power of arbitrators and umpires to extend time, and does not affect the power of the court. Section 9 of the Arbitration Act is not inconsistent with the provisions as to arbitration contained in the Public Health Act, and therefore that section applies to awards made under the Public Health Act. The case of *Warburton* v. *Haslingden Local Board*, 48 L. J. Q. B. 451, 27 W. R. Dig 11, which was under section 8 of the Common Law Procedure Act, 1854, is in the plaintiffs' favour: see also *Lord* v. *Lee*, 16 W. R. 856, L. R. 3 Q. B. 404; *May* v. *Harcourt*, 13 Q. B. D. 688, 33 W. R. Dig. 8; *In re Yeadon Local Board and Yeadon Waterworks Co.*, 37 W. R. 360, 41 Ch. D. 52. The case of *In re Mackenzie and the Ascot District Gas Co.* was wrongly decided, and ought to be overruled.

*Cripps, Q.C.*, and *Buckmaster*, for the defendants.—This case is governed by *In re Mackenzie and the Ascot District Gas Co.* Sub-section 9 of section 180 of the Public Health Act contains an express prohibition which is perfectly general in its terms. The time for making an award shall not in any case be extended beyond the specified period. Section 9 of the Arbitration Act is inconsistent with this; and therefore, by virtue of section 24, the Arbitration Act does not apply to an arbitration under the Public Health Act.

A. L. SMITH, L.J.—The question is whether the learned judge had power to enlarge the time for making an award in this case. In *Lord* v. *Lee* it was held, under section 15 of the Common Law Procedure Act, 1854, that the court had power to enlarge the time for making an award, after the time for making it had elapsed and after an award had in fact been made. But it is said that by section 180 of the Public Health Act, 1875, the power of the court is now fettered with regard to arbitrations under that Act. Sub-section 9 is relied on. That sub-section, however, in my opinion, deals only with the powers of arbitrators and umpires to extend the time for making an award; it does not affect the power of the court at all. No case has been cited which binds us to hold that the jurisdiction of the court to enlarge the time for making an award at any time has been taken away. The case of *Warburton* v. *Haslingden Local Board* is in favour of what I am saying, and I agree with it. I do not agree with *In re Mackenzie and the Ascot District Gas Co.* I think that there is power to enlarge the time in this case, and that the time ought to be enlarged.

ROMER, L.J., concurred.

*Appeal allowed.*

Solicitors for the plaintiffs, *Rowcliffes, Rawle, & Co.*, for *Fullagar & Hulton*, Bolton.

Solicitors for the defendants, *Holt-Beever Hinnell*, Bolton.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

when, upon the 9th of February, 1897, he gave the second two notes to Peed in order to pay off the first three notes, and he gave value for the second two notes, when he paid the £4,000 in July, 1897, to Peed to pay them off; but this was months before the fraud was perpetrated by Peed upon the plaintiffs and before he got the notes back, which took place on the 29th of September, 1897. When he got the notes back the defendant gave nothing for them. How can it be said, then, that he took back the notes for value? For he did not. If the case cited of *London and County Banking Co.* v. *London and River Plate Bank*, 37 W. R. 89, 21 Q. B. D. 535, were to be held to apply to this case, we should have to hold that the defendant gave real value for the notes and then a supposed value over again for the same notes, which cannot be. But supposing the defendant did give value for the notes when he took them back, which in my opinion he did not, did he take the notes after they were due? I cannot see how it can be held that the defendant, when he received back the notes in September, 1897, though payable on demand, did not take them when overdue; for he must have known they were overdue if he thought about it at all, inasmuch as he had himself paid them off, the first three notes in February, 1897, and the last two notes in July, 1897. How can the defendant now say that they were not overdue in September, 1897, when he received them back? It seems to me that as the defendant did not give value for the notes when he took them back, and as, even if he did, the notes were then overdue, the defendant did not take a better title to them than Peed had, and that the plaintiffs, having disaffirmed, as they were entitled to do, the transaction with Peed, can maintain trover for the notes and bring an action upon the notes against the defendant, who has no better title to set up than that of Peed. I must point out that the difficulty which the defendant unfortunately is in arises through his own default in not getting the notes back from Peed when he paid them, thereby giving Peed the opportunity of cheating the plaintiffs as he did. It is a well-known principle of law that whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it. See the well-known case of *Lickbarrow* v. *Mason*, in 1 Smith's Leading Cases, 674, and *Babcock* v. *Lawson*, 27 W. R. 886, 4 Q. B. D. 394, which contains matters very apposite to the present case. In my opinion counsel for the plaintiffs are right in their construction of section 61 of the Bills of Exchange Act, which was so much relied upon by the defendant's counsel, and that section does not apply to the present case, and the words "in his own right" do not mean in contradistinction to a representative right as argued for the defendant. For these reason I think that the appeal must be allowed, and that judgment must be entered for the plaintiffs.

COLLINS, L.J., read the following judgment: This case was very elaborately and ingeniously argued on both sides, but I think when the facts are understood it resolves itself into a simple question, and may be decided in accordance with the familiar principle laid down in *Lickbarrow* v. *Mason*, 2 T. R. 63—namely, "That wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." In the present case the defendant de Freville placed three promissory notes, made by himself, in the hands of Peed, as security for sums due from the defendant to Peed, taking from him a promise not to negotiate them. He afterwards gave him two others in substitution for the first three, but suffered the first three to remain in Peed's possession. Peed, in violation of his promise, passed all five to the plaintiffs, innocent holders for value, who thereby acquired a good title against the defendant. The result of this was that the defendant, having handed to and left in the possession of Peed instruments on their face negotiable, was estopped from setting up against the plaintiffs any fact which as between the defendant and Peed would have debarred Peed from negotiating them. Peed after negotiating them obtained possession of them from the plaintiffs by fraud, and passed them back to the defendant without any fresh consideration, unless a consideration can be made out by implying a release given to Peed by the defendant of his right to complain of Peed having negotiated the notes: see *London and County Banking Co.* v. *London and River Plate Bank*. Are the plaintiffs to lose their remedy against the defendant because the physical custody of the instruments has been transferred to him by the hand of Peed? Can the defendant take back from Peed, otherwise than subject to the existing rights of the plaintiffs, which he was estopped from denying before he got possession of the notes again from Peed? This seems to me *primâ facie* to come clearly within the general principle above stated, unless there is something in the law regulating bills of exchange to prevent it. I have purposely left out the ineffectual dealings between the defendant and Peed for the satisfaction of the defendant's liability on the notes, because, in my opinion, for reasons which I will now give, they do not affect the principle which I think will turn out, when the facts are analyzed, to be decisive as to both sets of notes, though they do not stand on precisely the same footing. The fact, however, that such payment or attempted satisfaction of the notes as between the defendant and Peed had taken place before the defendant resumed possession of them will, as I shall presently point out, make it still clearer that the defendant has no answer to the plaintiff's claim.

First, then, as to the three notes originally given. They were fully negotiable in Peed's hands. They were delivered to him, not for safe custody, but as security, and the defendant had nothing but Peed's promise to protect him from their being negotiated. While they were thus in Peed's hands an arrangement was made whereby two new notes were to be taken by Peed in substitution for the first three, and two new notes were handed to him accordingly, though he was still allowed to remain in possession of the first three. This transaction has been treated by the Lord Chief Justice as not amounting to an extinguishment of these three notes so as to destroy their negotiability, and the argument has been conducted before us by both sides on that footing. Probably that is the true view, as the two might be deemed to be taken in final satisfaction only if and when they were paid (see *Ex parte Barclay*, 7 Ves. 597; *Thorne* v. *Smith*, 10 C. B. 659); and therefore I will so treat it. When these notes, therefore, were negotiated by Peed, they were still current, and the defendant was estopped as against the plaintiffs from setting up any fact which would have defeated Peed's right to negotiate them. Peed, then, having transferred them for value to the plaintiffs, gets them back by fraud from them and passes them on to the defendant. Obviously the plaintiffs could disaffirm the transaction by which Peed got possession against anyone who could show no better title than Peed. Did, then, the defendant when he opened the envelope containing the returned notes get a higher title against the plaintiffs than Peed had? In my opinion, clearly not. He remained bound by precisely the same estoppel that he was bound by before; no fresh fact had

intervened to displace it. It is said that he has taken for value and without notice; but the only value that can be suggested is the somewhat artificial value based on the case of *London and County Banking Co.* v. *London and River Plate Bank*—namely, his implied release to Peed of his right against him in respect of his violation of duty in negotiating the notes; but it is precisely this duty which he is estopped from setting up against the plaintiffs. He cannot, therefore, as against the plaintiffs, prove any consideration given for the notes. There were no circumstances founding any such estoppel in the case cited, and if there had been the decision must have been different. The equities in that case were equal; the bank had done nothing to facilitate the fraud of their manager; and they were not debarred from protecting their possession by the somewhat fine-drawn consideration which was there implied out of the circumstances. Here the estoppel is raised by the handing to Peed by the defendant of negotiable instruments as such, which, as pointed out by Bramwell and Brett, L.JJ., in *Baxendale* v. *Bennett*, 26 W. R. 899, 3 Q. B. D. 525, is a very different thing from depositing for safe custody securities capable of being negotiated (see pp. 529 and 531 of the report); and, further, in the case of these three first bills, neglecting to resume possession of them. It would certainly be an extraordinary result if the payee who wrongfully negotiated the notes could by stealing them from the holder for value and replacing them in the possession of the maker get rid of the intervening title which was good against the makers before the theft.

Apart from the doctrine of estoppel, which, in my opinion, governs this case, I think the defendant could not acquire from Peed a higher title than Peed had to give. The three notes came back to him at the end of September from Peed's custody, he knowing that as between himself and Peed the latter had received from him, in the previous February, other notes instead of them, intended as between himself and Peed to satisfy his liability on these notes, at all events, if the second set were paid; and he had put money in Peed's hand's to pay these. Can he after such an interval receive back the notes, otherwise than subject to intervening rights, from the person in whose custody he had left them, in a negotiable condition, six months before, though he had given others in substitution for them, and furnished money to pay these last? Had he been an indorsee from Peed, and not himself the maker, and had known what had passed between Peed and the maker, he could not have acquired a better title than Peed. If he chooses to settle otherwise than in return for the notes themselves, can he after an interval receive the notes back from the person in whose custody he left them in a negotiable condition otherwise than subject to intervening rights? If, though maker, he has to rely upon a fresh consideration to support the transfer from Peed, why is he in a better position than an indorsee? He has to make title under a purchase for fresh consideration, given in respect of notes of which he knew that payment had been demanded, and an attempt at satisfaction made six months before.

There is authority that a note payable on demand is after demand overdue: see *Barough* v. *White*, 4 B. & C. 325; *Bartrum* v. *Caddy*, 9 A. & E. 275. As soon as demand has been made the time for payment has arrived just as much as if the note had been made payable on a particular day which had passed. It is true that there is nothing on the face of the notes to show that they are overdue, but had the facts known to the defendant been written on their face they would have appeared to be overdue or actually paid. How, then, can he get a better title than his transferor? For instance, if the fact of Peed's dealings had been communicated to the plaintiffs when they took the first three notes, could they have got a better title than Peed? Clearly not. But these are the facts known to the defendant when he gets back the notes, plus the additional fact that he has meanwhile paid the second set. He cannot displace the plaintiffs' title by virtue of his old right. He has got to show a new transfer for good consideration without notice of infirmity, and this he cannot do because the notes came back to him as pieces of paper only, evidencing the fact that he has satisfied them. Could this be doubted if Peed had written on them, as he might have done, "Paid" or "Cancelled" before he put them into the envelope? These pieces of paper, therefore, as between the defendant and Peed, having lost their negotiable quality, are denuded of that element which alone makes it possible for a transferee to get a better title than his transferor.

With regard to the two substituted notes, I think the same principles apply. These were negotiated before any attempt at payment by the defendant. But on such transfer to the plaintiffs the defendant was equally estopped from setting up against the plaintiffs a breach of duty in Peed in negotiating. When he put Peed in funds to satisfy these notes, Peed was not in fact the holder, and the defendant took no trouble to find out whether he was or not. Here, too, he is obliged to rely for consideration for Peed's transfer to him on the same constructive release of his claim against Peed; but admitting, as he has to do against the plaintiffs, that the plaintiffs took a good title to the notes, he cannot set up a duty in Peed, in derogation of that title, to return the notes otherwise than subject to it. The consideration therefore fails in this case also. Here, too, he receives back notes some two or three months after he had supposed he had satisfied them by the transaction in July, with the result, for the reasons that I have already given as to the others, that he cannot get a better title than his transferor.

I have, I think, shown that even if the defendant could be said to have given fresh consideration for the transfer from Peed, he could, nevertheless, in the circumstances, acquire no better title than Peed. I have also, I think, shown that even if the suggested consideration could exist, the defendant would be estopped from setting it up against the plaintiffs. But I am further of opinion that, in the circumstances of this case, no such consideration in fact existed. There is no room for an implied consideration when one is proved in fact.

If someone steals my boots, and afterwards replaces them, one might perhaps—but not, I think, without some strain on the imagination—conceive that I impliedly release my right to complain of the theft, in return for the restored boots, though I did not know that they had been stolen. But if I buy and pay for a pair of boots, and the bootmaker delays a fortnight before he sends them home, do I give two considerations for them—one when I pay for them; and a second when I receive them—or only one? It seems to me that in such case there is no need to search for an implied consideration. There is one in fact and only one, namely, the price. So here the only consideration given by the defendant was the sum which he paid in July, which entitled him as against Peed to a return of the notes.

It remains to consider the effect of section 61. I agree with the argument of the learned counsel for the plaintiffs on this point. "In his own right" must mean something more than "not in a representative capacity," as executor, for instance. It could not possibly mean that if a thief stole the note from the holder and placed it in the possession of the

maker at or after maturity, the note should *ipso facto* be satisfied; and yet this would be the result if the words "in his own right" are to bear the limited meaning suggested. I think "in his own right" must mean having a right not subject to that of anyone else but his own, good against all the world.

On the whole, therefore, I think in this case there is no technical difficulty to prevent the application of the broad principle which I have named—that the defendant is "he who has enabled" Peed to occasion the loss, that he must therefore sustain it, and that the judgment of the Lord Chief Justice ought to be reversed.

As to estoppel being the foundation of rights arising upon unauthorized transfers of negotiable instruments, see Lord Mansfield in *Russel* v. *Langstaffe*, 2 Doug. 514; Tindal, C.J., in *Schultz* v. *Astley*, 2 Bing. N. C. 544; *Ingham* v. *Primrose*, 7 C. B. N. S. 82, 7 W. R. C. L. Dig. 12, impugned by Brett, L.J., in *Baxendale* v. *Bennett*, but decided in a considered judgment by a very strong court, not questioned so far as I know elsewhere, and at all events sound in principle if wrong on the facts.

ROMER, L.J., read the following judgment: In the course of the argument before us, many points, some of considerable difficulty, were raised and discussed. But I think that the question raised on this appeal can be, and ought to be, decided on comparatively simple considerations. It is clear that before Peed obtained the promissory notes from the plaintiffs by fraud, the defendant was liable to the plaintiffs upon those notes. Now, the notes were obtained from the plaintiffs by Peed and sent on by him to the defendant without the defendant taking any part or step in the matter, or having any communication of any kind with Peed. Peed alone carried the transaction through, and the defendant was simply the passive recipient of the notes when they were forwarded to him by Peed. This being so, it does not appear to me just that the defendant should be able to say, as against the plaintiffs, that he can avail himself of the fraud of Peed, by which alone the notes came into the defendant's hands, so as to discharge him from his pre-existing liability on the notes to the plaintiffs. I cannot think it right to hold that Peed's fraud had had the effect contended for by the defendant. It appears to me, when the facts of the case are duly appreciated, that legal considerations prevent us from so holding. For the plaintiffs, when they discovered the fraud of Peed, were entitled to have the notes re-delivered to them, and the only question is, whether the defendant acquired as against the plaintiffs a better title to the notes than Peed. In my opinion he did not. For, in truth and in fact, the act of Peed, after he obtained the notes from the plaintiffs, in forwarding them to the defendant, was, so far as the plaintiffs are concerned, a voluntary act on his part. As already pointed out, the defendant took no conscious part whatever in or about this act of Peed, and did not even know that it was about to be performed. The defendant, after Peed acquired the notes, did not then pay the notes, or purchase them, or bargain for their delivery. The notes were simply forwarded by Peed to the defendant, and accepted by him as notes which had been long since paid, and not as notes which in Peed's hands, so far as the plaintiffs were concerned, were current notes. The only possible consideration for the delivery by Peed to him which the defendant can allege is the fact that as between himself and Peed the notes had been previously discharged—that is to say, discharged while the notes were in the plaintiffs' hands as current notes, and that is precisely a consideration which the defendant could not set up as against the plaintiffs in respect of their rights against him upon the notes.

It appears to me that, in the peculiar circumstances of the case, the defendant cannot say, as against the plaintiffs, that he is to be regarded as having become a holder for value of the notes from Peed, although as between the defendant and Peed alone the defendant was entitled to receive the notes. And further, in my opinion, so far as he is concerned, the defendant can only be regarded as acquiring the notes from Peed as notes which were paid and no longer current, and, this being so, he can only take them subject to all the equities attaching to the notes in Peed's hands, including the rights of the plaintiffs to have the notes handed back to them as notes upon which the defendant was liable.

For these short reasons it appears to me that the plaintiffs are entitled to hold the defendant as liable for the amount of the notes, and that the appeal should be allowed.

*Appeal allowed.*

Solicitors for the plaintiffs, *Chester & Co.*

Solicitors for the defendant, *Cole & Jackson*, for *Francis, Francis, & Collin*, Cambridge.

---

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — Feb. 9.

BURGE v. ASHLEY & SMITH. (a.)

*Gaming—Wagering—Money deposited with stakeholder—Right to recover—Money paid under contract rendered void by* 8 & 9 *Vict.* c. 109, *s.* 18—*Gaming Act*, 1892 (55 & 56 *Vict.* c. 9), *s.* 1.

*Money deposited with a stakeholder to abide the event of a boxing match is not "money paid under or in respect of a contract made void by* 8 & 9 *Vict.* c. 109, *s.* 18," *and may be recovered by the depositor from the stakeholder if he has given the latter notice not to part with it.*

O'Sullivan *v.* Thomas, 43 *W. R.* 269, [1895] 1 *Q. B.* 698, *approved.*

Appeal by the defendants from the judgment of Lawrance, J.

The plaintiff in the action sued to recover the sum of £300 deposited with the defendants as stakeholders, to be paid over to the winner of a boxing match. A boxing match took place between the plaintiff and another man, and each party deposited £300 with the defendants, who were the editors of the *Sportsman*. As a result of the contest the plaintiff's opponent was declared the winner. Subsequently, but before the stakes were handed over to the winner, the plaintiff gave notice to the defendants not to pay over the £300, but to hand it back to him. Notwithstanding this notice the defendants parted with the money.

At the trial of the action Lawrance, J., held, on the authority of *O'Sullivan* v. *Thomas*, 43 W. R. 269, [1895] 1 Q. B. 698, that the plaintiff was entitled to recover.

*Duke, Q.C.*, and *Ellis Hill*, for the appellants.—Before the Gaming Act, 1892, the plaintiff might have recovered his deposit if he had claimed it before the defendants had paid it over to the winner. But the law has been altered by section 1 of that Act, and the present case comes within its very words, because the £300 is money "paid" to a stakeholder "under or in respect of a contract made void by 8 & 9 Vict. c. 109,

(a.) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

s. 18." The substantial question is whether the money is "paid" to the stakeholder. The general words are clearly large enough to support the view that it is, and such money has been spoken of as "paid" in case after case. In *Hastelow* v. *Jackson*, 8 B. & C. 221, both the judges spoke of money deposited with a stakeholder as money "paid" to him. Unless such money is of the nature of a *depositum* and is not paid, it comes within the first clause of section 1 of the Act of 1892. Both in the primary and particular meaning of the word this money was paid to the stakeholder, the property in it had passed to him, and the plaintiff ought not to have recovered in the action. The payment should be looked at with regard to the intention of the parties at the time. Their intention was that the stakeholder should hold the money in trust for the winner of the wager, so the property in the money passes from the depositor to the stakeholder. The Act of 1892 was passed ten years after the decision of *Read* v. *Anderson*, so that there was no sudden intention on the part of the Legislature to upset that particular decision. The intention of the Legislature was to make a clean sweep of actions brought with regard to wagering contracts.

They referred to *Read* v. *Anderson*, 32 W. R. 950, 13 Q. B. D. 779; *Diggle* v. *Higgs*, 25 W. R. 777, 2 Ex. D. 422; *Varney* v. *Hickman*, 5 C. B. 271; *Hampden* v. *Walsh*, 24 W. R. 607, 1 Q. B. D. 189; *Hastelow* v. *Jackson*, 8 B. & C. 221; *Carney* v. *Plimmer*, 45 W. R. 385, [1897] 1 Q. B. D. 634; *Shoolbred* v. *Roberts*, [1899] 2 Q. B. 560.

*Marshall Hall, Q.C.*, and *Ashworth Harrison*, for the respondents, were not called upon.

A. L. SMITH, L.J.—The real question in this case is whether the case of *O'Sullivan* v. *Thomas* was rightly decided. As matters stand now, there appear to have been four judges who have all decided a question of this kind in the same way. The point is this, whether or not the Act of 1892 prevents an action being brought against a stakeholder to recover from him money which has been deposited with him.

The circumstances of the case are very short. There was a bet made between two men on the result of a boxing match under the Queensberry rules. It may be taken for the purposes of this case that each man deposited with a stakeholder the sum of £300. It must be also taken that before the money was paid over the plaintiff gave notice to the stakeholders not to part with it. The plaintiff brought an action to recover it, and the Gaming Act, 1892, was set up in answer.

The real question is whether or not a deposit with a stakeholder comes within the words "to pay any person any sum of money." In ordinary parlance I should come to the conclusion that if I deposited a stake with a stakeholder, I had paid nothing to the stakeholder at all.

The first section of the Act says: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

In a case of *Strachan* v. *Universal Stock Exchange*, 44 W. R. 90, [1895] 2 Q. B. D. 697, we had a great discussion as to the meaning of the Act 8 & 9 Vict. and the law on the subject of wagers, commencing with the year 1828, and I simply state what I stated then: "It is manifest that no action can be brought by the one against the other to enforce any contract so declared to be void; but it has been held by authorities, which it is far too late now to question, that, as soon as one party to a gaming contract receives notice from the other party that the former declines to abide any longer by the wagering contract, money deposited by him thereupon ceases to be money deposited in the hands of the latter 'to abide the event on which any wager shall have been made,' and any money still in the latter's hands unappropriated by him becomes money of the former, without any good reason for the latter detaining it, and in such circumstances an action for money had and received to the plaintiff's use will lie." That is not my own opinion only, but it is the opinion expressed by learned judges from the year 1828 down to 1880. Therefore it seems to me that the defendants cannot succeed under the first branch of section 1 of the Act of 1892.

But they said, Supposing that is not so, the defendants can get within the second branch of the section. They cannot do so because it has not been proved that depositing money with a stakeholder is a "payment" of a sum of money within the meaning of the Act. It has been attempted to stretch this Act to include any promise, express or implied, to pay any sum of money or to deposit any sum of money. I do not find these words in the section, and it seems to me that it would be passing strange if the very learned and noble lord (Lord Herschell) who settled the Act, had intended to bring in what was the notorious practice throughout the kingdom—namely, the depositing money with stakeholders—that he did not insert words to effect that purpose.

Now I come to what authorities there are on the subject, and in *O'Sullivan* v. *Thomas* Wills, J., said: "In my opinion an action will lie, we must give to the word 'paid' its *primâ facie* meaning of paid out and out. I do not think it is properly applicable to money deposited for the purpose of paying a third party." Wright, J., said: "The expression 'money paid by him' does not appear properly to apply to a revocable deposit. And it seems difficult wholly to disregard the consideration that a different construction would tend directly and almost necessarily to defeat the very object of the Act by preventing a revocation of the deposit, and so giving to the winner of the wager a practical certainty of being paid his bet, which advantage he did not previously possess."

I think that case was rightly decided. We had our attention called to the case of *Carney* v. *Plimmer*, which was decided by this court; but that case is not in point. Mr. Duke referred us to the judgment of Chitty, L.J., in which he spoke of money deposited with a stakeholder as money "paid" to him; but so little were the judges in that case thinking of the point which we have to decide here that, though the case of *O'Sullivan* v. *Thomas* was cited to them, not one of the learned judges thought it applicable to that case or referred to it in their judgments. I think that the judgment of the learned judge is right, and that the decision in *O'Sullivan* v. *Thomas* was right, and this appeal must therefore be dismissed.

COLLINS, L.J.—This is virtually an appeal from the decision in *O'Sullivan* v. *Thomas*, and the question is whether the Act of 1892 has in fact overruled or substituted new law for what existed as the interpretation of the Act of 1845. It was well settled under the Act of 1845 that a person who had deposited money with a stakeholder could in certain circumstances recover that money. Then came the Act of 1892, and it is suggested that the wording of that Act is such that it is now no longer possible to recover money from a stakeholder. Mr. Duke had to say

that this money now in question was money paid by the plaintiff under or in respect of a wagering contract, and that being so paid there is an implied promise to pay it back, and that that is the very promise which, he says, is rendered null and void by the Act. This Act was passed after a long current of authorities had established that money so paid could be recovered, and if it was intended to overrule these authorities we should expect some clear and definite expression in the Act to that effect. I do not find any such expression. This Act was passed shortly after the decision in *Read* v. *Anderson*, and was, I consider, obviously passed to overrule that particular case. It was passed with the intention of dealing with the case where money had been paid in the full sense of the term, and I cannot escape the conclusion that it was passed *alio intuitu* as far as this case is concerned. I think that the word "paid" is not meant to cover this class of deposit. I agree with the reasoning of the court below, and I think the plaintiff is entitled to recover in this case.

ROMER, L.J.—I agree. Before the passing of the Act of 1892 the matter stood thus: If a person deposited a sum of money with a stakeholder to abide the result of a game or wager, he had the right at any moment before the money was parted with to demand to have it handed back to him. So that the person depositing the money was, with regard to the stakeholder, in the position of a person who had deposited money with an agent, giving him instructions to deal with the money in certain events, but having the right to recover the money before the mandate was acted upon. Before 1892 you could not describe that as a "payment" to the stakeholders, so that when you come to the Act of 1892 it is reasonably clear that the Legislature did not intend to include that transaction under the word "pay." That being so, I agree with the decision in *O'Sullivan* v. *Thomas*.

The case of *Carney* v. *Plimmer* is perfectly distinguishable, and I agree that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the appellants, *Gush, Phillips, Walters, & Williams.*

Solicitors for the respondent, *Bernard Abrahams & Co.*

---

From Chan. Div. (Lindley, M.R., and Vaughan Williams and Romer, L.JJ.) — Feb. 3.

*In re* GENERAL RAILWAY SYNDICATE. WHITELEY'S CASE. (*a.*)

*Company—Winding up—Contributory—Action for payment of calls—Summons for leave to enter final judgment—Affidavit—Leave to defend—Misrepresentation—Rescission—Proceedings taken before commencement of winding up.*

*A shareholder who, in an action for calls brought against him by a company, obtains leave to defend an application to enter final judgment under order 14 on an affidavit which sets up misrepresentation as a ground of defence, and states that he intends to counterclaim for rescission, has done all that can reasonably be expected in the way of commencing legal proceedings to establish his right to repudiate his shares.*

*He is not made, therefore, too late for relief owing to a petition for the winding up of the company being presented before delivery of his defence and counterclaim.*

This was an appeal from a decision of Wright, J. (reported [1899] 1 Ch. 770, 47 W. R. Dig. 36).

The facts were as follow:

On the 15th of June, 1896, 5,000 £1 shares in the above-named company were allotted to W. A. Whiteley.

On the 22nd of December, 1897, a call was made of 5s. per share, which was payable in the following January.

On the 27th of June, 1898, the company commenced an action against Whiteley to recover the amount of the call, and on the 12th of July served him with a summons for leave to enter final judgment under order 14.

On the 15th of July Whiteley filed an affidavit in opposition to the summons, wherein, after a formal denial of indebtedness, he stated that he had been induced to apply for the shares by misrepresentation on the part of the company, and that he intended to counterclaim for rescission of the contract and to have his name removed from the register of members, and on the 20th of July, Whiteley obtained unconditional leave to defend.

On the 22nd of July a petition was presented for the compulsory winding-up of the company, and on the 3rd of August a compulsory winding-up order was made upon the petition.

In the meantime on the 2nd of August, Whiteley put in a defence to the action, and delivered a counterclaim for a rescission of the contract and rectification of the register and for an injunction to restrain the company from enforcing the calls.

The liquidator having settled Whiteley on the list of contributories in respect of the 5,000 shares, Whiteley issued a summons asking that his name might be struck off the list, with leave to raise the question whether it was too late for him to set up a case of misrepresentation against the company.

Wright, J., held that Whiteley was not entitled to be relieved from his shares, since the counterclaim was not entitled to be delivered until after the presentation of the winding-up petition.

Whiteley appealed.

*Upjohn, Q.C.*, and *W. Whateley*, for the appeal, cited *Reese River Silver Mining Co.* v. *Smith*, 17 W. R. 1042, L. R. 4 H. L. 64; *In re Scottish Petroleum Co.*, 31 W. R. 846, 23 Ch. D. 413; *In re Cleveland Iron Co., Ex parte Stevenson*, 16 W. R. 95; *In re Estates Investment Co., McNeill's case*, 18 W. R. 1102, 1126, L. R. 10 Eq. 503.

*Hon. E. C. Macnaghten, Q.C.*, and *Peterson*, *contrâ*.

LINDLEY, M.R.—I do not think that the case, although novel, is really difficult, although I am unable to come to the same conclusion as the learned judge upon it.

We have to consider what effect the new practice introduced by the Judicature Act has upon the rules which have been laid down respecting proceedings taken by a shareholder to get his name removed from the register when winding-up proceedings are imminent.

The old practice was settled, and the rule was laid down by the court in *In re Scottish Petroleum Co.* It is very difficult for judges to frame language which is adapted to all possible contingencies; they frame it with reference to the circumstances with which they have to deal. But the real question is whether what has been done by the applicant here is not equivalent for all practical purposes, and for all legal purposes, to taking proceedings to have his name removed from the register. In my opinion it is.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Here is a person on the register of members, and *primâ facie* a shareholder, and, before any petition to wind up was presented, an action was brought against him for calls, and a summons was taken out under order 14. That introduces the new practice. What is the effect of that? The applicant had two courses open to him. He could immediately commence a cross-action for rescission—there is no doubt about that; but he could also not only defend the action, but put in a counterclaim raising the question of his right to rescind. There were thus two ways of raising that question. Under the old practice there were not, and it was settled that a shareholder could not acquire a right to rescind by simply defending an action for calls. That may account for the decision of Bolt, L.J., in *Ex parte Stevenson*. In this case the applicant did not, as he might have done, bring a cross-action to rescind, but he took the other alternative of asserting his right to rescind in the action for calls, and he applied for leave to defend. After the summons had been taken out under order 14 he could not defend without leave, and I cannot help thinking it would have been rather a vexatious proceeding, considering that he could do everything he wanted in one action, to start another.

The summons for leave to sign judgment having been issued, he filed an affidavit which shows no defence at all apart from the right to rescind. It starts with a formal statement that the deponent is not indebted. That goes for nothing unless you can find some circumstances which can throw light upon it and give rise to some reason for supposing that that is a true statement. I disregard that altogether. Then the whole of the rest of the affidavit shows nothing more nor less than a right to repudiate the shares and to have the contract rescinded, and it is upon that affidavit that he gets leave to defend.

Now, it is true that the petition to wind up was presented before he could put in his counterclaim. If he had put in his counterclaim the case would not have been arguable. The difficulty arises from the fact that he had not put in his counterclaim. But he got leave to defend upon the affidavit to which I have referred, and I think that he did all that could be reasonably expected to assert in a legal proceeding his right to repudiate these shares. That is the principle on which the courts have acted in several cases.

Whether *Ex parte Stevenson* went a little too far or not it is unnecessary to consider. One can easily see that it would lead to very extraordinary results, because, supposing that in an action for calls the defendant pleaded that he had been induced to take his shares by fraud and repudiated his shares, and that were tried out, it would be very difficult to see how he could be made a contributory after that, assuming that he was successful. However, I say nothing more about it. We are asked to extend what was done by Bolt, L.J., under the old practice to a new practice which has entirely altered the procedure. I think that would be wrong. In substance the applicant has taken legal steps before the commencement of the winding up to have his name removed from the register. Therefore, upon this preliminary point, I think that the order must be set aside and the matter must go back to the learned judge.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

Solicitors, *Ward, Perks, & McKay; Hays, Schmettau, & Dunn.*

## High Court of Justice.

Chan. Div. } Jan. 27; March 1, 6;
Stirling, J. } April 5.

JACOB *v.* DOWN. (*a.*)

*Landlord and tenant—Lease—Construction—Building covenant—Repairing covenant—Continuing breaches of covenants—Waiver by acceptance of rent—Recovery of possession—Sufficiency of notice under Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

*A piece of land, with four houses, was demised on lease to the defendants by the predecessor in title of the plaintiffs on the 4th of June,* 1894. *The lease contained a licence to the defendants to pull down the houses within twelve months, and covenants by the defendants* (a) *within the same period to erect new premises in their place, and* (b) *to "at all times during the said term keep the said messuages and premises so to be erected as aforesaid in good and substantial repair." There was also a proviso for re-entry on "any breach or non-observance of any of the lessees' covenants." The new houses were never built. On the 27th of August,* 1895, *rent was paid by the defendants and accepted on behalf of the original lessor. In August,* 1898, *the plaintiffs served on the defendants a notice under section* 14 *of the Conveyancing Act,* 1881, *which set out the building covenant and the breach thereof, but did not refer to the repairing covenant.*

*Held,* (1) *that, by the acceptance of rent, the breach of the building covenant, which had been made once for all, had been waived;* (2) *that there was no continuing breach of the building covenant;* (3) *that there was a continuing breach of the repairing covenant; and* (4) *that the notice served under section* 14 *of the Conveyancing Act,* 1881, *was insufficient.*

This was an action to recover possession of a piece of land in Cardiff held by the defendants under a lease dated the 4th of June, 1894, for an alleged breach of covenants therein contained.

The lease was made between a tenant for life (on whose death on the 22nd of November, 1895, the plaintiffs became entitled in possession to the property) and the defendants.

The lease demised for a term of twenty-one years from the 27th of November, 1893, a piece of land with four messuages or dwelling-houses erected thereon, and full licence and authority for the lessees at any time within twelve months from the date of the lease to pull down the same, and within the same period to erect good and substantial premises thereon in accordance with a building covenant by the defendants to erect the premises therein specified at a cost of not less than £2,500; the lease also contained a repairing covenant by the defendants to "at all times during the said term keep the said messuages and premises so to be erected as aforesaid in good and substantial repair, and the same in good and substantial repair deliver up to the lessor at the expiration or sooner determination of the said term"; and after other covenants there was a proviso for re-entry on "any breach or non-observance of any of the lessee's covenants."

On the 20th of June, 1895, the lessor's representatives wrote to the defendants complaining that they had taken no steps to comply with the building covenant.

The rent which fell due on the 27th of August, 1895, was paid by the defendants, and accepted on behalf of the lessor; the rent which accrued due

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

subsequently to that date was paid and received without prejudice to the question between the parties.

The messuages had never in fact been built.

On the 8th of August, 1898, the plaintiffs served upon the defendants a notice under section 14 of the Conveyancing Act, 1881, which set out the building covenant and that alone, stated the breach of it, and called upon the defendants to erect the buildings, in default of which the lessors would sue for recovery of possession.

The writ in the action was issued on the 5th of November, 1898, and the statement of claim (which did not mention the repairing covenant) was delivered on the 6th of December.

The defendants in their defence expressed their willingness to perform the covenants, but submitted that there was a waiver of the breach of the covenants by the acceptance and receipt of rent; they counterclaimed for relief.

Jan. 27.—*Jenkins, Q.C.*, and *St. J. Clerke*, for the plaintiffs.—The building covenant is in substance one for the erection of the houses, and the period of twelve months mentioned therein is not of the essence. At any rate, there has been a continuing breach of the repairing covenant, and this latter covenant includes the words "so to be erected as aforesaid"; covenants to keep in repair and deliver up in repair involve a covenant to build: *Clark* v. *City of Glasgow Assurance Co.*, 1 Macq. 668; *Payne* v. *Haine*, 16 M. & W. 641; *Proudfoot* v. *Hart*, 38 W. R. 730, 25 Q. B. D. 42. The proviso as to right of re-entry is not in common form but peculiar, for it includes a continuing covenant and a continuing breach and provides for re-entry on any breach of any of the covenants; it does not point to one definite breach. The acceptance of rent on the 27th of August, 1895, is immaterial, for it could not be a waiver where there was a continuing breach of a continuing covenant.

*Upjohn, Q.C.* (*Kenyon Parker* with him), for the defendants.—There was no continuing breach of the covenant, but one only, once for all, on the 4th of June, 1895. Assuming that, then on the 5th of June there was a right of re-entry which, however, was done away with either (*a*) by the death on the 22nd of November, 1895, of the original lessor, to whom alone the right accrued (Sheppard's Touchstone of Common Assurances, 1820 (7th ed.), p. 148), or (*b*) by waiver by the plaintiffs (i.) in accepting rent, and (ii.) by their conduct in treating the lease as a subsistent lease. Moreover, the notice of the 8th of August, 1898, served under section 14 of the Conveyancing Act, 1881, was not sufficient, as it did not refer to the repairing covenant. The defendants are themselves entitled to relief: *Sampson* v. *Easterby*, 9 B. & C. 505, 6 Bing. 644; *Dawes* v. *Tredwell*, 29 W. R. 793, 18 Ch. D. 354; *Coward* v. *Gregory*, 15 W. R. 170, L. R. 2 C. P. 153; and *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826, at p. 833.

*Jenkins, Q.C.*, in reply.—As to the alleged extinction of the right of re-entry see section 10 of the Conveyancing Act, 1881; but the case must stand or fall on the "continuing covenants" point. It is artificial to say that because there is no house therefore the covenant to repair cannot be broken. The notice of the 8th of August, 1898, pointed out the breach which is in substance what is required: see *dicta* in *Horsey Estate* (*Limited*) v. *Steiger*, 47 W. R. 644, [1899] 2 Q. B. D. 79.

*Cur. adv. vult.*

STIRLING, J., after stating the facts as above, said: The first question is whether there is a continuing breach of any and which of the covenants in the lease. This is, of course, a question of the construction of the document itself. For the plaintiffs it was contended that the building covenant was in substance one for the erection of these houses and that the period of twelve months mentioned therein was not of the essence; and, further, that at all events there was a continuing breach of the repairing covenant. For the defendant it was said that the building covenant was completely broken at the end of the period of twelve months specified and that the repairing covenant did not apply unless and until the new houses were built.

First, as regards the building covenant, a very similar point was raised in *Bennett* v. *Herring*, 6 W. R. 37, 3 C. B. N. S. 370, but was not decided, though the view contended for on behalf of the plaintiffs seems to have found favour with some of the learned judges. But it was held in *Coward* v. *Gregory* that a covenant forthwith to put the demised property into good and tenantable repair could only be broken once. In my judgment that is equally true of the building covenant in the present case.

Secondly, as to the repairing covenant, a covenant to keep in good repair imposes an obligation to put in repair premises which at the time of the demise were not in repair: *Payne* v. *Haine*, *Proudfoot* v. *Hart*. It also imposes an obligation to rebuild the demised premises if these are destroyed by fire during the term: *Bullock* v. *Dommitt*, 6 T. R. 650; *Clark* v. *Glasgow Assurance Co.* In *Bennett* v. *Herring*, already cited, a lease contained covenants by the lessee to complete within two months two messuages described as having been lately erected and to keep "the said messuages and premises" in repair during the term. The messuages were never completed, and it was held that there was a breach of the covenant to repair. But it is to be observed that in that case the covenant related to messuages which were treated as being in existence, though not complete at the time of the demise. None of these authorities completely covers the present case, but they go far to show that such a covenant imposes the obligation to do everything necessary in order that the houses may be found during the term to be in existence and in the proper state of repair. Here the covenant is not to keep in repair "the said messuages and premises if and when erected," but "the said messuages and premises so to be erected as aforesaid," words which seem to me to refer simply to the nature and character of the messuages and premises, and not to the time of their erection. The object of the covenant is to secure that at all proper times the messuages referred to shall be in proper repair, and in my opinion the covenant imposes an obligation to do all things necessary for that purpose, including the erection of the messuages if not completed within the period prescribed in the building covenant. If this be not so, it seems to me that the lessee by omitting to perform the building covenant might practically escape from the obligations of the lease. In my judgment, therefore, there is no continuing breach of the building covenant, but there is a continuing breach of the repairing covenant. This being so, the question arises whether the notice under the Conveyancing Act of 1881, s. 14, was sufficient. The form of notice required was considered by the Court of Appeal in the case of *Horsey Estate* (*Limited*) v. *Steiger*, 47 W. R. 644, [1899] 2 Q. B. 79 [His lordship read from the judgment of the court delivered by Lord Russell, C.J., at p. 91 of the latter report]. In the present case the plaintiffs were not in a position to rely on the breach of the building covenant, for that breach had been waived by acceptance of rent. There is a continuing breach of the repairing covenant, but this is not mentioned in the notice or the statement of claim. In these circumstances,

in my judgment the notice was not sufficient. I think that the defendant was entitled to rely on his defence to the breach of the building covenant, and that if the plaintiffs desired to insist on the continuing breach of the repairing covenant they ought to have given the defendant notice thereof, all the more that it is not without difficulty that I have arrived at the conclusion already stated. The result is that the action fails and must be dismissed.

*Action dismissed, with costs.*

Solicitors, *Warriner & Co.*, for *W. Lyndon Moore*, Newport; *Downing, Bolam, & Co.*, for *Downing & Handcock*, Cardiff.

---

Chan. Div. } Kekewich, J. } March 28.

EWART *v.* FRYER. (*a.*)

*Landlord and tenant—Lease to company of public-house—Condition for re-entry on liquidation—Forfeiture—Underlessee, relief to—Conveyancing Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 14—*Conveyancing Act,* 1892 (55 *&* 56 *Vict. c.* 13), *s.* 4—*Waiver.*

*A voluntary winding up by a solvent company for the purpose of amalgamating with other companies works a forfeiture of a condition for re-entry on liquidation.*

*On forfeiture of the head lease the court has power, under section* 4 *of the Conveyancing Act,* 1892, *in granting relief to an underlessee, to vary (even by way of increase) the amount of rent reserved by the underlease.*

This was an action by the trustees of the will of a lessor to recover possession of a public-house under a condition in the lease. By the lease in question, made in 1896, the lessor demised the premises to Coombe & Co. (Limited) for thirty years at a rent of £300 a year, and there was an express condition that if and whenever the lessees or their assigns, being a company, should enter into liquidation, whether compulsory or voluntary, it should be lawful for the lessor, his heirs or assigns, to re-enter upon the demised premises. By an underlease of the same date Coombe & Co. demised the premises to the defendant Fryer for 29¾ years in consideration of a premium of £8,000 and at a rent of £800 per annum, reducible to £300 so long as he should buy his beer from Coombe & Co. This the defendant Fryer had always done.

In the year 1899 Coombe & Co., who were perfectly solvent, were voluntarily wound up for the purpose of being amalgamated with two other large brewery companies under the name of Watney, Coombe, Reid, & Co. (Limited). This amalgamated company was the second defendant to the action. The amalgamation of the said companies was widely advertised in the *Gazette* and other newspapers, and by the issue of the prospectus.

The defendant Fryer had never paid more than £300 a year rent for the public-house, of which he was in possession; and in the event of the plaintiffs being held entitled to recover possession as against the defendant company, he claimed relief under section 4 of the Conveyancing Act, 1892, and an order vesting the demised premises in him for the remainder of the term of his underlease. It was admitted that in the event of forfeiture he was entitled to relief, and the only question was upon what condition it should be granted. By section 4 of the Conveyancing Act, 1892, the court has power on forfeiture of the superior lease to make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as underlessee "upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise," as the court shall think fit.

*Warrington, Q.C.*, and *T. T. Methold*, for the plaintiffs, argued that the voluntary liquidation of Coombe & Co. was a forfeiture of the lease, and cited *Horsey Estate* v. *Steiger*, 47 W. R. 644, [1899] 2 Q. B. 79; *Wardens of Cholmeley's Schools* v. *Sewell*, 41 W. R. 637, [1894] 2 Q. B. 906; *Imray* v. *Oakshette*, 45 W. R. 681, [1897] 2 Q. B. 218.

*R. Merivale*, for the defendant Fryer, claimed relief under section 4 of the Conveyancing Act, 1892.

*Warmington, Q.C.*, *Renshaw, Q.C.*, and *Davenport*, for the defendant company, argued that even if there had been a forfeiture the plaintiffs had waived it by accepting rent after the amalgamation, of which they must be assumed to have had notice. With regard to the defendant Fryer, the true principle was compensation; he ought to be put in the same position as if no breach had taken place, and there was no reported case in which the rent had been increased.

They referred to *North London Land Co.* v. *Jacques*, 32 W. R. 283, [1883] W. N. 167; *Bond* v. *Freke*, [1884] W. N. 47; *Quilter* v. *Mapleson*, 31 W. R. 75, 9 Q. B. D. 672.

*Warrington, Q.C.*, replied.

KEKEWICH, J., said that, having regard to the decision in *Horsey Estate* v. *Steiger*, it was impossible now to argue that the voluntary winding up of Coombe & Co. (Limited) did not work a forfeiture, and that being so the lease, together with the underlease, was now wholly gone. Then it was argued that the plaintiffs had waived the forfeiture in more ways than one. It was said that the fact of amalgamation was public property, so that no one could say that it had not happened. But supposing that the plaintiffs knew of the amalgamation, did they know that amalgamation meant a winding up of Coombe & Co.? Even if they knew of the amalgamation I cannot hold that they knew of the way in which it was effected so as to fix them with notice of the forfeiture. Neither the advertisement in the *Gazette* nor in the other papers nor the issue of the prospectus was notice in that way. [His lordship then proceeded to consider whether the plaintiffs had notice by the receipts for rent given after the amalgamation, and held on the facts that there had been no waiver on that or any other ground.]

The amalgamation, therefore, having worked a forfeiture, and the lease and underlease having consequently gone, the court must create a new interest, having regard to the new remedy imported by the Conveyancing Act, 1892. Mr. Warmington called my attention to the earlier cases decided before the Act of 1892, but we ought not now to be guided by them, but by the new relief given by the Legislature. It is not simply a question of compensation—there is no revival of the old estate, but a new estate is to be vested in the underlessee. The vesting may be part of the term or part of the property, but it cannot be for any longer term than the original sub-demise. The court has a large discretion, and may vest in the sub-lessee the original term, as in *Cholmeley School* v. *Sewell*, or no lease at all, as in *Imray* v. *Oakshette*. The language of section 4 is difficult to construe. What is meant by payment of rent? It has been argued that it only means rent up to the present time; but I cannot think that it means only payment of rent actually due, though such a construction runs

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

well with the context, except with the words "giving security." I think the court has a very wide discretion as to the conditions on which the vesting order should be made and has power to vary the rent where circumstances require it. Do the circumstances require it here? Fryer was willing to pay £300 a year and buy his beer of Coombe & Co. The covenant as to buying beer will of course not be inserted in the new lease; and though it might be fair to Fryer to grant him a lease at £300 without the tie, it would not be fair to the plaintiffs now that the tie is gone. The new estate to be created must be fair to all the parties concerned. There was evidence that the rent of £300 was too small a rent to pay for the tavern if it was not a tied house and it would not be fair to the lessors to compel them to accept that. Fryer must pay a fair rent, which is a matter for reference. There will be a declaration of forfeiture and an order vesting the property in Fryer on conditions to be settled in chambers, and an inquiry as to rent having regard to the tie being gone; defendants to pay the costs.

Solicitors, *Bolton & Co.; Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

---

Chan. Div.
Buckley, J. } March 27, 28, 30; April 2.

SACCHARIN CORPORATION (LIMITED) v. ANGLO-CONTINENTAL CHEMICAL WORKS (LIMITED) AND REITMEYER. (a.)

*Patent—Chemical process—Infringement—Use abroad—Part of manufacture of commercial article—Sale in England.*

*The sale in England of an article imported from abroad, in the manufacture of which a process patented in this country has been used, is an infringement of the patent, even although the process is only the first part of the manufacture, which also consists of subsequent processes not patented.*

Action.

This was an action for the infringement of a patent (No. 25,273 of A.D. 1894) for improvements in the manufacture of toluene-sulpho-chlorides granted to Imray on the communication of Monnet, dated the 29th of December, 1894, which belonged to the plaintiffs. The claims were (1) The manufacture of toluene-sulpho-chlorides by acting with chlorsulphonic acid in large excess on toluene at a temperature not exceeding 5° C., substantially as described; and (2) the direct conversion of toluene by means of chlorsulphonic acid into toluene-sulpho-chlorides, mostly in liquid form, substantially as described; and his lordship found that the essence of the invention was that the whole of the toluene was converted into toluene-sulpho-chloride without the formation of any sulpho acids. The liquid form of toluene-sulpho-chloride was commonly known as ortho-toluene-sulpho-chloride, and was a coal tar product the manufacture of which was a necessary step in the production of saccharin.

The plaintiffs claimed an injunction against the defendant company and their managing director to restrain infringement, and consequential relief. They gave as particulars of breaches the importation into England and the selling and supplying in England of certain compounds sold by the defendants under the name of saccharin, manufactured according to the plaintiffs' invention. The defendants denied infringement, but in answer to interrogatories they admitted that they had imported and caused to be sent and supplied in this country certain saccharin which had been supplied them by the firms of Grandjean Zimmerman & Co., of Brougg, in Switzerland, and the Basle Chemical Works in the same country, and that they had dealt with these firms as manufacturers. Evidence was given at the trial as to the process employed by these firms in the manufacture of saccharin. They first manufactured ortho-toluene-sulpho-chloride, and it was then necessary for the production of saccharin first to change the chlorine for an amide group, and then oxidize into saccharin and water. His lordship held that in the manufacture of the ortho-toluene-sulpho-chloride the foreign firms had used substantially the patented process of the plaintiffs. The subsequent process was admittedly well known, and not within the patent.

*Moulton, Q.C., C. A. Cripps, Q.C., J. C. Graham,* and *Colefax,* for the plaintiffs.—The cases of *Elmslie* v. *Boursier,* 18 W. R. 665, L. R. 9 Eq. 217, and *Von Heyden* v. *Neustadt,* 28 W. R. 496, 14 Ch. D. 230, decide that the importation of an article manufactured abroad by the use of machinery or a process patented in this country is an infringement of the patent. The terms of the judgments in these cases are quite general, and not limited to cases where no other machinery or process is employed. Otherwise an inventor would lose all profit from his patent, as anyone could go over to Boulogne or Ostend and use it there, and bring back the products. The words of the grant cover the case, as the patentee is to have the whole profit and advantage of his invention, and no one is to use it either directly or indirectly.

*Neville, Q.C., Roger Wallace, Q.C., Lord Robert Cecil, Q.C., A. J. Walter,* and *Bucknill,* for the defendant company; and *M. Romer,* for the defendant Reitmeyer.—The plaintiffs' patent is for the manufacture of toluene-sulpho-chloride. We do not import this, but saccharin, which is a different thing. It is true, toluene-sulpho-chloride is used in the manufacture of saccharin, but even if that is manufactured according to the patented invention the case does not fall within the cases cited. The patented process is only one step in the manufacture.

BUCKLEY, J. (after stating the facts and holding the patent valid).—The article imported and sold therefore is produced by certain subsequent chemical operations from the article produced under the patented process. The imported article is saccharin, and not ortho-toluene-sulpho-chloride; but ortho-toluene-sulpho-chloride is contained as such in saccharin. The defendants say that the importation is not an infringement. Now, the grant contained in the letters patent is a grant to the patentee to make, use, exercise, and vend the invention, and to have and enjoy the whole profit and advantage by reason of the invention; and to the end that he may have and enjoy the sole use and exercise, and the full benefit of the invention, all others are precluded from either directly or indirectly making use of or putting in practice the invention, or any part of the same, or in any wise imitating the same. Accordingly it was held in *Elmslie* v. *Boursier* that the importation and sale in England of articles manufactured abroad according to the specification of an English patent is an infringement of that patent. This decision was followed by the Court of Appeal in *Von Heyden* v. *Neustadt.* Neither of these cases entirely covers that before me, but in my judgment the principle of the decisions applies. If the last stage in the production of the article sold was the patented process, it would, I think, plainly

(a.) Reported by NEVILLE TERBUTT, Esq., Barrister-at-Law.

be an infringement, and it is not the less an infringement, in my opinion, because the article sold is manufactured with the subsequent use of other processes. By the sale of saccharin in the course of the production of which the patented process is used, the patentee is deprived of some of the whole profit and advantage of the invention, and the importer is indirectly making use of the invention.

*Injunction granted.*

Solicitors for the plaintiffs, *J. H. & J. Y. Johnson.*

Solicitor for the defendant company, *J. W. Asprey.*

Solicitors for Reitmeyer, *Deacon, Gibson, & Metcalf.*

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 18.

DAVIS (*Appellant*) *v.* HARRIS (*Respondent*). (*a.*)

*Landlord and tenant — Distress—Exemptions from—Bedding — Bedstead — Law of Distress Amendment Act,* 1888 (51 & 52 *Vict.* c. 21), *s.* 4—*County Courts Act,* 1888 (51 & 52 *Vict.* c. 43), *s.* 147.

*By section* 147 *of the County Courts Act,* 1888, *which is incorporated in section* 4 *of the Law of Distress Amendment Act,* 1888, *wearing apparel and bedding to the value of £5 are exempt from distress.*

*Held, that the word "bedding" includes "bedstead."*

Case stated by Haden Corser, Esq., metropolitan police magistrate, sitting at Worship-street.

On the 20th of June, 1899, at the Worship-street police-court, a complaint was preferred by Esther Davis, the appellant, against Gershon Harris, the respondent, under the provisions of 2 & 3 Vict. c. 71, s. 39, for that Gershon Harris did, on the 25th of May, 1899, unlawfully take from the appellant a certain article of furniture—to wit, a bedstead—by an unlawful distress.

At the hearing of the summons the following facts were proved or admitted:

In the month of April, 1899, the respondent let to the appellant on a weekly tenancy, at a rent of eight shillings per week, a certain two-roomed house, of which he was the owner.

On the 25th of May, 1899, there was due and owing from the appellant to the respondent, in respect of arrears of rent of the house, the sum of £1 5s., and upon that day the respondent, by his duly authorized bailiff, levied a distress for that amount upon the goods of the appellant at the house.

Amongst the goods of the appellant was a bedstead with certain bedding thereon.

The respondent's bailiff, having removed the bedding from the bedstead, took away the bedstead and sold it, leaving the bedding in the house.

Upon the above facts it was contended on behalf of the appellant that the bedstead was privileged from distress, as it was included in the term "bedding" mentioned in section 147 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which is incorporated in the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), and which, so far as is material to this case, is as follows: "Excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of £5, which shall to that extent be protected from such seizure"; and that the said distress so levied by the respondent's bailiff was unlawful by reason of the removal and sale of the same.

On behalf of the respondent it was contended that the bedstead was not so included, and was not, therefore, privileged from distress.

The magistrate came to the conclusion that although a bedstead might in ordinary circumstances be included in the term "bedding," yet as the statute took away part of the landlord's security, and as it had not been the practice to include it in these cases, and there being no decision of the High Court upon the point, he ought to interpret the section strictly. He therefore dismissed the summons.

The question for the opinion of the court was whether upon the above facts the magistrate came to a correct conclusion in point of law, and, if not, what ought to be done in the premises.

*Foa,* for the appellant.—The word "bedding" in the section includes "bedstead." That is the reasonable construction to be placed on the word, and as such it is exempt from distress up to the value of five pounds. No doubt in one sense a "bedstead" and bedding have distinct meanings, but in the ordinary sense whatever is in, on, or about a bed is included in the word "bedding." Reading the word in this sense would not work hardship, because the exemption being limited to the value of five pounds, and all the articles being taken together, a valuable bedstead would not escape distraint. Dr. Johnson, in his dictionary, defines "bedding" as "the materials of a bed." Dryden and Chaucer both used it in this sense. In Skeat's Glossary of Chaucer "bedding" is described as "a couch." In the Century Dictionary "bedding" is defined as "a bed and its furniture; the materials for a bed, whether for man or beast." The magistrate, as stated in the case, thought the section must be construed strictly, as it took away part of the landlord's security; but this is not so. That was not the object of the Legislature; the object was to benefit and protect tenants of a very poor class: *Wright* v. *Pearson,* 17 W. R. 1099, L. R. 4 Q. B. 582.

*J. R. Randolph,* for the respondent.—The decision of the magistrate is right. In the Act "bedding" does not include "bedstead." The bedstead is a frame to support the "bedding." In all the dictionaries there are to be found three separate and distinct words—"bed," "bedding," and "bedstead." Had the word "bed" been used in the statute it might well be that both "bedding" and "bedstead" would have been included; but that word was not made use of in this section. The word "bedding" ought to be construed in the restricted sense.

*Foa* replied.

CHANNELL, J.—The question we have to decide here is not whether the word "bedstead" is commonly included in the word "bedding," but whether it is so included within the meaning of the 147th section of the County Courts Act, 1888. The word "bedding" occurs far more frequently in the English language in the sense as apart from "bedstead" than as including it; but the question we have to consider is in what sense the word "bedding" is used in this Act. I am not inclined to agree with the magistrate that the section ought to be construed strictly on the ground that it takes away part of the landlord's security, but rather that the point is upon whom does the onus of proof lie and which side has to bring his case within the statute. That is the real test.

In my opinion it is for the tenant to bring himself within the statute. In construing the statute, however, the words must not be taken as strictly against him, but in accordance with the object and purpose of the statute itself. The words of the section are, "excepting the wearing apparel and

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

bedding of such person or his family." I think what the Act means by these words is that whatever is used—however inappropriate it may be for the purpose—as wearing apparel or bedding, so long as it really is used as such, is exempt up to the value of £5 from the liability to distress. Whatever the tenant happens to use as sleeping accommodation is "bedding" for the purposes of this section, whether it be a mattress on the floor, or on a raised frame, or a bedstead without a mattress; so also if he used a bedstead in addition to a mattress.

In the present case a bedstead as well as a mattress formed the sleeping accommodation, and the bedstead was therefore privileged from distress. This case must be sent back to the magistrate with the intimation that in our opinion the word "bedding" includes "bedstead."

BUCKNILL, J.—I entirely agree.

*Appeal allowed; leave to appeal refused.*

Solicitors for the appellant, *Vandamm & Terry.*

Solicitors for the respondent, *Pritchard, Englefield, & Co.*

---

## IN BANKRUPTCY.

Q. B. Div. (Wright, J.) March 23.

*In re* FLACK.

*Ex parte* BERRY *v.* EAST LONDON WATER CO. (*a.*)

*Water—Waterworks Clauses Acts—Recovery of arrears of water rate—Bankruptcy—Adjudication—"Owner and occupier"—"Incoming tenant"—Waterworks Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 17), *s.* 53—*Metropolis Water Act,* 1871 (34 *&* 35 *Vict. c.* 113), *s.* 48.

*A trustee in bankruptcy who takes over the bankrupt's premises is an "incoming tenant" within the meaning of section* 48 *of the Metropolis Water Act,* 1871, *and is entitled to a supply of water without being obliged to defray the arrears of water rate left unpaid by the bankrupt.*

Motion by the trustee in the bankruptcy against the East London Water Co. to recover from them certain arrears of water rate paid by him under protest.

The bankrupt Flack had been an oil and colour merchant having four shops in the north of London. A receiving order was made against him and he was adjudicated bankrupt upon the 28th of July, 1899.

The trustee took over the shops and carried on the business in order to be able to sell it as a going concern. At the date of the receiving order there were arrears of water rate due from the bankrupt in respect of two of the shops, and the water company threatened to cut off the supply to those shops unless the trustee paid the arrears. The trustee refused, pointing out that water rates are not a preferential claim in bankruptcy, but offered to pay for all water supplied since the receiving order.

The water company thereupon cut off the supply and informed the sanitary authority, who served the trustee with notice to close the shops. The trustee then paid the arrears under protest and now sought to recover them from the water company.

*Frank Mellor,* for the trustee.—The water company had no right to insist on payment of the arrears, or to cut off the water. They were bound to continue the supply by reason of section 48 of the Metropolis Water Act, 1871: "In case any consumer leave the premises where water was supplied to him without paying to the company the rate due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears, but the company shall, notwithstanding any such arrears, supply water to the incoming tenant, on being required by him so to do." The trustee is in the position of an incoming tenant within this section because the premises have vested in him by virtue of the order of adjudication. This case is distinguishable from *In re Smith, Ex parte Mason,* 41 W. R. 159, [1893] 1 Q. B. 323, where there had been a receiving order, but no adjudication, and the official receiver was held not to be an "incoming tenant" under a similar statute.

*Reed, Q.C.,* and *Acland,* for the respondents.—We rely on section 53 of the Waterworks Clauses Act, 1847: "Every owner and occupier of any dwelling-house . . . shall, when he has . . . paid or tendered the water rate payable in respect thereof, . . . be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes." In this case the trustee ought not to be considered as "owner or occupier" of the shops, and if he were, he has not "paid or tendered" the water rate and is not entitled to receive a supply of water.

*Frank Mellor* was not called upon to reply.

WRIGHT, J.—In this case the water company have made a mistake. I am not called upon to decide whether the trustee tendered the water rate or not, but I am inclined to think that his offer to pay for water supplied after the bankruptcy did amount to a tender. The water company took a wrong point, they raised the question whether they could make the trustee pay the arrears of water rate due from the bankrupt. Here the trustee took possession of the shops and carried on the business and was in the position of a new tenant. Consequently, by reason of section 48 of the Metropolis Water Act, 1871, the water company were unable to claim the arrears from him. In those circumstances, although the water company might have refused a future supply without payment, they took up the position that they were entitled to the arrears of water rate left owing by the bankrupt, and managed to obtain payment of them. They must repay to the trustee the money they obtained, and then they will be in a position to insist on payment for water supplied and to be supplied since the date of the bankruptcy.

*Application allowed.*

Solicitors for the trustee, *Piesse & Son.*

Solicitors for the respondents, *Bircham & Co.*

---

Q. B. Div. (Channell and Bucknill, JJ.) Jan. 24, 25.

NATIONAL SPORTING CLUB (LIMITED) (*Appellants*) *v.* COPE (*Respondent*). (*a.*)

*Licensing law—Proprietary club—Company carrying on a club—Sale of liquors—Some shareholders of company not members of club—Necessity of licence for sale of liquors to members.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

*The proprietor of an ordinary proprietary club, where the refreshments and liquors sold to the members are the property of the proprietor, and where the proprietor gets the profit from such sales, cannot sell intoxicating liquors to the members of the club without having the necessary licences.*

*A limited company incorporated under the Companies Acts carried on the business of a club. Most of the shareholders of the company were members of the club, but there were a few outside shareholders who were not members. The refreshments and liquors were the property of the company, and the profits (if any) from the sale of such refreshments went to the company, and not to the club.*

*Held, that the company, being a legal entity distinct from the club, and being composed of different members, could not sell intoxicating liquors or tobacco to members of the club without the requisite licences.*

Case stated by the metropolitan police-magistrate sitting at Bow-street police-court.

Informations were taken out by the respondent, an officer of Inland Revenue, against the National Sporting Club (Limited) (the appellants) for having sold spirits, wine, beer, and tobacco without having in force the licences required by the various statutes in that behalf for such sales. There were seven summonses in respect of such sales, and the magistrate convicted the appellants on all the summonses, and imposed in respect of the charge of retailing spirits without a licence a fine of £10 and £10 10s. costs, and on each of the other summonses a fine of 1s. and 2s. costs.

The following facts were proved:

The appellants were a limited company duly registered and incorporated under the Companies Acts, and carried on the business of a club at No. 43, King-street, Covent-garden, W.C., under the style of "The National Sporting Club (Limited)," and rules, regulations, and bye-laws had been made for the government of the club.

It was admitted that the company had no excise licence for the sale of any intoxicating liquor or tobacco.

The capital of the company was £16,000, divided into 6,500 preference shares of £2 each and 1,500 ordinary shares of £2 each. The preference shares (of which rather more than one-half were issued) were originally allotted to members of the club, but were now held partly by members and partly by non-members; the holding by non-members was only of such shares as were not repurchaseable by the club by reason of their being the property of members who had resigned, or, having been held by members of the club who had died, had become the property of their representatives. The preference shareholders were entitled to receive out of the profits each year a preferential dividend of 8 per cent. per annum. The whole of the ordinary shares were taken by the two vendors of the business in part payment of the purchase-money, and dividends were only payable on such ordinary shares out of the surplus profits, if any, in the year's working after the payment of the preferential dividend of 8 per cent. No dividend was payable except out of the net profits of the company which were entirely earned on the club premises; and the business of the company was acquired from the two vendors, who became two directors of the company; and dividends were paid on the preference and ordinary shares for the years 1897 and 1898.

In August, 1895, a lease of the club premises, which up to that time had been held by the company from the vendors of the business, was granted to the company by the Duke of Bedford for a term of twenty-one years at a yearly rent of £750, the company undertaking to pay all rates and taxes, and execute all repairs.

The rules enabled members to introduce guests to the club. On ordinary nights the practice was for a member introducing a guest to write his (the member's) name and the guest's name in a book kept for that purpose. On "entertainment nights"—that is to say, on evenings when an athletic or some other display was being held in the theatre of the club—the practice was as follows: Tickets were issued to members desirous of introducing guests, such tickets being taken from a book containing the counterfoils of the same, and no person was allowed to be admitted to the club on such occasions unless he produced to the officials especially employed for the purpose a ticket, on the counterfoil of which was written the name of the guest and the name of the member introducing such guest, such member being held responsible for his guest.

There were provisions in the rules for preventing persons not being members of the club from paying for any refreshment or tobacco supplied to them in the club, and the same must be paid for by a member. Those provisions were made in good faith, and notices calling attention to these regulations were posted in the different rooms on the club premises. Strict instructions were given to the servants of the club to comply with this rule, and several persons, including an ex-inspector of the metropolitan police, were specifically employed (as on other "entertainment nights") to see that such rule was carried out.

All intoxicating liquor and tobacco served upon the club premises was supplied to the National Sporting Club (Limited), and paid for by the company's cheque, and the profit (if any) upon the sale of the same, as well as all profits derived from carrying on the club, went into the funds of the company, and were distributed in dividend among the shareholders.

On the evenings of the 24th of April and the 1st of May, 1899, which were "entertainment nights," the respondent, an officer of Inland Revenue, in company with a Mr. Thorpe, also an officer of Inland Revenue, obtained admission to the club by means of tickets which had been obtained from, and the counterfoils of which were signed by, a member.

On the 24th of April the officers Cope and Thorpe arrived about 9 p.m. At the door they handed in their tickets and passed in downstairs through a refreshment room into a theatre. A boxing competition was going on. About 10 p.m. there was an interval and they went into the refreshment room where there was a bar with tables there. Thorpe ordered supper for two, half a bottle of claret, and a glass of gin and soda from a waiter. No question was asked as to their being members. They had signed no book. What Thorpe ordered was supplied and he paid the waiter. After that Cope ordered of the waiter two cigars and was supplied, paying 2s. After that the officers went to the bar, and Cope ordered of the barmaid one gin and soda and one bottle of beer. She served the gin and as she was pouring the soda out she asked if Cope was a member and without waiting for an answer finished pouring it out. Cope made no answer, but put down 2s. The beer was supplied too. There were other persons in the room being supplied with liquors and tobacco.

On the 1st of May the same officers went to the club again. They handed in the tickets. They were not asked any questions, and signed no book. There was a boxing competition going on, and in the interval the officers went into the refreshment room. Thorpe ordered supper and gin, claret, and cigars of the waiter. They were supplied, and Thorpe paid. The officers went to the bar and Cope ordered from the same barmaid one gin and so[illegible] bottle

Bass. She said: "Are you a member?" Cope said "No." She said: "You know you are not allowed to pay"—and did not supply. While the officers were in the refreshment room other persons were being served with liquors and tobacco. Having regard to the circumstances in which these officers were served and to the evidence as to the precautions against the service of non-members, the magistrate was of opinion that for the purposes of this case the respondent and the other officer were in the position of members of the club, that they were in fact taken and assumed by the waiters and barmaid who supplied them to be members of the club, and under that assumption the officers were in fact supplied by the waiters and barmaid as members of the club. The magistrate thought that, if the waiters or barmaid had knowingly supplied non-members, they would have acted beyond the scope of their authority in so doing; and he found as a fact that they sold the liquors and tobacco to the officers thinking they were members, and he declined to deal with the case as one of a sale to non-members. Neither the waiters nor the barmaid were called before him.

It was also proved by these Excise officers, and not disputed by the appellants, that on each of the two visits a number of members of the club were served with intoxicating liquors and tobacco upon the club premises, and the magistrate found as a fact that the appellants, on the 24th of April and the 1st of May, made a practice of selling, and did sell, both intoxicating liquors of the kinds mentioned in the information and tobacco to members of the club.

On the part of the appellants it was contended that the sale by the National Sporting Club (Limited) of intoxicating liquors and tobacco to the shareholders of the company who were members of the club was a sale to members of their own property, or, at all events, of property of which the members were co-owners, or in which the members had an interest, and was not a sale within the meaning of the statutes under which the proceedings were taken; and that, therefore, no licence was necessary; and special reliance was placed by the appellants upon the cases of *Graff* v. *Evans*, 30 W. R. 380, 8 Q. B. D. 373, and *Newel* v. *Hemingway*, 58 L. J. M. C. 46, 37 W. R. Dig. 109.

On behalf of the respondent it was contended that the intoxicating liquor and tobacco sold to the members of the National Sporting Club (Limited) were the property of the limited company and not of the members of the club, and that in any case such sale was an infringement of the statutes.

The attention of the magistrate was called to the following cases: *Graff* v. *Evans*; *Newell* v. *Hemingway*; *Newman* v. *Jones*, 17 Q. B. D. 132, 34 W. R. Dig. 105; *Bond* v. *Evans*, 36 W. R. 767, 21 Q. B. D. 249; *Bowyer* v. *Percy Supper Club*, 42 W. R. 29, [1893] 2 Q. B. 154; *John Foster & Sons* v. *Commissioners of Inland Revenue*, 42 W. R. 259, [1894] 1 Q. B. 516; *Collman* v. *Mills*, [1897] 1 Q. B. 396, 45 W. R. Dig. 98; *Lynam* v. *O'Reilly*, [1898] 2 Ir. R. 48; and to the Sale of Goods Act, 1893, s. 1, sub-section 1.

The magistrate was of opinion, upon the evidence, that the appellant company was carrying on the business of a proprietary club, the goodwill and fixtures whereof the company had bought; that the company known as the National Sporting Club (Limited) was a separate legal entity distinct from the club and also distinct from its shareholders; that the refreshments, liquors, and tobacco sold were bought for and paid for by the company, and were the property of the company, and not in any way the property of the members of the club; that the refreshments, liquors, and tobacco were sold by and for the company to the individual members of the club who were supplied therewith by the waiters and barmaid; that all the profits from the sale of the refreshments, liquors, and tobacco to members of the club, and from carrying on the club, were the property of and received by the company, and were divisible amongst the shareholders of the company as such according to their respective rights; that the managers, waiters, barmaid, and other servants employed in the club were the servants of the company, and that there was no transfer of the property in any liquor or tobacco until the particular liquor or tobacco was supplied and handed to the member of the club ordering it, who was in fact thereby bound to pay for it, and that such supplying and handing over the liquor and tobacco was a sale thereof.

The magistrate convicted the company accordingly of two offences against 6 Geo. 4, c. 81, s. 26, for retailing spirits without a licence on the two days respectively; and of two offences against the same enactment for dealing in tobacco without a licence on the two days respectively; and of two offences against 23 & 24 Vict. c. 27, s. 19, for selling wine by retail without a licence, and of one offence against 4 & 5 Will. 4, c. 85, s. 17, for selling beer by retail without a licence, and he imposed the penalties as above stated.

The question for the opinion of the court was whether upon the above statement of facts the magistrate came to a correct determination and decision in point of law with regard to the said sale of intoxicating liquors and tobacco to members of the club.

*Lawson Walton, Q.C.*, and *C. Mathews*, for the appellants.

*Sir Richard Webster, A.G.*, *Danckwerts, Q.C.*, and *Rowlatt*, for the respondent, were not called upon to argue.

[CHANNELL, J., to the Attorney-General: If you are content to have this appeal dismissed on the ground that in this case there were outside shareholders, we are prepared to do that, but if you want to use the case to argue other questions we must hear you.—*Sir R. Webster, A.G.*: That would be sufficient for our purpose; but it is necessary to see what this club really is. It is the directors of the company who have the general management of the club. Rule 107 says so.—CHANNELL, J.: That is the reason why we are prepared to give judgment dismissing the appeal upon the special facts of this case without considering the more general question of what the result would be when the company is incorporated.]

CHANNELL, J.—In this case I am of opinion that the appeal must be dismissed. There have been a good many cases cited to us, and the principle of those cases has been referred to, but I think that this case must be disposed of on its special facts. The law with reference to purely members' clubs may be taken to be settled—namely, that in the case of purely members' clubs a licence is not required; that the form that is gone through in the coffee room or in other places in the club where refreshments are sold, in one sense is not a selling of liquors so as to make the licensing laws applicable, but that it is merely a form of distributing common property. It is treated as being analogous to the simple case in which people living in the same house might order a cask of beer from the brewers—order it all together on their joint account—and arrange between themselves that the proportions in which they should pay for it should be the proportions in which they used it and that an account should be kept of the quantity they each had out of it. As in that case there would clearly be one purchase of the cask of beer the beer would become—not their joint property.

because they might not all have equal interests—but property in which they all had a common interest, and the arrangement would be a mere distribution of common property. Members' clubs are treated as being similar to that. Then it has further been held that, that being the principle applicable to the members' clubs, it is not altered by the fact that the property is vested, for purposes of convenience, in trustees. In the case where it is vested in trustees the property is, of course, in those trustees, and in one sense the members' clubs have no legal property —certainly in the stock of exciseable articles—but they have an interest in them, and whether we may properly call it an equitable interest or not, I do not know and it does not signify. For this purpose it is treated just the same as if the legal property had been in them; it is so to all intents and purposes, and it is treated in that case as being a mere distribution of property in which they have a common interest, although the legal interest is vested in trustees. Counsel for the appellants may be quite right—though I express no opinion upon the matter—in saying that a corporation may be constituted a members' club which may stand in exactly the position which the trustees stand in in the case I have put. That much seems clear. He may also be right in saying that *Newell* v. *Hemingway* is a distinct authority to that effect. Possibly it is, but possibly, on the other hand, it may be explained merely by the fact that it was only the manager who had been prosecuted in that case. I say nothing about which way it is, because I do not think the facts of this case bring this case within the principle, even if he is right upon it; and as to that, we have not heard the Attorney-General's argument upon that, or indeed upon any part of the case. Going on from that, what is the case in an ordinary proprietor's club? I propose to imitate the caution of Wright, J., in one of the cases, in not laying down any general rule applying to proprietary clubs generally, because I can conceive that it is possible that a club might exist which might be called a proprietary club and in which nevertheless the proprietors might really be in the position of trustees of a members' club. It is possible by special constitution, and it might be so; but to take the ordinary case of a proprietary club, or the case of an individual or of several individuals joining together, an individual runs the club, as it is called, provides everything that is provided, but only to persons who are members of the club. He does not allow everybody to come into the place, or to use the place or have his liquors there, as an hotel proprietor would do. He is either elected by the members themselves or by a committee or in some way or other by the club. It is a very limited portion of the public who have the benefit of the institution, nevertheless the proprietor manages the whole thing; the property is his both legally and in fact. The members have no interest in the property at all, and it is impossible to bring that case within the suggestion that it is a mere distribution of, and a mere mode of enjoying, property in which they have a common interest. That seems to me to be the case in reference to an ordinary proprietor's club in which the proprietor makes a profit out of the concern. It has been said, and rightly said, in the members' club cases that it does not signify whether there is a profit or not—that is to say, that it does not signify whether the articles are sold in the club at the exact cost price, or whether they are sold for something greater than the exact cost price, so as to make a profit to the club. That does not signify in the case of the members' club, because the profit there goes to the general purposes of the club and is distributed again among the members, and so it is only a mode of distributing and enjoying common property. Where, however, there is a proprietor of the club it is a very important question—to whom does the profit go, and who bears the loss if there is a loss? The Irish case (*Lynam* v. *O'Reilly*, [1898] 2 Ir. Rep. 48) which has been cited is important, to a certain extent, in bringing that out.

The result, therefore, seems to me to be that it is quite clear in principle that in the case of what I call an ordinary proprietor's club—that is, where the proprietor gets the profit of the transaction and is carrying on the business—there is a case of sale, and sale by retail. I further think that that was in fact decided, and must be taken to have been decided, in *Bowyer* v. *Percy Supper Club*, because although it is true that observations were made by one of the learned judges which show that he did not agree with the magistrate in point of fact, yet we might assume that he decided the case upon that ground. He purports to decide it upon the very ground upon which I think it ought to have been decided, and upon which the case of a purely proprietor's club, where the proprietor gets the profit, ought to be decided. The important passage of that judgment begins where Mathew, J., says: "It is agreed on all hands that the stock of wines and spirits in this place belonged to the proprietary company. It is agreed further that the company was under no obligation to furnish the members of the club with any special wine or any particular spirits. The company supplied them as it thought proper out of its stock." In many or most proprietary clubs there would be a tariff put up that would be generally settled in concert with, and in consultation between, the proprietor and the members. That is only a portion of the terms on which the members have come into the club and paid their subscriptions; it is a matter of arrangement and does not give them any real interest in the property of the club or in the stocks of wines and spirits which are distributed when sold in the coffee-room. That appears to me to be clearly the principle of an ordinary proprietary club, and that appears to me to have been decided in *Bowyer* v. *Percy Supper Club*. From my recollection of that case I think it was so understood at the time, and it was understood as a decision that proprietary clubs pure and simple required a licence, although Wright, J., carefully said that he did not say there might not be proprietary clubs which would really come under the same principle as members' clubs.

That being so, how are we to deal with the present case? The present case is not a case in which the members of the club have been incorporated into a simple corporation consisting solely and entirely of the members of the club. If that were the case the argument might be a strong one; but we said we should not decide that point, and I do not decide it. The argument is a strong one to say that the corporation are simply put in the position of a members' club, although in law the shareholders in the company have no interest at all in the property of the club. They have only a right to share in the ultimate proceeds of it in certain circumstances; and although in law the company is a legal entity entirely distinct from its shareholders, yet nevertheless in such a case as that, it might well be held (and counsel for the appellants says it was held in *Newell* v. *Hemingway*) that it was still a mere case of distributing property in which the shareholders of the company and the members of the club—who would be identical in that case—had a common interest. But in this case the constitution of the company does not appear to me to be confined to a mere incorporation of the members of the club; as a matter of fact there are more than members. It is

said that the number is few and arising from accidental circumstances—from people having resigned or people having died—but there are some outside shareholders, and therefore we have got a legal entity (the corporation) which is not either in law or in fact "the members' club"; and it is to that outside body that the property of the club belongs. If the members of the club in buying or taking liquors on the club premises are distibuting some common property they are distributing not their own common property, but the common property of a different body—namely, the shareholders in the company. The consequence is that the case is clearly brought within the case of an ordinary proprietor. The "proprietor" in this case is incorporated, but the proprietor makes profits out of his club and pays dividends, and there are some few shareholders who are not members of the club actually taking profits arising from the sale of the liquors, or at any rate from the general carrying-on of the club in which the liquors are sold, and of which the selling of the liquors forms part. It seems to me, therefore, quite impossible to bring this case within the principle of members' clubs. It comes within the case of a proprietary club where there is a sale of liquors, and it is a sale by retail; and whether we treat this case as arising upon the words of the Excise Act or upon the words of the 3rd section of the Licensing Act, 1872, it is clearly within it. On this ground the appeal must be dismissed.

BUCKNILL, J.—I entirely concur, and I do not think I can add anything.

*Appeal dismissed.*

Solicitors for the appellants, *Lea & Lea.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

## Court of Appeal.

From Q. B. Div. (Collins and Romer, L.JJ.) — March 29.

STREET *v.* STREET. (*a.*)

*Practice — Costs — Arbitration — Reference of action — Costs of reference in discretion of arbitrator — Award for less than £50 — Scale of costs — R. S. C.*, 1883, *ord.* 65, *r.* 12.

*Where an action of contract is referred to arbitration, whether compulsorily or by consent, upon the terms that the costs of the action shall abide the event of the award, and the costs of the reference and award shall be in the discretion of the arbitrator, if the arbitrator awards the plaintiff a sum less than £50 and orders that the defendant shall pay the plaintiff's costs of the reference and award, such costs may be taxed on the High Court scale, although by virtue of ord.* 65, *r.* 12, *the plaintiff's costs of the action can only be taxed on the county court scale.*

Moore *v.* Watson, 15 *W. R.* 429, *L. R.* 2 *C. P.* 314, *overruled.*

Galatti *v.* Wakefield, 4 *Ex. D.* 249, 27 *W. R. Dig.* 59, *followed.*

Appeal from an order of Bigham, J., refusing a review of taxation of costs.

The action was brought in the district registry of Manchester to recover a sum of £90, the balance of an account for building work, and the defendant set up a counterclaim.

By an order of the district registrar, the action, as involving mere matters of account, was referred to an arbitrator agreed on by the parties, and the order provided that the costs of the action should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator.

The arbitrator made an award in favour of the plaintiff for £33, and ordered that the defendant should pay the plaintiff's costs of the reference and award.

On the case coming before the district registrar for taxation of costs, he directed that the plaintiff's costs of the action should be taxed on the county court scale, the plaintiff having recovered a sum less than £50, but that the costs of the reference and award should be taxed on the High Court scale.

Bigham, J., refused an application by the defendant for a review of taxation.

The defendant appealed.

*H. Tindal Atkinson*, for the defendant.—The district registrar had no jurisdiction to tax the costs of the reference and award on the High Court scale. By ord. 65, r. 12, "In actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding £50, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a county court, unless the court or a judge otherwise orders." The costs of the reference and award as well as the costs of the action ought to have been taxed on the county court scale. In *Moore* v. *Watson*, 15 W. R. 429, L. R. 2 C. P. 314, which was a case of a compulsory reference under the Common Law Procedure Act, 1854, it was ordered that the costs of the reference should be in the discretion of the arbitrator, as in the present case. The arbitrator awarded the plaintiff a sum less than £20, and directed the defendant to pay the costs of the reference. But the court held that the plaintiff was not entitled to these costs, by reason of section 11 of the County Courts Act (13 & 14 Vict. c. 61). This is a case of a compulsory reference, and the principle of that case applies.

*A. J. Ashton*, for the plaintiff.—This is a reference by consent. Unless the parties had consented, the district registrar could only have sent the case to an official referee. In *Galatti* v. *Wakefield*, 4 Ex. D. 249, 27 W. R. Dig. 59, it was held that the rule laid down in *Moore* v. *Watson* did not apply to a reference by consent. Moreover, the court expressed great doubt as to the correctness of *Moore* v. *Watson*, and that case ought now to be overruled. See also *Holland* v. *Vincent*, 2 W. R. 96, 9 Exch. 274, and *Forshaw* v. *De Wette*, 19 W. R. 777, L. R. 6 Ex. 200.

COLLINS, L.J.—In this case an action was referred to an arbitrator agreed upon by the parties by an order which directed that the costs of the action should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator. The plaintiff recovered by the award a sum less than £50, and he is accordingly not entitled to more costs of the action than he would have got in the county court. The costs of the reference, however, have been allowed on the High Court scale. Against this taxation the defendant appeals, and he relies on the case of *Moore* v. *Watson*. That was a case of a compulsory reference, and there it was ordered, as it was here, that the costs of the cause should abide the event, and that the costs of the reference should be in the discretion of the arbitrator. The court held that in a compulsory reference the costs of the reference were to be treated as part of the costs of

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the cause, and were therefore governed by the rule debarring a plaintiff who recovered less than £20 from recovering any costs of action. That was a decision with regard to compulsory references. The defendant contends that the present case is one of a compulsory reference, and that it is covered by *Moore* v. *Watson*. *Moore* v. *Watson*, however, has been criticized in *Galatti* v. *Wakefield*. In that case an action was referred to arbitration by consent, and it was urged that the principle laid down in *Moore* v. *Watson* as to a compulsory reference was equally applicable to a reference by consent, and that in either case the costs of the reference were part of the costs of the cause. But in answer to that Bramwell, L.J., commented on the earlier case. He said, "Reliance has been placed upon *Moore* v. *Watson*: it seems to me that that case is quite distinguishable from that before us; but I desire to add that, as at present advised, I do not agree with the decision." Brett, L.J., also refrained from approving of it. *Moore* v. *Watson* has been again referred to in *Fergusson* v. *Davison*, 30 W. R. 462, 8 Q. B. D. 470. Counsel for the plaintiff called our attention to a case under the earlier practice, *Holland* v. *Vincent*. That was a case of a reference in an action, but it does not appear whether it was by consent or not. The costs of the reference and award were to be in the discretion of the arbitrator. The arbitrator made an award in favour of the plaintiff for £17, and ordered the costs of the reference and award to be paid by the defendant. The master treated the costs both of the cause and the reference as governed by the rule in the "Directions to the Masters of the Courts of Hilary Term, 16 Vict.," making a lower scale applicable where the sum recovered did not amount to £20. It seems to me that the same point was raised there as here. Does the lower scale cover the costs of the reference as well as the costs of the action? The court held that the lower scale did not apply to the costs of the reference, but only to the costs of the action. That case is an authority that the costs of the reference are not part of the costs of the cause; and it was not cited in *Moore* v. *Watson*. In *Forshaw* v. *De Wette* an arbitrator made an award for less than £10 in tort and less than £20 in contract, and directed the defendant to pay the costs of the reference and award. It was held that, though the plaintiff was debarred from recovering any costs of the cause, the costs of the reference and award were on a different footing, and the plaintiff was entitled to those costs. These cases seem to me inconsistent with the principle lying at the bottom of *Moore* v. *Watson*.

The reference in the present case is in one sense a compulsory reference, but it is also a reference by consent, because the person named as arbitrator could not have been appointed except by consent. The reference gives him a discretion over costs. Why does not the consensual part of the reference extend to what the named person is to do in dealing with costs? In my opinion the order for reference in this case is virtually a consent order. But whether that be so or not, I think that the opinions of Bramwell, L.J., and other judges justify us in saying that, even supposing it to be a compulsory reference, the costs of the reference are not part of the costs of the cause, and that ord. 65, r. 12, does not apply to them.

ROMER, L.J.—I agree. I think that a reference such as we have to deal with in this case is a reference by consent within the meaning of consent as used in *Galatti* v. *Wakefield*. If so, this case is governed by *Galatti* v. *Wakefield*; but in my opinion the question should be decided on a broad ground, and we ought to consider what is the meaning and effect of this order of reference, if it is a compulsory order. I think the order means what it says, and that the costs of the reference are left in the discretion of the arbitrator and are not made merely part of the costs of the action. The arbitrator has a discretion expressly given him by the order, and under it he can deal with the costs of the reference apart from the costs of the action. I disagree with *Moore* v. *Watson*, and I agree with what was said by Bramwell, L.J., in *Galatti* v. *Wakefield*. The authority of *Moore* v. *Watson* received a blow in *Galatti* v. *Wakefield*, and it remains with us to give it the *coup de grace*. As to ord. 65, r. 12, I think it refers only to the costs of the action and does not include the costs of the reference.

The question remains, Has the arbitrator exercised his discretion? I think he had a discretion to say on what scale the costs of the reference should be taxed. His award is silent as to the scale of costs; but what is the proper inference to be deduced from the terms of his order and the circumstances? I think he intended to award costs on the ordinary scale—that is to say, on the High Court scale—and not on any special scale or the county court scale. For these reasons I think the appeal should be dismissed.

*Appeal dismissed.*

Solicitor for the plaintiff, *G. Featherstone Johnson*, for *John A. Bradbury*, Manchester.

Solicitors for the defendant, *Robbins, Billing, & Co.*, for *Nicholls, Harris, & Lindsell*, Manchester.

---

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) — Feb. 21.

RICHARDSON v. STORMONT, TODD, & CO. (*a*.)

*Stock Exchange—Defaulter—Assets—Official assignee—Right to sue—Stock Exchange Rules.*

*Rule* 176 *of the Rules of the Stock Exchange, which says that the official assignee shall collect the assets of a defaulting member, applies to all his assets without any limitation. The official assignee is, by virtue of the rule, in the position of an equitable assignee of the assets, and, if he has allowed the defaulting member to sell any of the assets as his agent, he can recover the price from the purchasers.*

Tomkins *v.* Saffery, 26 *W. R.* 62, 3 *App. Cas.* 213, *considered.*

Appeal from a judgment of Mathew, J., at the trial of an action without a jury.

The action was brought to recover £187 10s., being the balance of the price of 2,105 preference shares in the Western Australian Market Trust (Limited), alleged to have been sold to the defendants by the plaintiff as the official assignee of the London Stock Exchange.

The plaintiff's case was that it was his duty as official assignee to collect the assets of one Reavely, a defaulting member of the Stock Exchange, and to distribute the same according to the rules of the Stock Exchange; that among Reavely's assets was a debt of £5,339 due to him from the Western Australian Market Trust (Limited); that the plaintiff took steps to realize that debt; that the company being unable to pay, a scheme of reconstruction was carried out, under which the shares in question were allotted to Reavely; that the plaintiff allowed the shares to remain in the name of Reavely in trust for him; that the plaintiff authorized

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Reavely to sell the shares as his agent, and that Reavely, acting under that authority, sold them to the defendants.

The defence was that Reavely sold the shares to the defendants as a principal, and not as an agent, and that Reavely was at the time of the sale indebted to them in the sum of £187 10s., which they claimed to be entitled to deduct from the price of the shares. The defendants denied that the plaintiff as official assignee had any legal or equitable right to or interest in the shares.

Rule 174 of the Rules of the Stock Exchange is as follows: "Two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account and a statement of the sums owing to and by him; to attend meetings of creditors; to summon the defaulter before such meetings; to enter into a strict examination of every account; to investigate any bargains suspected to have been effected at unfair prices; and to manage the estate in conformity with the rules, regulations, and usages of the Stock Exchange."

Rule 176 is as follows: "The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible."

Mathew, J., was of opinion, on the evidence, that the defendants dealt with Reavely in the purchase of the shares, not as a principal, but as an agent for a disclosed principal—namely, the plaintiff; and he gave judgment for the plaintiff.

The defendants appealed.

*Rufus Isaacs, Q.C.*, and *McIntyre*, for the defendants.—The plaintiff purported to act under the Rules of the Stock Exchange; but those rules cannot affect the rights of the general creditors of a defaulting member: *Tomkins* v. *Saffery*, 26 W. R. 62, 3 App. Cas. 213, and *Ex parte Grant, In re Plumbly*, 28 W. R. 755, 13 Ch. D. 667. Secondly, the plaintiff never reduced these shares into his possession, and therefore he cannot sue the defendants in this action. The utmost extent of his power was to collect the shares.

*Herbert Reed, Q.C.*, and *F. M. Abrahams*, for the plaintiff, were not called upon to argue.

A. L. SMITH, L.J.—I agree with the judgment of Mathew, J. The first question is as to the construction of rule 176 of the Rules of the Stock Exchange, which says that the official assignees shall collect and pay the assets of a defaulting member to the credit of their joint account at a banker's, and shall distribute the same as soon as possible. What is the meaning of "the assets" in that rule? Does it mean only the Stock Exchange assets or all the assets? *Primâ facie*, it means all the assets which he had; and the case of *Tomkins* v. *Saffery* in the House of Lords contains a strong indication of opinion that the rule means all the assets of the defaulting member without any limitation. I am prepared to hold that the meaning of the rule is that the official assignees shall collect the whole of the defaulting member's assets and shall distribute them among his Stock Exchange creditors.

Then it is said that the official assignee cannot sue. I agree with Mathew, J., in thinking that he can. Further, there is good evidence of a direct bargain between the defendants and the official assignee that the price of 3s. per share should be paid to the official assignee without any set-off. I therefore think the appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. The case seems to me to resolve itself into one small point—viz., whether the effect of the Stock Exchange rule is such that it constitutes a *cessio bonorum* on the part of Reavely of all his assets, either by itself or coupled with what was done. If it is a *cessio bonorum*, that disposes of the first point—namely, that the rule applies only to Stock Exchange assets, and it also disposes of the second point—namely, that the official assignee only has power to collect the assets. I think that *Tomkins* v. *Saffery* amounts to a decision that the operation of the rule was in that case to constitute a *cessio bonorum*. It seems to me that the plaintiff became the true owner of these shares, and that the defendants who bought them cannot refuse to pay the full price to the true owner.

ROMER, L.J.,—I agree. The first question is whether the assets of a defaulter which the official assignee is to collect are limited to special assets or are his general assets. I think that the rule covers the whole of his assets. This point seems to me to have been in substance disposed of in *Tomkins* v. *Saffery*. The other question is as to the right of the official assignee with regard to the estate of a defaulting member. In my opinion he is in the position of an equitable assignee of the assets. Reavely held these shares as the property of the plaintiff as official assignee; and the defendants, having become the purchasers of them with knowledge of all the facts, cannot now, when they come to pay for them, set off against the price a private debt due to them from Reavely.

*Appeal dismissed.*

Solicitors for the plaintiff, *Michael Abrahams, Sons, & Co.*

Solicitors for the defendants, *Spyer & Sons.*

---

From Chan. Div. (Lindley, M.R., and Vaughan Williams and Romer, L.JJ.) — Jan. 18-20; Feb. 19.

## ALLEN v. GOLD REEFS OF WEST AFRICA (LIMITED). (a.)

*Company—Deceased member—Notices—Calls—Special resolutions — Forfeiture — Fully paid-up shares — Vendor's shares—Company's lien.*

*Notices addressed to a member at his registered place of address in the books of a company are not invalidated by the fact that the company was aware, at the time the notices were sent out, that such member was dead, so long as his executors have not been registered as the holders of the shares of such member.*

*A limited company formed with articles which confer no lien on fully paid-up shares has, under the Companies Act,* 1862, *s.* 50, *power to alter the articles so as to impose a lien and restrictions on the transfer of those shares by members indebted to the company, and such lien and restriction can be imposed in respect of debts contracted before and existing at the time of the alteration of the articles, as well as in respect of debts subsequently contracted.*

*In the absence of a special bargain, there is no distinction between fully-paid shares allotted to the vendor by the company and any other fully-paid shares; and, consequently, the altered articles apply to vendors' shares.*

*Order of* Kekewich, J. (47 *W. R.* 568, [1899] 2 *Ch.* 40), *varied.*

This was an appeal from a decision of Kekewich, J. (reported 47 W. R. 568, [1899] 2 Ch. 40).

The plaintiffs were the executors of one Emilie

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Zuccani, who died on the 4th of February, 1897. At the time of his death Zuccani was the registered holder of 27,885 fully-paid 5s. shares issued by the defendants, and 36,435 5s. shares with 1s. 8d. paid up.

The defendants' articles provided (article 29) that they should have a lien for all debts, obligations, and liabilities of any member upon all shares (not being fully paid) held by such member.

The 27,885 fully-paid shares were shares which had been allotted to Zuccani as the nominee of the vendor to the company. No suggestion was made that these shares were not his own property. He had also applied for, and had allotted to him, 60,000 ordinary 5s. shares, not paid up. Previous to Zuccani's death the company had made several calls on him in respect of these shares. He did not pay these calls, but from time to time he had paid up quantities of shares in full before the amounts had been called up. This was done to enable him to deal with these shares. The amount due for calls at his death was over £6,000.

On the 9th of February, 1897, the defendants sent out a notice of an extraordinary general meeting to be held on the 18th of February for the purpose of passing a special resolution to alter article 29 by omitting the words "not being fully paid."

The meeting was held on the 18th of February, and the special resolution passed.

On the 8th of March the confirmatory meeting was held and the resolution confirmed. Notices of these meetings were sent to Zuccani at his registered address, although the defendants were aware of his death. Zuccani was, in fact, the only holder of fully-paid shares.

On the 4th of June, 1897, the defendants posted a notice to Zuccani at his registered address requiring payment by the 21st of June of £6,072 10s. due in respect of the 36,435 shares, and a sum of £804 6s. 11d. for interest on arrears of calls and further interest from the date of the notice. The notice also stated that in the event of non-payment by the time appointed the shares would be liable to be forfeited. This notice was also sent to the plaintiffs, who had not then lodged the probate for registration. The amount demanded was not paid, and on the 23rd of June the defendants purported to forfeit the shares.

The plaintiffs claimed a declaration that the defendants had no lien upon the fully-paid shares, and an injunction to restrain the forfeiture of the partly-paid shares.

Clause 5 of the memorandum of association of the defendant company provided that the original shares or any of them, or any other shares which might be afterwards created, might be issued fully paid up, and with such preference, privileges, or priority over, or postponement to the remaining or any other shares of the company in respect of dividends or otherwise as might be determined.

The defendants' articles provided (article 2) that the word "member" should mean a registered holder of any share or stock of the company; (article 22) that if any member failed to pay any call, instalment, or interest, the directors might serve a notice on such member requiring him to pay the same, together with further interest from the date of the notice; (article 23) that the notice should state that in the event of non-payment the shares would be liable to be forfeited; (article 24) that if the requisition of the notice were not complied with, any share in respect of which such notice was given might be forfeited by a resolution of the directors to that effect; (article 29) that the company should have a lien for all debts, obligations, and liabilities of any member to the company upon all shares (not being fully paid) held by such member; (article 41) that the executors or administrators of a deceased member (not being one of several joint holders) should be the only person recognized by the company as having any title to the shares registered in the name of such member; (article 42) that any person becoming entitled to a share in consequence of the death of any member might elect either to be registered as a holder, or to have some person nominated by him registered as a transferee; (article 45) that a person so becoming entitled should, subject to any lien of the company, be entitled to receive dividends, bonuses, or other moneys payable in respect of the share, but should not be entitled to receive notices of, or to attend, or vote at a meeting of the company, or, save as aforesaid, to any of the rights or privileges of the member unless and until he should have become a member in respect of the shares; (article 74) that notice of general meetings should be given to such members as were under the provisions therein contained entitled to receive notices, but the accidental omission to give such notice to, or the non-receipt of such notice by, any member should not invalidate any resolution passed at any such meeting; and (article 170) that a notice might be served upon any member either personally or by sending it prepaid by post addressed to such member at his registered address as appearing in the register of the members of the company.

There was no special provision for service of notices in the case of a deceased member.

Kekewich, J., held that the notice threatening forfeiture was invalid as claiming interest from too early a date, and also on the ground that the company could not give notice to a dead man after notice of his death. He also held that the notices of the meetings of the 18th of February and the 8th of March, 1897, were invalid on this latter ground, and he made a declaration and granted an injunction accordingly. He also doubted whether a company had power to alter its articles so as to affect retrospectively the existing rights of the owner of a particular group of paid-up shares without his consent.

The company appealed.

On the appeal the question of the interest was first taken, and on this point the court upheld the decision of Kekewich, J.

The question of the lien was then argued.

*Warrington, Q.C.*, and *Dunham*, for the appellants.

*Renshaw, Q.C.*, and *Kerly*, for the respondents.

*Warrington, Q.C.*, replied.

The following cases were referred to in the course of the argument: *Pépé* v. *City and Suburban Building Society*, 41 W. R. 548, [1893] 2 Ch. 311; *Andrews* v. *Gas Meter Co.*, 45 W. R. 321, [1897] 1 Ch. 361; *Menier* v. *Hooper's Telegraph Works*, 22 W. R. 396, L. R. 9 Ch. App. 350; *James* v. *Buena Ventura Nitrate Grounds Syndicate*, 44 W. R. 372, [1896] 1 Ch. 456; *Swabey* v. *Port Darwin Gold Mining Co.*, 1 Megone 385; *Strohmenger* v. *Finsbury Permanent Investment Society*, [1897] 2 Ch. 469, 46 W. R. Dig. 19; *Sixth West Kent Mutual Building Society* v. *Hills*, 47 W. R. 647, [1899] 2 Ch. 60; *Const* v. *Harris*, Turn. & R. 496; *Kaye* v. *Croydon Tramways*, 46 W. R. 405, [1898] 1 Ch. 358; *Bradford Banking Co.* v. *Briggs*, 35 W. R. 521, 12 App. Cas. 29; *Bank of Africa* v. *Salisbury Gold Mining Co.*, [1892] A. C. 281, 40 W. R. Dig. 43.

*Cur. adv. vult.*

Feb. 19.—LINDLEY, M.R. — This is an appeal from a decision of Kekewich, J., granting an injunction restraining the defendants from enforcing a lien on some fully paid-up shares in the company which belonged to a deceased shareholder named

Zuccani. The appeal is not only important to the parties to it, but it raises several questions of great general interest relating to the powers of limited companies to alter their articles, and especially to their power to alter their articles so as to affect shares standing in the names of deceased shareholders, and as to the effect of an alteration duly made on vendors' fully paid-up shares issued before the alteration is made. [His lordship then referred to the facts, and continued:] No one can blame the directors for endeavouring to obtain payment of the money due from Zuccani's estate to the company by any legal means. Steps were taken to have his estate administered in the Chancery Division, and the company could, of course, have carried in a proof for its debt. But more summary means were had recourse to. The articles of association as they stood when Zuccani died contained a power to forfeit shares in respect of which any money was due to the company. The company attempted to exercise this power, but the court has held that, owing to mistakes made by the company, the forfeiture declared was invalid. The power of forfeiture extended only to shares not fully paid up. The articles gave the company no power to refuse to register a transfer of fully paid-up shares. The directors did, however, refuse to register a transfer of some paid-up shares on the 29th of January, 1897. But they were wrong in so doing, and that transfer was ultimately passed. Again, the company had no lien whatever on fully paid-up shares. A lien on such shares, or the possibility of a lien on them, renders them unquotable on the Stock Exchange, and it is usual in articles of association conferring a lien on shares expressly to exclude fully paid-up shares from any lien. Article 29 did this. The articles of the company gave it a lien on unpaid-up shares, not only for money due from their holder to the company in respect of such shares, but for all debts, liabilities, and engagements of their holder to the company; and on proper notice and default of payment power was given to the company to sell the shares subject to such lien. Moreover, the directors were empowered to refuse to register the transfer of any shares on which the company had a lien. The lien conferred by the articles clearly extended to all Zuccani's unpaid shares, and did not cease on his death. It continued to be available as against his executors (although not themselves members) as it was against him in his lifetime. But, independently of any article, a lien on property does not cease on the death of the owner of the property. So far, therefore, as Zuccani's unpaid shares are concerned, the company was entitled to the lien and power of sale conferred by articles 29 and 30. I do not understand that this was disputed. The directors, however, desired to extend the lien and power of sale and power to refuse to register transfers to Zuccani's fully paid-up shares. I say to his shares, for he was the only person entitled to fully-paid up shares from whom any calls were due. Accordingly, steps were taken to pass a special resolution to alter article 29 by striking out the words "not being fully paid." A resolution to that effect was passed on the 18th of February, 1897, and confirmed on the 8th of March, 1897. Notice of these meetings was sent addressed to Zuccani at his registered place of address, and the notice came to the knowledge of his executors. The directors knew that he was dead; but I cannot agree with the learned judge that the resolution was invalid by reason of any defect in the notice. Notices of meetings have only to be given to members, and the executors were not members. If no notice at all had been sent to the executors or to Zuccani's registered address, the omission would not, in my opinion, have affected the propriety of holding the meetings or the validity of the resolutions passed at them. Article 45 expressly provided that notices of meetings need not be sent to executors who had not become members. To hold that meetings of companies could not be properly held unless the notices convening them were given to the legal personal representatives of all deceased members would be to paralyze the transaction of business, and would be contrary to the ordinary principles applicable to corporate bodies, and indeed to other associations as well. The regularity of the proceedings to alter the articles by no means, however, disposes of the matters in controversy between the parties.

The facts above stated raise the following important questions: First, whether a limited company registered with articles conferring no lien on its fully paid-up shares can by special resolution alter those articles by imposing a lien on those shares; secondly, whether, if it can, the lien so imposed can be made to apply to debts owing by fully paid-up shareholders to the company at the time of the alteration of the articles; thirdly, whether, if it can, fully paid-up shares allotted to vendors of property to the company are in any different position from other fully paid-up shares issued by the company; fourthly, whether, assuming the altered articles to be valid and to be binding on the general body of the holders of fully paid-up shares in the company, there are any special circumstances in this particular case to exclude the fully paid-up shares held by Zuccani from the operation of the altered articles. The articles of a company prescribe the regulations binding on its members (Companies Act, 1862, s. 14). They have the effect of a contract (section 16), but the exact nature of this contract is even now very difficult to define. Be its nature what it may, the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions; and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute: *Walker* v. *London Tramways*, 28 W. R. 163, 12 Ch. D. 705. The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of section 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities, enabling them to bind minorities. It must be exercised not only in the manner required by law, but also *bonâ fide* for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed. But if they are complied with, I can discover no ground for judicially putting any other restrictions on the power conferred by this section than those contained in it. How shares shall be transferred, and whether the company shall have any lien on them, are clearly matters of regulation, properly prescribed by a company's articles of association. This is shown by Table A in the schedule to the Companies Act, 1862 (clauses 8, 9, 10). Speaking, therefore, generally, and without reference to any particular case, the section clearly authorizes a limited company, formed with articles which confer no lien on fully-paid up shares, and which allow them to be transferred without any fetter, to alter those articles by special resolution, and to impose a lien and restrictions on the registry of transfers of those shares by members indebted to the company.

But then comes the question whether this can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles are altered. Again, speaking generally, I am of opinion that the articles can be so altered, and that, if they are altered *bonâ fide* for the benefit of the company, they will be valid and binding as altered on the existing holders of paid-up shares, whether those holders are indebted or not indebted to the company when the alteration is made. But, as will be seen presently, it does not by any means follow that the altered article may not be inapplicable to some particular fully paid-up shareholder. He may have special rights against the company which do not invalidate the resolution to alter the articles, but which may exempt him from the operation of the articles as altered. The conclusion thus arrived at is based on the language of section 50, which, as I have said, the court is not, in my opinion, at liberty to restrict. This conclusion moreover, is in conformity with such authorities as there are on the subject. *Andrews* v. *Gas Meter Co.* is an authority that under section 50 of the Companies Act, 1862, a company's articles can be altered so as to authorize the issue of preference shares taking priority over existing shares, although no power to issue preference shares was conferred by the memorandum of association or by the existing articles. The answer to the argument that the company could not alter existing rights is that, within the limits set by the statute and memorandum of association, the rights of shareholders in limited companies, so far as they depend only on the regulations of the company, are subject to alteration by section 50 of the Act. The decision of Chitty, L.J., in *Pépé* v. *City and Suburban Building Society* is in principle also clearly in point. A member of a building society, who had given notice of withdrawal, and who by the rules as they then stood became entitled to a certain sum of money, was held to be deprived of his right to that sum by an alteration made in the rules before he had ceased to be a member. This case went very far, but it has been treated as correct in *Botten* v. *City, &c., Building Society*, [1895] 2 Ch. 441, 43 W. R. Dig. 25. It was urged that a company's articles could not be altered retrospectively, and reliance was placed on Rigby, L.J.'s, observations in *James* v. *Buena Ventura Nitrate Grounds Syndicate*. The word "retrospective" is, however, somewhat ambiguous, and the concurrence of Rigby, L.J., in *Andrews* v. *Gas Meter Co.*, shows that his observations in *James* v. *Buena Ventura Nitrate Grounds Syndicate* are no authority for saying that existing rights, founded and dependent on alterable articles, cannot be affected by their alteration. Such rights are in truth limited as to their duration by the duration of the articles which confer them. But although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered. It is easy to imagine cases in which even a member of a company may acquire by contract or otherwise special rights against the company, which exclude him from the operation of a subsequently altered article. Such a case arose in *Swabey* v. *Port Darwin Gold Mining Co.*, where it was held that directors, who had earned fees payable under a company's articles, could not be deprived of them by a subsequent alteration of the articles, which reduced the fees payable to directors. I take it to be clear that an application for an allotment of shares on the terms of the company's articles does not exclude the power to alter them, nor the application of them when altered to the shares so applied for and allotted. To exclude that power or the application of an altered article to particular shares, some clear and distinct agreement for such exclusion must be shown, or some circumstances must be proved conferring a legal or equitable right on the shareholders to be treated by the company differently from the other shareholders.

This brings me to the last question which has to be considered, whether there is in this case any contract or other circumstance which excludes the application of the altered article to Zuccani's fully paid-up vendors' shares. First, let us consider the shares. I am unable to discover any difference in principle between one fully paid-up share and another. Whether a share is paid for in cash or is given in payment for property acquired by the company appears to me quite immaterial for the present purpose. In either case the shareholder pays for his share, and in either case he takes it subject to the articles of association and power of altering them, unless this inference is excluded by special circumstances. Next let us consider whether a vendor who makes no special bargain, except that he is to be paid in fully paid-up shares, is in any different position from other allottees of fully paid-up shares. I fail to see that he is, unless he stipulates that his shares shall be specially favoured. Zuccani bargained for fully paid-up shares and he got them. The imposition of a lien on them did not render them less fully paid-up than they were before. They remained what they were. Zuccani did not bargain that the regulations relating to paid-up shares should never be altered, or that, if altered, his shares should be treated differently from other fully paid-up shares. I cannot see that the company broke its bargain with him in any way by altering its regulations or by enforcing the altered regulations as it did. I have already drawn attention to clause 5 of the memorandum of association. Having regard to its plain language, no allottee of shares, whether a vendor or an ordinary applicant, can complain of injustice or even hardship if his rights under the original articles are modified to his disadvantage. Every allottee was told by the memorandum that his rights as a shareholder were subject to alteration, and no allottee acquired any rights except on these terms, unless, of course, some special bargain was made with him. If Zuccani had not been indebted to the company, could he have successfully maintained that the company had no power to alter the articles and so make his shares liable to a lien, and consequently less marketable than before? I take it that it is clear that he could not. But I arrive at this conclusion only because the bargain with him has not been broken. Zuccani's indebtedness to the company confers on him or his executors no rights against it. But it is his indebtedness which creates the embarrassment from which they seek to escape. The fact that Zuccani's executors were practically the only persons affected at the time by the alterations made in the articles excites suspicion as to the *bona fides* of the company. But, although the executors were the only persons who were actually affec[illegible]me, that was because Zuccani was the c[illegible]id-up shares who at the time was in [illegible] The altered articles applied to all ho[illegible]d shares and made

no distinction between them. The directors cannot be charged with bad faith. After carefully considering the whole case, and endeavouring in vain to discover grounds for holding that there was some special bargain differentiating Zuccani's shares from others, I have come to the conclusion that the appeal from the decision of the learned judge, so far as it relates to the lien created by the altered articles must be allowed. His decision as to the forfeiture having, however, been affirmed, each of the parties should be left to pay their own costs.

VAUGHAN WILLIAMS, L.J.—I have had an opportunity of reading the judgments of my brethren. I do not know that I differ from them as to the law of this case. We are all agreed that there was power in the shareholders to pass the resolution which they did pass. There is no question of the abstract validity of the resolution. It falls within the power of alteration conferred by section 50 of the Companies Act, 1862. We are further all agreed that a company cannot contract itself out of the statutory power of alteration conferred by section 50, and the alteration of the articles in the present case involves no contravention of the memorandum of association. But I think we are all agreed that cases might occur in which a member might have acquired, by contract or otherwise, special rights against the company which would exclude him from the operation of the altered article. It is in this sense that I understand the observation of Rigby, L.J., in *James* v. *Buena Ventura Nitrate Grounds Syndicate*. A resolution may alter the regulations of a company, but cannot retrospectively effect existing rights. I also take it to be clear that the alteration must be made in good faith. The result is that we have to consider in the present case whether the alteration, if enforced against Zuccani's executors, would defeat existing rights or operate oppressively. On this point I confess that I have much more doubt than my brethren seem to have. It is, of course, true that Zuccani, when he took these shares as the price of the property which he was selling, knew, or must be taken to have known, of the statutory powers of alteration; but it does not seem to me that it follows that the company could make alterations which would alter the value, according to the articles in force, of the consideration which they were giving for the property purchased. For instance, I doubt very much whether in a case in which the articles provided (as they might well do) for the issue of ordinary and preference shares, and the memorandum of association contained a clause in the terms of clause 5 of the present memorandum, a company who had bought a property by the issue of fully-paid preference shares could afterwards, by altering the articles, issue preference shares and thus reduce the value of the consideration which they had agreed to give. It is impossible to suppose that the parties to such a contract of sale and purchase could have contemplated the value of the consideration shifting from time to time at the will of the purchasers: *Griffith* v. *Paget*, 25 W. R. 523, 5 Ch. D. 894, which, of course, was decided prior to *Andrews* v. *Gas Meter Co.*, is an authority that, in the absence of express power in the memorandum, such a thing could not be done. This, of course, is not the present case. The present case is that the company, by the articles then in force, reserved to themselves a lien upon all shares not being fully paid, and then purchased a property by the issue of fully-paid shares; and the question is whether they could on the very day after the contract, it might be, materially affect the consideration given by passing a resolution that the fully-paid shares thus given as a price should be subject to a lien for all debts, obligations, and liabilities of the vendor to the company, whether such debts, liabilities, and obligations should actually have accrued or not, and thus render the shares unmarketable. I think not. I think that, notwithstanding the statutory powers of alteration, the basis of the contract of purchase was that the property should be paid for in marketable shares. I think that the very object of the exception in article 29 of fully-paid shares from lien was to render those shares marketable; and as they chose to pay for the property in shares thus made marketable, I think that to allow the company to subject the vendor's shares to a lien would be to make the alteration of the articles retrospectively affect existing rights. I think, moreover, that the resolution was not passed in good faith, being really passed merely to defeat the existing rights of an individual shareholder. My observations have no bearing on shares fully paid up in pursuance of calls in the ordinary way; but it is worthy of observation that Zuccani did, in respect of shares other than vendor's shares, prepay such shares, with the assent of the company, for the purpose of freeing those shares from lien. I doubt if the company could have subjected these shares to lien after receiving prepayment.

ROMER, L.J.—For the reasons given by the Master of the Rolls in his judgment, I agree with him that there was no defect in the resolutions altering the articles of the company as to lien on the ground of absence of notice to Mr. Zuccani or his representatives, and I have nothing to add to what the Master of the Rolls has said on this head. I also agree with him in the conclusions he has come to on the other points taken by the respondents on this appeal; but having regard to the importance of some of the arguments addressed to us, I think it right to give my reasons for arriving at these conclusions.

A company such as this may undoubtedly by its articles of association provide for a lien on the shares of its shareholders in respect of any debts for the time being due from them to the company, and, if the original articles do not provide for the lien, the company may subsequently, by duly altering its articles, give itself such a lien; and the fact that the original articles did not provide for a lien would be in itself no ground for justifying a shareholder who was indebted when the articles were altered in saying that he contracted the debt or that he took his shares in reliance on there being no lien, and that the new articles must not operate so as to make the lien thereby given extend to his existing debt. A shareholder must be taken to have known that the articles might be so altered as to give the lien. And certainly a shareholder could not say as against the company that he was entitled to special rights because he did not pay his debts. And the same considerations apply to the case where the original articles give only a limited lien, as, for example, a lien limited to debts due for unpaid calls. The company might by subsequent articles extend their lien, and a shareholder would have no right to object to the extended lien because he happened to be indebted to the company. Of course, by the above observations I have not been dealing with exceptional cases. I can imagine a case, for example, where by the memorandum of association certain provisions as to lien are made part of the constitution of the company which could not be effected by any alteration of the articles. And special contracts might be made with particular classes of shareholders or individuals, or special obligations to them might be incurred by the company, and that even by virtue of the original articles alone, which would prevent the articles being

altered as against them or prevent the alterations being enforceable against them. But putting aside such exceptional cases, the observations I have made as to the general law are, in my opinion, sound. I will now consider the circumstances of the case before us; and the first question is as to the meaning and effect of article 29 of the company. In my opinion, that article merely provides for limited lien—that is to say, it limits the lien so as to include fully paid-up shares. There is nothing in the memorandum of association of the company to prevent that lien being subsequently extended to fully paid-up shares by an alteration in the articles. There is nothing in the company's original articles of association to prevent such extension of the lien, nor was any shareholder justified in assuming from article 29 that fully paid-up shares would never be made subject to the lien by an alteration in the articles. That article only in substance stated that the lien thereby given did not extend to fully paid-up shares. No one was justified in assuming from it that the company thereby held out in favour of any person acquiring fully paid-up shares that those shares should never be made subject to a lien by an alteration of the articles. If article 29 had gone on to state expressly that the lien thereby provided might be extended later on by an alteration of the articles no one could venture to doubt what was the true meaning and effect of the article. But such a statement is implicit though not expressed. It was not, in my opinion, necessary for the article to say at the end: "Caution.—Remember the power of the company by altering its articles to extend its lien," or any words to that effect. But then it is said that, though holders of shares paid-up in the ordinary way by calls could not complain of an alteration of the articles, yet the holders of other paid-up shares stand in a different position, though they were not the subject of any special contract as to lien. I cannot think this contention sound. Put aside, for the moment—as we are doing—any case of a special bargain with the company, in my opinion no shareholder was justified in assuming from article 29 that if he obtained by allotment fully paid-up shares or ordinary shares subsequently paid up in full in advance of calls, those shares should be specially distinguished from shares subsequently paid up in full by ordinary calls, or give him special rights, so as to prevent the company from altering the articles and extending the lien to fully paid-up shares, or so that he would be able to say that such an alteration of the articles if made could not be enforced as against his shares. I find nothing in article 29 to deprive the company of its right by altering its articles to extend its lien to fully paid-up shares generally or to limit that right to shares paid up by ordinary calls. Still less, in my opinion, was any shareholder entitled to assume from the company's memorandum and original articles that the lien, if extended at all, should only be extended so as to give a lien for liabilities incurred after the alteration in the articles. I fail to see why a shareholder because he became indebted to the company should acquire special rights against the company in respect of that debt as to the alteration of the articles, or why the company should not when it obtained its extended lien use it in respect of any existing debt as well as in respect of debts subsequently incurred. In truth, every shareholder was bound to bear in mind—when paying up in full his shares, or acquiring fully paid-up shares, or incurring a debt to the company—that the company had a legal right by altering its articles to extend its lien, and might exercise that legal right at any time. This being so, Zuccani's shares became bound by the company's alteration of its articles, unless he can show some special bargain with the company or some special obligation incurred towards him by the company in respect of his fully paid-up shares. He fails to establish any such special bargain or obligation. There was certainly no such special bargain or obligation alleged or proved with regard to the shares allotted to him as fully paid up, and, as already pointed out, no such bargain or obligation can be implied merely from the wording of article 29. Nor was there any special bargain or obligation with regard to the shares paid up in full by him after allotment. The fact is, with regard to the latter, that being indebted at the time in very large sums to the company, and paying certain sums on account, he was permitted as a favour to him to attribute the payment to a few shares so as to make them paid up. No doubt this was done so as to give him the opportunity, so long as the lien was limited by the original articles, of disposing of the fully paid-up shares, but if he did not avail himself of the opportunity before the alteration of the articles, then he could not do so afterwards. I understand that as a matter of fact he did fully avail himself of the opportunity; but, even if he did not do so as regards some shares, that would not, in my opinion, prevent those shares from becoming subject to the extended lien. Zuccani, in respect of all his fully paid-up shares, whether allotted as paid up or not, in fact has obtained and enjoyed all the advantages with regard to lien which the company ever impliedly or expressly promised him—that is to say, the right to deal with the shares without their being subject to any lien so long as the articles remained unaltered, and did not extend the lien to fully paid-up shares. Something was said on behalf of the respondents as to want of good faith on the part of the company in altering its articles. I fail to see any want of good faith. In my opinion, it is eminently fair for a company to provide by its articles as originally framed or as altered by resolutions that shareholders who are indebted to the company should not be permitted to dispose of their shares without paying their debts, and that the company should have a lien on the shares for the debts. In the ordinary case of a partnership no partner would be permitted to withdraw or sell his share in the partnership venture without his debts to the partnership being first paid thereout; and, if the company in the present case had, as I think it had, the legal right to alter its articles so as to give it the lien it now claims, I cannot see why, in exercising that legal right, it should be accused of want of good faith. That the reason of the alteration was the large debt due from Zuccani, and that the company had principally in mind this large debt when it made the alteration in the articles, is no ground for impeaching the action of the company. It appears to me that the shareholders were acting in the truest and best interests of the company in exercising the legal right to alter the articles so that the company might as one result obtain payment of the debt due from Zuccani. The shareholders were only bound to look to the interests of the company. They were not bound to consult or to consider Zuccani's separate or private interests. Further, I may say that the alteration of the articles giving the extended lien was, in my opinion, in no true sense retrospective. The lien given was not made to take effect before the date of the alteration. It operated only from and after that date. Again, the alteration of the articles cannot be impeached as being one not binding on all shareholders alike. It purports to bind, and d[illegible] the shareholders without exception. An [illegible] lien cannot be objected to as made in f[illegible] inst a special class of shareholders m[illegible] me shareholders only are or may bec[illegible] he company. Lastly,

I may say that the contention that there was anything improper in the way alteration of the articles was effected falls to the ground on examination. It is untrue that the company intentionally waited for the death of Zuccani before attempting to alter the articles, with the object of thereby preventing votes in respect of his shares being used in considering whether the alteration should or should not be made. Besides, as a matter of fact, under the articles, Zuccani, if living, could not have voted, seeing that he was indebted to the company. I have now dealt substantially with the points raised on behalf of the respondents, and in the result I can find no good or sufficient ground on which to hold that the lien given by the amended articles was not good against Zuccani's executors, and accordingly I think that the appeal on this point should be allowed.

*Order varied.*

Solicitors, *Mayo & Co.; Kerly, Son, & Verden.*

## High Court of Justice.

Chan. Div. North, J. — Dec. 1.

LONDON AND GLOBE FINANCE CORPORATION v. KAUFMAN. (a.)

*Practice*—Subpœna—*Issue of—Oppression—Ord.* 27, *rr.* 26-34—*Abuse of the practice of the court.*

*Although a* subpœna ad testificandum *may be issued at any time, the court will set aside the service of a* subpœna *which is issued at a time when it cannot be effective by any possibility, and can only be oppressive to the witness.*

Motion.

On the 15th of November the plaintiff had served on several witnesses in the action a writ of *subpœna ad testificandum* requiring the attendance of the witnesses from the 14th of November, 1899, and daily during the sittings.

The pleadings in the action were not closed, and just prior to the issue of the above writ the plaintiff had applied for an extension of time of a month for delivering reply to the defence. On the writ was indorsed a notice that "notice will be given you by letter or telegram when your attendance is required." At the time of serving the writ on the witnesses the plaintiff sent a typewritten letter stating the writ was issued as a matter of form, and that the action was in the list of actions to be taken next, and that the witnesses would receive notice when they need attend.

As a matter of fact the action had not yet been set down for trial. The plaintiff's solicitors' affidavit stated that the object of issuing the writ thus early was to get into communication with the witnesses and to prevent their leaving the country without the solicitors having an opportunity of taking their evidence on commission.

This was an application by the witnesses to set aside the writ of *subpœna* as being oppressive and an abuse of the process of the court.

*H. Terrell, Q.C.*, and *Younger*, for the motion.—A party aggrieved by the issue of the writ of *subpœna* need not wait until the trial, but can apply at once: *Steele* v. *Savory*, (1891) W. N. 195. The issue of the writ now is oppressive and interferes with the applicants, who will be harassed in their business by being unable to go abroad without the plaintiff's leave. The court has a discretion and will not allow such a writ to be issued oppressively, although we admit that the writ may be issued at any stage of the action: *Raymond* v. *Tapson*, 31 W. R. 394, 22 Ch. D. 430; *Reg.* v. *Vickery*, 12 Q. B. D. 478.

*Martelli*, for the plaintiff.—There is no oppression in this case; the witnesses are expressly told that they need not attend until they have notice. *Raymond* v. *Tapson* is in my favour, as it shows that a man is entitled to make sure of the evidence of anybody whose evidence he thinks will be in his favour. There is nothing in the rules limiting the time when a *subpœna* may issue: see ord. 37, rr. 26-34. A *subpœna* may be issued before issue joined: Chitty's Forms, p. 328 (12th ed.).

*Vernon Smith, Q.C.*, and *P. F. Wheeler*, for other witnesses who had similar motions.

NORTH, J., made the order asked for, and pointed out that under the Practice Masters' rule 14, *subpœnas* only remain in force for the sitting or assize for which they were issued, so that this *subpœna* would expire with the current sitting, during which the case could not by any possibility come on. The consequence would be that the witnesses would be harassed in their business, and prevented from going away without the plaintiff's leave and be entirely at the latter's mercy. The learned judge refused to lay down any general rule as to when *subpœnas* should be served, but said that in this case it had been served at a time when it was wholly unnecessary and when the parties knew that the *subpœna* would not be operative for those sittings.

Solicitors, *Tatham & Lousada; Slaughter & May; Duffield & Bruty.*

---

Chan. Div. Stirling, J. — Feb. 20-22; March 29.

SMITH v. BAXTER. (a.)

*Easement—Light—Ancient lights—Obstruction—Alteration of dominant tenement—Abandonment—Evidence—Undertaking—Prescription Act*, 1832 (2 & 3 *Will.* 4, c. 71), *ss.* 1, 3, 4.

*Where a substantial quantity of useful light, which would have passed through portions of old windows of a building if they still existed, now penetrated through the corresponding portions of new windows, the temporary use of interior boarding and shelving, by which a material interference with the light had been caused, is a mere discontinuance of user, and not an adverse obstruction or "interruption" within the meaning of sections* 3 *and* 4 *of the Prescription Act.*

*It is not necessary, in order to the acquisition of a right to the access of light under the said section* 3, *that the building should be occupied or fit for occupation during the specified period* (Courtauld v. Legh, 17 *W. R.* 466, *L. R.* 4 *Ex.* 126, *and* Collis v. Laugher, 43 *W. R.* 202, [1894] 3 *Ch.* 659). *Continuous user is not necessary:* Cooper v. Straker, 37 *W. R.* 137, 40 *Ch. D.* 21. *Fixedness and mobility of obstacles are elements to be considered, but the decision must turn on all the circumstances of each case.*

*Evidence of the intention of those who rebuild to preserve ancient lights is admissible* (Newson v. Pender, 33 *W. R.* 243, 27 *Ch. D.* 43), *but may be unnecessary* (Scott v. Pape, 34 *W. R.* 465, 31 *Ch. D.* 554).

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law.

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

Per Stirling, J.—(1) *Non-user which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of the right under the Prescription Act;* (2) *the user or non-user cannot be entirely determined by simply considering whether an obstacle interposed to the light is fixed or movable.*

This was an action in which the plaintiffs sought to restrain the defendant from obstructing the access of light to certain sky and window-lights in premises leased to the plaintiffs, and involved two questions—viz., (1) whether the plaintiffs were entitled to any ancient lights; (2) if so, whether they were entitled to any and what relief in respect thereof.

The plaintiffs were underlessees of a large building, Nos. 28 to 32, Hatton-street, Whitefriars, for a term of twenty-one years, from the 29th of September, 1892, under a lease dated the 5th of September, 1892; on the site of this building there formerly stood five small houses, Nos. 28 to 32, Hutton-street, which were pulled down in 1891; and the plaintiffs claimed the access of light in respect of certain parts of the skylight lighting the ground-floor and of three windows on the first floor, all at the back of the existing building. These portions of the skylight and windows corresponded to skylights and windows in the old houses, Nos. 28, 29, and 30. The existing skylight was situate in a plane parallel to that of the old skylights, but was 1ft. 6in. higher than they were. The first floor back wall of the plaintiffs' premises was set back from the common boundary of the plaintiffs' and defendant's premises to a distance of 4ft. 6in, while the back wall of the old premises was set back from the same boundary 4ft. only.

*Upjohn, Q.C.*, and *Hamilton, Q.C.*, for the plaintiffs.—A substantial quantity of useful light which would have passed through the old skylights and windows if they still existed is shown by the evidence to pass through the corresponding portions of the new skylight and windows respectively, and the plaintiffs are entitled to relief in respect of the same: *Aynsley* v. *Glover*, 23 W. R. 457, L. R. 10 Ch. App. 283; *Carr* v. *Foster*, 3 Q. B. 581; *Cross* v. *Lewis*, 2 B. & C. 686; *Moore* v. *Hall*, 26 W. R. 401, 3 Q. B. D. 178; *Martin* v. *Price*, 42 W. R. 262, [1894] 1 Ch. 276; *Shelfer* v. *City of London Electric Lighting Co.*, 43 W. R. 238, [1895] 1 Ch. 287. The interference with the access of light by the boarding and shelving (described in the judgment, *infra*) is not "interruption" within the meaning of sections 3 and 4 of the Prescription Act, 1832, and does not amount to abandonment: *Tapling* v. *Jones*, 13 W. R. 617, 11 H. L. Cas. 290; *Scott* v. *Pape*, 34 W. R. 465, 31 Ch. D. 554, at p. 561; *Greenwood* v. *Hornsey*, 35 W. R. 163, 33 Ch. D. 471.

*Jenkins, Q.C.*, and *Sargant*, for the defendant.—The interference with the first floor lights was trivial: *Presland* v. *Bingham*, 37 W. R. 385, 41 Ch. D. 268. The plaintiffs must show uninterrupted enjoyment for twenty years next before action: *Hollins* v. *Verney*, 33 W. R. 5, 13 Q. B. D. 304; *Cooper* v. *Straker*, 37 W. R. 137, 40 Ch. D. 21; *Wheaton* v. *Maple & Co.*, 41 W. R. 677, [1893] 3 Ch. 48; *Carr* v. *Foster*, 3 Q. B. 581, also relied on.

*Cur. adv. vult.*

STIRLING, J., after detailing the facts of the case, proceeded as follows: Dealing first with the old skylights, I am quite satisfied by the evidence adduced on behalf of the plaintiffs that useful light reached the ground-floor of the old houses through them, and also that a substantial quantity of useful light which would have passed through these old skylights now reaches the ground-floor of the existing building through the existing skylight, the area of which, however, is larger than that of the combined areas of the three old skylights.

As regards the old windows on the first floor no one of them has been preserved in its entirety in any existing window of the plaintiffs' premises; but (subject to a question to be presently mentioned) substantial portions of all three coincide with portions of windows numbered 1, 4, and 7 on a plan put in evidence by the defendants. Here, again, I am satisfied upon the evidence that (subject to the question mentioned) a substantial quantity of useful light which would have passed through those last-mentioned portions of the old windows if they still existed now reaches the first floor of the plaintiffs' building through the corresponding portions of the existing windows.

The first point to be considered is whether the rights which the plaintiffs would have had if they had been owners of the old houses have been lost by reason of the alterations made in rebuilding. A question arose whether evidence of the intention of those who rebuilt was admissible. Such evidence appears to have been considered admissible in *Newson* v. *Pender*, 33 W. R. 243, 27 Ch. D. 43, and I allowed it to be given. It was to the effect that the building was not erected in accordance with the plan originally prepared, but in accordance with plans altered in order to preserve the ancient lights, both skylight and windows, in Nos. 29 and 30. From that the inference may be drawn that there was an intention to preserve the ancient lights on rebuilding. It appears to me, however, that regard being had to the subsequent case of *Scott* v. *Pape*, 34 W. R. 465, 31 Ch. D. 554, at p. 567, such evidence is unnecessary. In my opinion, that applies to the skylight in the present case, and also (subject to the question reserved) to the first floor windows. That question arises in this way; it was admitted on cross-examination by Mr. Hall, one of the plaintiffs, that in the windows Nos. 1 and 7 considerable portions of the old area had been boarded up for more than twelve months before action brought, the reason being that printing machines were placed before each window at which the printers worked with their backs to the light, and it was found that accidents repeatedly occurred by which these portions of the windows were broken. As regards window No. 4 it was also admitted by the same witness that a considerable portion of the old area had for more than a year been covered by open shelving used for drying printing work. The shelves were three inches to a foot apart, and projected about two feet, and caused a material interference with the light, though substantial quantities of light still passed into the plaintiffs' building. The boarding and shelving had been removed before the trial; but it was contended that in these circumstances the access and use of the light claimed by the plaintiffs to the first floor windows had not been actually enjoyed for the full period of twenty years mentioned in section 3 of the Prescription Act without interruption, that period being by section 4 the period next before the bringing of the present action. It was first of all said the erection of the boarding and shelving constituted an interruption within the meaning of the section. The term "interruption," however, has the same meaning there as in section 4, and refers to an adverse obstruction, and not a mere discontinuance of user: see *Carr* v. *Foster*; *Hollins* v. *Verney*. It was then urged that the use of the light had not been actually enjoyed for the statutory period. On this there are some decisions which ought to be referred to. It is not necessary in order to the acquisition of a

right to the access of light under section 3 of the Prescription Act that the building should be occupied or fit for occupation during the specified period: *Courtauld* v. *Legh*, 17 W. R. 466, L. R. 4 Ex. 126; *Collis* v. *Laugher*, 43 W. R. 202, [1894] 3 Ch. 659. In both cases it is pointed out that there may be a user of light without actual occupation. In *Cooper* v. *Straker*, 37 W. R. 137, 40 Ch. D. 21 (see pp. 26 and 27), Kay, J., held that the owner of a building having windows with movable shutters acquired a right to light under section 3 of the Prescription Act if he opened the shutters at any time he pleased for the admission of light during those twenty years. The learned judge refers to what was said by Channell, B., in *Courtauld* v. *Legh*, and remarks, "The essential word in that sentence is fixed, which obviously means either shutters that will not open or shutters that are never, in fact, opened during the twenty years." It is expressly laid down that continuous user is not necessary. With this view of the law I entirely agree. Not only, as is pointed out, is no such word as continuous found in that Act, but there are strong reasons against such a construction of it. For example, it is matter of common knowledge that in this country most shops have the shutters regularly closed for one whole day every week and occasionally at other times. It cannot have been intended that this class of property should be excluded from the benefit of the Act. The conclusion is really involved in the decisions of the cases that the right is not lost by rebuilding; for where one building is pulled down and another built on the site, there must in most cases be an interval where there is no actual enjoyment of the light in connection with any building. This being so, it seems to me that the rule laid down in *Hollins* v. *Verney*, with regard to discontinuous easements applies to light.

Before proceeding to apply that to the present case I wish to make two observations: (1) I think that non-user which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of the right under the Act; (2) I do not think that the user or non-user can be entirely determined by simply considering whether an obstacle interposed to the light is fixed or movable. Fixedness and mobility are elements to be taken into consideration, but the decision must turn on all the circumstances of each case. Guiding myself by this rule I have to deal with the boarding over of parts of these windows. Here the plaintiffs, being in occupation and carrying on their ordinary business, have for upwards of a year absolutely excluded from the rooms the light which arrived at those parts of these windows. I cannot see my way to say that there has been as to the portions of the windows No. 1 and 7 which were boarded over a user of the light actually enjoyed for the prescribed period. On the other hand, the shelving did not exclude the light, but allowed a substantial portion of it to pass; and I think that a sufficient user is made out as regards the whole of window No. 4. It was then said that as regards the portions of windows which were boarded up, sufficient evidence had been given to establish a title under a lost grant. It is laid down in *Aynsley* v. *Glover*, that a plaintiff may establish his right in this way; see also the observations of Lord Blackburn in *Dalton* v. *Angus*, 30 W. R. 91, 6 App. Cas. 740. In the present case the action was tried without pleadings. The affidavits on the motion did not direct the attention of the defendants to this mode of making out a title. The plaintiffs' evidence, however, did go to show that the old cottages now pulled down did enjoy access of light to the windows for more than twenty years before they were pulled down. On the second day of the trial the plaintiffs' counsel expressed his intention of availing himself of this right. Although the defendant's counsel objected, I think it was open to the plaintiffs, subject only to the defendant having an opportunity of adducing evidence for the purpose of rebutting the presumption which arises from twenty years' enjoyment.

His lordship then expressed his readiness to make a declaration to the following effect—viz., that the plaintiffs were entitled to the enjoyment as ancient lights of such portions of the skylight and windows which formerly existed in the ground and first floors of the messuages Nos. 28, 29, and 30, Hutton-street, as were not blocked up in the rebuilding of the plaintiffs' premises, or had not been subsequently boarded up; and as regards the portions of the windows which were boarded up, either to allow the defendant to adduce evidence before the judgment was drawn up, or to reserve the matter, giving either party liberty to apply. After some discussion, and an undertaking by the defendant to give the plaintiffs a month's notice of his intention to build, and at the same time to produce his building plans, his lordship said that the plaintiffs' rights would be amply protected by reserving them liberty to apply for an injunction based upon the above declaration.

Solicitors, *James, White, & Leonard*; *Ranger, Burton, & Frost.*

---

Chan. Div. } April 3, 4.
Byrne, J. }

LLOYDS BANK (LIMITED) v. PRINCESS ROYAL COLLIERY CO. (No. 1). (a.)

*Practice—Leave to discontinue—Auxiliary proceedings before another tribunal—Costs incident to those proceedings costs in the action—R. S. C., ord. 26, r. 1.*

*A plaintiff seeking to discontinue an action upon terms of paying the defendant's costs in that action will not be compelled as part of his bargain to pay the costs incurred by the defendant in auxiliary proceedings taken by the plaintiff before another tribunal arising out of the same case, and the result of which caused the plaintiff to discontinue his action.*

Adjourned summons.

In 1897 the plaintiffs commenced an action before Romer, J., alleging that the defendants had trespassed upon a certain gale or colliery work belonging to the plaintiffs, situate in the Forest of Dean, and claimed in addition to an injunction that if and so far as might be necessary the boundary between the plaintiffs' gale and an adjoining gale belonging to the defendants might be ascertained and determined.

The defendants delivered a defence in which, amongst other things, they objected that the dispute as to the boundary between the gales ought to be ascertained and determined by an officer called the gaveller, or his deputy, in accordance with the provisions in that behalf contained in the Dean Forest Mines Act, 1838, and amending Acts and the rules and regulations made thereunder.

The plaintiffs, after delivery of this defence, took no further proceedings in the action, but applied to the gaveller of the forest to ascertain and determine the disputed boundary between the two gales.

The gaveller upon compulsion by *mandamus* decided the question and delivered an award, but did not deal

(a.) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

with the costs of the proceedings before him to which the defendants were made parties.

It was conceded that the Dean Forest Mines Acts and rules made no provision for such costs.

Before the gaveller had given his award the defendants applied to have the action before Romer, J., dismissed for want of prosecution, but the judge directed that the action should be set down forthwith, but should not come into the paper without his sanction, which would not be given until the proceedings before the gaveller had been terminated.

On the result of the gaveller's award the plaintiffs now applied by summons under R. S. C., ord. 26, r. 1, for leave to discontinue their action upon terms of their paying the defendants' costs in the action.

The question now arose whether the costs of the proceedings before the gaveller and the costs of obtaining the *mandamus* were costs in the action.

*Rowden, Q.C.*, and *J. G. Wood*, for the plaintiffs.—The discretion given to the court as to costs is limited to such costs as could have been given at the trial. Whether the action had proceeded or been dismissed for want of prosecution the defendants could only have got the costs of that action. The court has no materials upon which to decide as to who ought to pay the costs incurred in connection with the proceedings before the gaveller.

*Levett, Q.C.* (*O. L. Leigh Clare* with him), for the defendants.—The proceedings before the gaveller were incident to and in support of the plaintiffs' action for trespass. It was "just" that the plaintiffs in seeking to discontinue their action should pay the costs of those proceedings.

BYRNE, J., without going into the question of jurisdiction as to the costs incident to the proceedings before the gaveller, decided that on the merits it was not just that the plaintiffs should be made to pay those costs as part of the terms upon which they were to be allowed to discontinue their action.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Blyth, Dutton, Hartley, & Blyth*, for *M. F. Carter*, Newnham.

Solicitors for the defendants, *Wood, Bigg, & Nash*, for *Winterbotham & Son*, Stroud.

---

Chan. Div.
Cozens-Hardy, J. } Feb. 10.

*In re* BROWN. (*a.*)

*Lunacy—Lunatic—Charging order—Fund in court.*

*Where a charging order has been obtained against the interest of a lunatic in a fund in the Court of Chancery, the charge will be satisfied before the fund is ordered to be transferred to Lunacy.*

Petition.

M. B. Brown had been found a person of unsound mind by inquisition. She, as executrix and sole legatee of the will of R. Brown, had carried on in pursuance of the will the business of R. Brown. She had never proved the will, and subsequently to being found of unsound mind administration with the will annexed was granted to the committee of the lunatic. Creditors of the testator had commenced the present action for the administration of the estate of the testator, and the usual inquiries and accounts had been directed. The business had been sold in these proceedings, and the proceeds paid into court. Thomas Clutterbuck had obtained judgment against M. B. Brown in the Queen's Bench Division, and had obtained an order absolute charging the interest of M. B. Brown in the fund in court for the amount of the judgment debt and costs.

This was a petition by the committee and the lunatic asking that the fund in court, after payment of costs and testator's debt, should be transferred to Lunacy notwithstanding the charging order.

*Eve, Q.C.*, and *Hon. Frank Russell*, for petitioners.—The fund should be transferred to Lunacy and used for the maintenance of the lunatic without reference to the charging order: *In re Plenderleith*, 42 W. R. 224, [1893] 3 Ch. 332; *In re Winkle*, 42 W. R. 513, [1894] 2 Ch. 519. In *In re Leavesley*, 39 W. R. 276, [1891] 2 Ch. 1, the lunatic had died and that is why effect was given to the charging order: *In re Clarke*, 46 W. R. 337, [1898] 1 Ch. 336.

*T. L. Wilkinson*, for judgment creditor.—Effect must be first given to the charging order and the balance only transferred to Lunacy. *In re Plenderleith* is distinguishable, as there the fund was in Chancery and not in Lunacy. Charging orders have been enforced in *Horne* v. *Pountain*, 38 W. R. 240, 23 Q. B. D. 264, and *In re Leavesley*.

*Hon. E. C. Macnaghten, Q.C.*, and *Kenyon Parker*, for plaintiffs.

*T. T. Methold*, for D. F. Alexander, appointed by the master in Lunacy to report on the lunatic's property.

COZENS-HARDY, J., thought that the charging order obtained by the judgment creditor must be recognized. The cases of *In re Plenderleith* and *In re Winkle* merely decided that when once the property had come under the jurisdiction of the court in Lunacy the requirements of the lunatic as to maintenance are preferred to the rights of execution creditors. But it has long been established that the court of Lunacy cannot override common law or statutory rights which have been established before the property has come under the control of the court. When an application has to be made to the court in Lunacy then no order can be made, except subject to the consideration of the lunatic's welfare. Here the court in Lunacy had not the property under its jurisdiction, and the charging order is effective against the property, and the judgment and costs should be paid out of the property before the balance is brought into court in Lunacy.

Solicitors, *Warriner & Co.*, for *W. Lyndon Moore*, Newport; *Thorneycroft & Willis*, for *Taynton, Sons, & Siveter*, Gloucester; *Thomas White & Sons*; *The Official Solicitor*.

---

Chan. Div.
Cozens-Hardy, J. } Jan 17, 26.

*In re* COOLGARDIE GOLD FIELDS.
*Ex parte* FLEMING. (*a.*)

*Solicitor — Practice — Unstamped documents — Undertaking to stamp—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 14.

*Where a solicitor undertakes at the hearing to have a document stamped, such an undertaking is properly given by the solicitor and not by the client, and is a personal undertaking of* [illegible] *and will be enforced against him by* [illegible]

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

(*a.*) Reported [illegible] Esq., Barrister-at-

Motion.

In this case two applications were made by shareholders seeking to have their names removed from the register of shareholders in the company on the ground substantially that the prospectus on the faith of which they had applied for shares contained statements which were false. The motion came on before the learned judge in July last. Witnesses were examined and cross-examined. Counsel for the company in the course of the cross-examination of one of the applicant's witnesses, proposed to put in certain documents which were unstamped, and which plainly required to be stamped. The learned judge pointed out the difficulty having regard to section 14 of the Stamp Act, 1891. That section, so far as material, is as follows: "Upon the production of an instrument chargeable with any duty as evidence in any court of civil jurisdiction in any part of the United Kingdom or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may be legally stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds."

Counsel for the company thereupon communicated with his professional client, and, upon an undertaking being given by the company's solicitors to stamp a certain deed, the matter proceeded. This course was adopted with reference to several similar documents which the company's counsel desired to use in opposition to the case of the applicants. The deeds and documents thus tendered did not, in the learned judge's opinion, assist the company. On the contrary, they helped the applicants.

In the result the learned judge allowed the application with costs.

The solicitor, who was present in court, seems to have been under the impression that he was not giving a personal undertaking, and he immediately endeavoured to be relieved from his undertaking. It was stated that to stamp the documents it would cost several hundred pounds. When an application by the solicitors was made to the learned judge on the 25th of July *ex parte*, the judge declined to enter in it without notice being given to the company and to the Inland Revenue authorities. This application is reported in the *Weekly Notes* for 1899, p. 128. Certain communications took place between the solicitors and the Inland Revenue authorities, but nothing more was done. The orders were not and could not be drawn up although six months had elapsed. The applicants still remained on the register. Meanwhile the company had been wound up by the court on the ground of insolvency.

In these circumstances the applicants now applied by motion for directions that the orders made on the hearing of motions on the 21st of July might be drawn up forthwith, omitting from such orders the unstamped documents, the company's liquidator undertaking not to appeal from the orders; or in the alternative that the solicitors might be committed for contempt in making default in carrying out their undertaking to stamp the documents; or as a further alternative that the solicitors might be ordered to stamp such documents with the proper stamp duty with four days after service upon them of the order. The notice was served upon the company and its liquidator. The liquidator was willing to undertake to withdraw the pending appeals from the order, as he did not desire to prosecute those appeals. The other respondents were the solicitors who gave the undertaking and the Commissioners for Inland Revenue.

*Martelli*, for applicants.—It is a great hardship that the applicants have to still remain on the register because the solicitors have not complied with their undertaking to have the documents stamped. I ask, therefore, that the order may be drawn up without entering the unstamped documents. In default, the application to commit the solicitor must be pressed.

*Hon. A. Russell*, for liquidator.

*Muir Mackenzie.*—The undertaking was given by the solicitor under a misapprehension, and as soon as the solicitor found his mistake he asked to be relieved from it. The client is the proper person to pay the money for stamping, and in the Queen's Bench Division the money would be paid by the client at the time, in court, before the case proceeded, and that is the course which should have been followed here.

*Vaughan Hawkins*, for the Commissioners of Inland Revenue.—The practice in the Chancery Division is for the solicitor to give the undertaking (*In re Ward*, 31 Beav. 1), and the court will enforce it against him. The commissioners have no power to remit the stamp duties, but they are willing to waive the penalties. The orders cannot be drawn up without entering the unstamped documents: *Owen* v. *Thomas*, 3 Myl. & K. 353. The court has to protect the revenue: *Nixon* v. *Albion Marine Insurance*, L. R. 2 Ex. 338.

*Martelli*, in reply.

COZENS-HARDY, J., after stating the facts, continued: Notwithstanding the express language of section 14 of the Stamp Act, 1891, it is settled practice to allow an unstamped document to be used upon the personal undertaking, not of the parties to the action, but of solicitors who are officers of the court, to stamp it and to produce it so stamped before the order is drawn up. I have endeavoured to ascertain the origin of this practice. The earlier Stamp Acts, so far as my investigations have extended, do not contain any provisions similar to section 14 of the Act of 1891. The Consolidation Act of 1854 (17 & 18 Vict. c. 83), only enacts in section 27 that every instrument liable to stamp duty shall be admitted in evidence in any criminal proceedings, although it may not be properly stamped. But by section 28 of the Common Law Procedure Act, 1854, which received the royal assent two days later, it was enacted as follows: "Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the court whose duty it is to read such document to call the attention of the judge to any omission or insufficiency of the stamp, and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole, or, as the case may be, the deficiency of the stamp duty and the penalty required by statute, together with the additional penalty of £1 shall have been paid." Section 29 gives certain consequential directions. These sections were repealed in 1870 and subsequently re-enacted in section 16 of the Stamp Act, 1870. This again was repealed and re-enacted in 1891, the chief distinction being that the obligation now rests directly upon the judge and not upon any officer of the court. I am indebted to Mr. Lavie, the registrar, for a note of the case which I believe to be the origin of the settled practice to which I have referred. On the 20th of July, 1855, a cause of *Jennings* v. *Christopher* came on before Sir John Romilly on motion for judgment, and the following

is an extract from the registrar's minute, folio 218: "Collins proceeds to show his title. The agreement referred to. Mr. Roupell says it is not stamped. The solicitor tenders the money to the registrar, who protests. Court reads the Act as to this clause and is of opinion that, though under the clause of the Act making these sections applicable to all courts of civil jurisdiction, this Act is applicable to this court, yet there is no officer of this court now, unless it be the clerk of records and writs, who answers the description of the officer whose duty it is to read the documents, &c.; certainly not the registrar. Mr. Blaxland, the solicitor for the plaintiff, undertaking that the proper stamp shall be paid and affixed, let the cause proceed," and at the end of the entry relating to the cause are the following: "See that memorandum is duly stamped before drawing up decree. The memorandum was duly stamped before drawing up the order." It will be observed that the court accepted the undertaking of the solicitor without requiring any signature of the registrar's book or other document. The advantages of the practice are obvious. It is not always easy to settle at once what is the amount of the stamp duty, and, moreover, it may well be that when the amount required is known the cash is not at the moment in court. It would be in the last degree inconvenient and undesirable to direct an action to stand over in the middle of the trial in order that a document might be stamped. The court, therefore, accepts the undertaking of its own officer that the document shall be stamped before the order is drawn up as satisfying the requirements of the statute. The court looks to its own officer and leaves the officer to claim indemnity from his own client. I am not aware of any difficulty having arisen until the present case. Sir John Romilly in 1862 refers to it as the ordinary course; see *In re Ward*, 31 Beav. 1, p. 8, where he says: "The court accepts the undertakings of solicitors to pay the penalty of not stamping an agreement and various other acts"; and he proceeds to say, "I am never informed whether they are performed or not, I have not the slightest doubt that they are performed in every case, but if it afterwards came to my knowledge that the act, without the performance of which the case could not have properly been heard, had not been performed or that the money had not been paid, I should compel the solicit r at the instance of anybody interested in the matter to make good his undertaking or assertion on the faith of which the court had acted; it is no answer to say that it is the duty of many other persons to look into the matter and see that the act was duly performed": see also Seton on Decrees, p. 26 (4th ed.). In this state of circumstances it seems to me to be clear that an undertaking was given to the court by the company's solicitors acting through the member of their firm who was present in court. This is not seriously disputed, for the application to be relieved from the undertaking presupposes that an undertaking was given. I think it is of the utmost importance that such an undertaking given by officers of the court should not be released without the consent of the person or persons for whose benefit the undertaking was given. Those persons are the Commissioners for Inland Revenue. They, through their counsel, state that they have no power to waive the stamping of the documents, although they can and will in the present case waive the penalties, and they insist for the protection of the Revenue that the undertaking should be enforced. On the other hand I think it is not just that the applicants, who have by their own evidence established a title to relief, should be prevented from obtaining relief by reason of the failure of their opponents or of their opponents' solicitors to stamp documents which were put in, not by the applicants, but by their opponents. If I make no order on the present motion it may be that the applicants will have to pay several hundred pounds before they can get the order made by me in July last perfected. I think I shall be doing right between the parties and right towards the Inland Revenue authorities by directing the order to be forthwith drawn up without entering the unstamped documents, the company undertaking to withdraw their appeals. I must order the solicitors upon their undertaking to cause these documents to be produced to Mr. King, the registrar, at his room properly stamped within a few days after service upon them of this order. It will be stated on the face of the order that the Inland Revenue authorities agree to waive penalties and I shall expressly reserve liberty to the commissioners to apply in case this order is not obeyed by the solicitors. The solicitors must pay the costs of the applicants of this motion. In point of form I think the motion should be headed "In the matter of the solicitors," and I direct it to be amended accordingly.

Solicitors, *Morten, Cutler, & Co.; Cannon, Son, & Morten; Solicitor for Inland Revenue; Solicitor for the Board of Trade.*

---

Prob. Div. & Adm. Div. Divorce. } Dec. 11, 15; Feb. 7.

COWLEY v. COWLEY. (a.)

*Peer—Title or dignity of honour acquired by marriage—Divorce—Re-marriage to a commoner—Injunction to prevent the wife from using her former title.*

*A peeress, not in her own right, but who has derived her title from marriage with a peer, and who, after procuring a decree of dissolution of the marriage, marries a commoner, loses the right to use the title so acquired, and will be restrained by injunction from continuing its use.*

Motion by a peer for an injunction to restrain his former wife, who had obtained a decree for divorce against him and subsequently married a commoner, from continuing to describe herself by the title she had derived from him by marriage.

Dec. 11, 15.—*Bargrave Deane, Q.C.*, and *Willock*, for Earl Cowley.

*Lawson Walton, Q.C.*, and *Barnard*, for the wife.

The facts and arguments are fully set out in the judgment.

*Cur. adv. vult.*

Feb. 7.—BARNES, J., in delivering a considered judgment, said: In this case Lord Cowley seeks to restrain a lady who was formerly his wife, but is now the wife of Mr. Robert E. Myddleton Biddulph, from using the style or title of "Countess Cowley." The application is made to this branch of the court in a suit for divorce, brought by the lady against Lord Cowley and determined in her favour. It will be convenient in this judgment still to term the parties petitioner and respondent respectively. The respondent is Henry Arthur Mornington Wellesley, third Earl Cowley. The first Lord Cowley was raised to the peerage of the United Kingdom in 1828 by the title of Baron Cowley. His son, the present earl's grandfather, was by letters patent under the Great Seal, dated the 11th of April, 1857, created

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law

Viscount Dangan in the county of Meath and Earl Cowley. On the death of his father in 1895 the respondent succeeded to these titles, which were by the letters patent aforesaid limited to the first earl and the heirs male of his body lawfully begotten and to be begotten. On the 17th of December, 1889, the respondent married the petitioner, who is a daughter of the Marquis of Abergavenny. There is one child of the marriage—a boy, Christian Arthur Wellesley—who is now by courtesy called by his father's inferior title, Viscount Dangan. The petitioner on the 17th of June, 1896, instituted a suit in this court for divorce from the respondent, and on the 2nd of February, 1897, obtained a decree *nisi* for the dissolution of her marriage with him, on the ground of his desertion and adultery. This decree was made absolute on the 9th of August, 1897. The petitioner afterwards married her present husband, Mr. Biddulph. Notwithstanding that her marriage with the respondent had been dissolved and that she has married again, the petitioner has without any sanction from the Crown continued to use, and still uses, the style or title "Countess Cowley"; for example, in her affidavit in opposition to this motion she describes herself as "Violet Countess Cowley," and signs herself "Violet Cowley." No objection seems to have been made by the respondent to this use of the title by the petitioner between the date of the said final decree and the lady's second marriage; but since she has become the wife of Mr. Biddulph the respondent has made formal objection to the petitioner's using the title "Countess Cowley." On the 14th of December, 1898, the respondent's solicitors wrote on his behalf to the petitioner's solicitors a letter in the following terms:

"Dec. 14, 1898.

"Gentlemen,—We presume that you still act for the Lady Violet Biddulph, formerly Countess Cowley. We have been consulted by the Earl Cowley in reference to the fact that, although married to Mr. Biddulph, the lady continues to use the title 'Countess Cowley,' notwithstanding it was she who sought the divorce, and by her own volition obtained a dissolution of the marriage. As long as Lady Violet was unmarried there may have been some ground for her continuing to bear her late husband's name, although we believe that this is a moot legal point; now, however, that she has remarried there cannot be the slightest doubt about the matter. While very anxious to avoid any unnecessary annoyance, we are instructed by Lord Cowley to request that the Lady Violet will cease using his name and adopt the only and very honourable one to which she is now entitled—viz., Lady Violet Biddulph. Trusting that we may hear from you that this course will be adopted,

"We are, your obedient servants,

"WONTNER & SONS.

"Messrs. Lewis & Lewis."

A letter in reply was received from the petitioner's solicitors as follows:

"Dec. 15, 1898.

"Gentlemen,—We are in receipt of yours of the 14th inst. In reply to your inquiry, we have to inform you that Countess Cowley intends to retain the same name as her son, notwithstanding that she has been compelled to divorce her husband on the grounds of his desertion and adultery.

"Yours obediently, LEWIS & LEWIS.

"Messrs. Wontner & Sons."

On the 6th of July, 1899, the respondent's solicitors wrote a letter to the petitioner's solicitors, in which the following passage occurs: "Thirdly, we are again instructed to ask that Lady Violet Biddulph cease to call herself by the name and title of 'Countess Cowley.' We have made research into the matter, and find that she undoubtedly has no right to so call herself, the only person entitled to now bear the title being Lord Cowley's mother, who since the divorce has become the only 'Countess Cowley,' and has also instructed us on her behalf and requested us to ask that the Lady Violet should cease to bear this name and title. We are writing you this in order, if possible, that some arrangement shall be arrived at on these points, which we desire to settle amicably, but unless we can come to some settlement within the next week we shall have to apply to the court without further delay." To this letter the petitioner's solicitors replied on the 7th of July, so far as is material, as follows: "It is useless you writing again to ask that Lady Cowley shall call herself by any name other than the Countess Cowley; all that we have to say upon that subject we have already said. We observe that you will now go to the court . . . We are prepared at any time to receive notice of motion on behalf of Lady Cowley." The respondent then moved the court in the old suit between the parties to restrain the petitioner from using the style or title aforesaid, on the ground that by so doing she was guilty of molestation. The motion was supported by the respondent's mother, the Dowager Countess Cowley. Upon the motion coming on before the court it seemed to me that the real questions raised between the parties were not strictly questions of molestation, but these—viz., whether the petitioner is entitled to use the style or title in question; and, if not, whether the respondent has any right to obtain an injunction in the High Court to restrain the petitioner from so doing; and that these questions could not be dealt with in a divorce suit which was at an end except so far as the court has jurisdiction to entertain applications with regard to the custody, maintenance, and education of the child of the marriage during his minority. It was thereupon agreed by counsel for the parties that the motion should be treated as if it was a motion to restrain the petitioner from using the style or title "Countess Cowley" in a suit for that purpose brought in the High Court, and the arguments proceeded on that basis.

The first question, then, is whether the petitioner is entitled to use the style or title "Countess Cowley." The petitioner, although the daughter of the Marquis of Abergavenny, was in the legal sense a commoner. At the time of her marriage with the respondent he had not succeeded to the peerage; but when his father died, in 1895, he became Earl Cowley and a peer. The petitioner by virtue of her union with the respondent became a peeress, for husband and wife are regarded in certain respects as one person in law, and a woman who is married to a peer of the realm becomes entitled to the same dignity as her husband, and acquires all the rights and privileges of peerage which are consistent with her sex; for instance, if she is accused of treason or felony she can only be tried by the House of Peers. The statute 20 Hen. 6, c. 9, declared what would seem to have been the common law: "That ladies of great estate in respect of their husbands, peers of the land, married or sole, that is to say, duchesses, countesses, or baronesses, shall be put to answer and judged before such judges and peers of the realm as peers of the realm should be if they were indicted or impeached, and in like manner and form and none otherwise." The petitioner, then, on the respondent becoming a peer shared his dignity, and as his wife her style and title was Countess Cowley, countess being the Norman feminine which corresponds with earl or *comes*: Seldon on Titles of Honour (ed. 1672), Part II., c. 5, s. 7, p. 526. Her marriage with him has, however, been dissolved; and she has married again to a commoner, and she has lost her

dignity aforesaid, and all the rights and privileges annexed to it. What her legal name, position, or dignity was between the time of the dissolution of her first marriage and her second marriage was not discussed before me, and it is not necessary to consider this, for there can be no doubt that, being legally a commoner by birth and only a peeress by marriage with Lord Cowley, on her second marriage she took her present husband's position, and her proper legal description became Violet, the wife of Robert E. Myddleton Biddulph, and, as the daughter of a marquis, she would be called by courtesy Lady Violet Myddleton Biddulph. The law on the subject is strictly stated in c. 3, section 83, p. 90, of Cruise on Dignities as follows: "If a woman who has acquired a dignity by marriage afterwards marries a commoner, she loses her dignity and all the rights and privileges annexed to it, for that which is gained by marriage may be lost by marriage. *Eodem modo quo quid constituitur dissolitur.*" This is in accord with all the old authorities: see *Acton's case*, Coke Rep., pt. 4, fol. 118*b*, at p. 556; *Countess of Rutland's case*, Coke Rep., pt. 6, fol. 53*b*, at p. 362; Brooke's Abridgment, Tit nosme de dignit., 69; Co. Litt., tit. Offer Simple, 166; (ed. 1832), 2 Inst., vol. 1, tit. Magna Charta, c. 29, 50 (1); *Duchess of Suffolk's case*, Comyn's Digest, tit. Dig., vol. 3, c. 6, p. 407; Fortesque de Laudibus, 95. In the case of *Hayward* v. *Duke of Suffolk*, in Hil. term, 6 & 7 Ed. 6, reported in 1 Dyer 79*b*, a writ of partition was brought against the Duke of Suffolk and his wife and others by Ranulph Hayward, Esq., and Lady Anne Powys, his wife, and so she was named in the writ. An exception was taken for misnomer because she ought only to have been called by the name of her husband and not otherwise. In the opinion of Montague, C.J., and Hales, J., the exception was good and the reason given was that "by the law of God" she was "under the power of her husband, and so her name of dignity shall be changed according to the degree of her husband notwithstanding the courtesy of the ladies of honour and of the court." Upon which the plaintiff brought a new writ to "Ranulph Hayward and Anne his wife—late wife of the Lord Powys, deceased." Further, in *Lady Dacres' case*, Journals of the H. of L., 13 Car. 2, July 4, 1661, p. 298, when she had petitioned the House of Lords claiming the privilege of Parliament, the House declared (having received the opinion of all the judges there present in point of law) "that the Lady Dacres by marrying a commoner had forfeited and lost her privilege of peerage in law." Also in 1692 the House of Lords ordered and declared "that privilege of Parliament should not be allowed to minor peers, noblewomen, or widows of peers, saving the right of peerage," and that, "if the widow of any peer should be married to a commoner, she should not be allowed the privilege of peerage": H. of L. Journals, vol. 15, 241, Feb. 21, 1692. I may also refer to the following passage in his work on the order of precedence, by the late Sir Charles George Young, Garter Principal King of Arms (1851), p. 75: "The widows of peers, baronets, knights of the order and knights bachelors are entitled to enjoy the same style and rank which they derived from their husbands so long as they remain unmarried, but on marrying again they have no other style or rank than that which the second husband may confer upon them, it being the established law that what a woman gains by marriage she loses by marriage." In a footnote referring to the above passage, the author states as follows: "Some instances, however, occur, where the Crown has permitted the retention of the title and precedence notwithstanding a second marriage, as in the case of Catharine Duchess of Lennox, relict of Esme Duke of Lennox, who died in 1624, remarried to James Earl of Abercorn, when, as a mark of favour, Charles I., in 1632, granted his royal letter, declaring that, notwithstanding her said second marriage she should still retain both the title of Duchess of Lennox and all the rank and precedence due thereto." So far the law is clear, and on the argument before me the petitioner's counsel did not seek to maintain that the petitioner was still entitled to her former dignity of peeress or to a legal right in the title in question; but he contended that she was justified in continuing to use her former title by some usage by society. No authority, precedent, or evidence was produced in support of this contention, and this is not surprising, for a case which would give rise to a question such as that under consideration cannot often have arisen. The only foundation for the contention was the following passage in Stephen's Commentaries, vol. 2. (12th ed.), p. 605: "By courtesy or the usage of society all dowager peeresses though afterwards married to commoners are ordinarily addressed by their former title." This statement was not supported by the citation of any further authorities; and, even if it be correct, this courtesy or usage of society (a somewhat vague term) is of no legal force or validity and cannot alter the legal positions and titles of dowager peeresses (not in their own right) who have afterwards married commoners. They no longer have any right to their former privileges, rank, and titles, and it is therefore difficult to understand why anyone in such a position should without the sanction of the Crown allow herself to be addressed by a title not hers as of right even though there may be a usage of society to do so. There is this important feature in connection with this subject—that in certain cases, of which instances are given in the affidavit filed in this case of Sir Albert William Woods, K.C.B., K.C.M.G., Garter Principal King of Arms, the sovereign in the exercise of the royal prerogative has expressly sanctioned the retention by dowager peeresses (not in their own right) marrying below their rank of their former titles, rank, and precedence, and has directed memorials thereof to be recorded in the register books of the College of Arms. There is a further answer to the contention aforesaid. It is obvious that the courtesy or usage of society, if correctly stated with regard to dowager peeresses (not in their own right) who have afterwards married commoners, has no application to the present case, when the petitioner's first husband is alive and is objecting to the use by her of a style or title which she only acquired as his wife, she now being the wife of another person. It was further argued that the petitioner is justified in calling herself Countess Cowley, because a person is entitled to call himself or herself by any name, and cannot be restrained from doing so. In support of this contention certain cases were cited to show that the courts will not restrain the use of a family name. The principal of these was the case of *Du Boulay* v. *Du Boulay*, 17 W. R. 594, L. R. 2 P. C. 430, where Lord Chelmsford in delivering the judgment of the Privy Council said: "In this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law, and any person using that name after a relative right of this description has been acquired by another is considered to have been guilty of a fraud, or at least of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the

use of the name by injunction. But the mere assumption of a name which is the patronymic of a family by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress." The foundation of this is that, except in certain cases, when the right to exclusive use of a name in connection with a trade or business has been acquired, there is by English law no right of property in a person to the use of a particular name to the extent of enabling him to prevent the assumption of his name by another. But the argument omitted to notice the difference between the use of a name and the use of a title. The law as to the former is as above stated, but as to the latter the position is entirely different. Titles of honour, or, in the language of the law, dignities, are conferred by the exercise of the royal prerogative. Among them the principal is that of the peerage. The dignities of the peerage "having been originally annexed to lands were considered as tenements or incorporeal hereditaments wherein a person might have a real estate; and although dignities are now become little more than personal honours and rights, yet they are still classed under the head of real property": Cruise, c. 4, s. 1; Co. Litt. 16*b*. The grant of the dignity in the present case was to the grantee and the heirs male of his body and created an estate in tail male. Lord Cowley had the exclusive right to the use of his titles, but on his marriage his wife became a sharer in his dignity and Countess Cowley.

Even if she had become his widow, and Dowager Countess Cowley, she would have lost all the privileges she had acquired by her marriage if she married again to a commoner. She is now no longer the respondent's wife, but the wife of Mr. Biddulph, "and has lost the right to style herself Countess Cowley"; and, although she does not desire to represent that she is now the respondent's wife, she is still using the style and title which can only lawfully be used by a woman who is the wife of the respondent, and is not merely assuming a name to the use of which objection could not be raised. I am, therefore, of opinion that the petitioner is not entitled to use the style and title "Countess Cowley."

The next and more difficult question is whether the respondent is entitled to obtain an injunction to restrain the petitioner from using the style and title aforesaid. The first point made against him was that, as his marriage with the petitioner had been dissolved in consequence of his misconduct, the present motion was one which he ought not to have made and ought not to be entertained by the court; to which it was answered that the respondent's conduct, which led to the dissolution of the marriage, did not affect the present question, and that the petitioner's real reason for using the title was to annoy the respondent, and not (as alleged in the letter of her solicitors above set out and in her affidavit) to retain the same name as her son. Upon this point, whatever view may be taken of the course adopted by the respondent in bringing forward this motion, it is necessary to observe that the court has to deal with the rights of the parties whose marriage has been dissolved, and who are now strangers to each other; and, in my opinion, the legal questions now raised do not depend on the cause which led to the dissolution of the marriage in this case. With regard to the suggestion of a desire on the part of the petitioner to annoy the respondent, it is to be noted that there is nothing in the evidence to show that she is actuated by any such desire, though it seems strange that she should wish to use her former title in the circumstances, instead of her present legal name, and though the reason given by her for wishing to retain the same name as her son is one which it is difficult to appreciate, seeing that during his father's lifetime the son will neither have the name nor title of Cowley. The main point made against the respondent was that the court has no jurisdiction to grant the injunction asked for. This was based upon the cases which deal with the right of a person to assume any name he may choose, and upon the contention that the court will not interfere by injunction when the relations between the parties are strictly of a personal nature and no question of proprietary rights are at issue. I have pointed out the difference between the assumption of a name and of a title or dignity such as that in question. With regard to the contention last mentioned, it is to be observed that it overlooks the proprietary rights which the respondent has in his dignities. He is entitled to share them with any lady whom he may make his wife, and, in my opinion, to assert that no other woman shall use the privilege which his wife should share with him. It may be observed further that if the petitioner were to assert that she was still the wife of the respondent she would be subject to a suit in this court for jactitation of marriage, which is founded on the injury which may be done to a complainant by a person representing that he or she is the husband or wife, as the case may be, of the complainant: *Lord Hawke* v. *Corri*, 2 Hagg. Cons. 280. This is not the position asserted by the petitioner; yet she asserts that she is justified in describing herself in a manner which represents that she is still sharing his dignity with the respondent, and by the style and title which only describes, and can only be used lawfully by a person who is, the wife of the respondent. There has been, and is, in my opinion, an invasion by the petitioner of the respondent's rights. There is in the legal sense a wrong done to the respondent, without lawful excuse, and intentionally, although an actual desire to annoy him is not established. In conclusion, it is important to notice, upon the question of the power of the court to interfere by injunction, that this is not a case in which a right is asserted by the petitioner to the dignity of a peerage. In cases of that character the jurisdiction of the court is exercised on petition, which may be referred in the first instance to the Attorney-General for examination and then, if necessary, to the House of Lords for investigation: Cruise, c. 6. The facts of this case are not in dispute, and, if my view of the law be correct, there is no assertion by the court of any jurisdiction to deal with a matter which should be considered elsewhere, and the remedy by injunction seems both applicable and convenient. The result is that, in my judgment, there must be an injunction restraining the petitioner from using the style and title of Countess Cowley.

*Order for injunction, each party to pay their own costs.*

Solicitors for the applicant, *Wontner & Sons.*

Solicitors for the petitioner, *Lewis & Lewis.*

## Court of Appeal.

Appeal.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) May 5.

DANIEL v. OCEAN COAL CO. (LIMITED). (a.)

*Master and servant—Employers' liability—Accident—Compensation—Payment in case of death—Right of legal personal representative to receive whole of compensation money—Investment for benefit of dependant—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *Schedule I.*, 4, 5, 6, 7.

*In an arbitration under the Workmen's Compensation Act, the applicant was the widow of the deceased workman, and she had taken out letters of administration. The county court judge by his award ordered the respondents to pay a lump sum to and for the benefit of the dependants of the deceased, whom he declared to be the widow and the two infant sons of the deceased, and he apportioned the said sum between the widow and the sons, and he ordered the sum apportioned to the widow to be paid to her, and the sum apportioned to the sons to be paid to the registrar and to be invested by him for their benefit.*

*Held, that, on the construction of paragraphs* 4, 5, 6, *and* 7 *of the first Schedule to the Act, the county court judge had power to make such order, and that the applicant, although she was the legal personal representative of the deceased, had no absolute right to receive the whole of the compensation money.*

Appeal from an award of the judge of the Pontypridd County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a workman who had been killed by an accident in the course of his employment. The applicant had taken out letters of administration to her deceased husband's estate.

The county court judge by his award ordered that the respondents, the Ocean Coal Co. (Limited), should pay the sum of £246 7s. to and for the benefit of the dependants of the deceased workman as compensation under the Act; and he declared that the persons entitled to share in such compensation as dependants were the widow and the two infant sons of the deceased; and he ordered that the said sum of £246 7s. be apportioned between them as follows—viz., £146 7s. to and for the benefit of the widow, and £100 to and for the benefit of the sons in equal shares; and he ordered that the sum of £146 7s. apportioned to and for the benefit of the widow should be paid to her, and that the sum of £100 apportioned to and for the benefit of the sons should be paid to the registrar of the court, and should be invested by the registrar in his name in the Post Office Savings Banks for the benefit of the sons.

From this award the applicant appealed.

*Cripps, Q.C.* (*Rhys Williams* with him), for the applicant.—The applicant, having taken out letters of administration, is the legal personal representative of her husband, and she is entitled to have the whole of the compensation money paid to her. The first schedule to the Act deals with compensation, and paragraph 4 of the schedule says: "The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the persons to whom the expenses are due; and if made to the legal personal representative, shall be paid by him to or for the benefit of the dependants or other person entitled thereto under this Act." The right of the legal personal representative to receive the compensation money is clearly expressed. Paragraph 6, which provides for the sum allotted as compensation to a dependant being invested for his benefit, does not affect the right of the legal personal representative to have the whole of the money paid to him.

*Ruegg, Q.C.*, and *Anton Bertram*, for the respondents, were not called upon to argue.

A. L. SMITH, L.J.—In my opinion paragraphs 4, 5, 6, and 7 of the first schedule to the Workmen's Compensation Act must be read together. Paragraph 4 is as follows: [His lordship read the paragraph as set out above.] Then paragraph 5 says: "Any question as to who is a dependant, or as to the amount payable to each dependant, shall, in default of agreement, be settled by arbitration under this Act." Then by paragraph 6: "The sum allotted as compensation to a dependant may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator." By paragraph 7: "Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar." Reading those paragraphs all together I have no doubt that the county court judge had power to make the order which he has made in this award. The appeal must therefore be dismissed, but as the question which has been raised is one which does not in any way concern the respondents, it will be dismissed without costs.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the applicant, *Riddell, Vaizey, & Smith*, for *Walter Morgan, Bruce, & Co.*, Pontypridd.

Solicitors for the respondents, *H. P. Becher*, for *Simons & Sons*, Pontypridd.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

## High Court of Justice.

Chan. Div.
Stirling, J. April 4; May 1.

*In re* WESTON.
DAVIES v. TAGART. (a.)

*Bankruptcy—Separation deed—Assignee in bankruptcy of husband—Default in payment of annuity—Trustees' right to retain trust property—Deed for valuable consideration.*

*Where a husband has become bankrupt, the trustees of a separation deed are entitled, as against the assignee in bankruptcy of the husband, to retain the trust property until the amount payable under the husband's covenant under the deed is satisfied.*

*Where husband and wife live apart pursuant to a separation deed, such deed is for valuable consideration.*

This was an originating summons by the sole surviving trustee of a separation deed, dated the 1st of September, 1864, made between Edward Weston of the first part, Ann Weston his wife of the second part, and trustees of the third part; it asked for the determination of questions which had arisen as to the

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

interests of persons claiming to be entitled to the property, subject to the trusts of the indenture.

The deed contained a recital that unhappy differences had arisen and were subsisting between Edward Weston and Ann Weston, and by reason of the same they had agreed to live separate and apart from each other, and that Edward Weston had agreed to make such provision and settlement, and enter into such covenants as were thereinafter contained; and in pursuance and performance of such agreement Edward Weston assigned to the trustees certain leasehold property upon trust to pay the rents to Ann Weston during her life for her separate use (subject to the discontinuance of the same as afterwards mentioned), and after her decease upon trust for sale and payment of the net proceeds to such one or more of them Walter Weston and Annie Weston, two of the children of Edward and Ann Weston, as should be living at the death of the latter, and if more than one in equal shares; but if neither should be then living, then the net proceeds were to be in trust for Edward Weston, his executors, administrators, and assigns absolutely. Edward Weston covenanted with the trustees for himself, his heirs, executors, and administrators, in case the rents of the leaseholds should not amount to £300 a year, to make up the wife's income to that amount.

The deed contained a proviso for determination in case Ann Weston should return or attempt to return to cohabitation. The deed contained a covenant by E. Weston that Ann Weston should be allowed to live apart from him. There was no covenant by Ann Weston or by anyone on her behalf.

On the 26th of May, 1868, Edward Weston was adjudicated a bankrupt. The trustees of the deed proved in the bankruptcy for the arrears due down to the bankruptcy under the covenant; it was admitted in argument that under the law of bankruptcy as it then stood no further proof could be carried in, and that the order of discharge did not free the bankrupt from the obligations under his covenant.

Ann Weston died on the 6th of May, 1899, having survived the two children named in the deed. She made a will of which the applicant and the respondent W. Tagart were the executors. The other respondent was the assignee in the bankruptcy of Edward Weston, who was himself also now deceased.

Edward Weston failed after his bankruptcy to perform the covenant on his part to make up the income of Ann Weston to £300, and a large sum was due from him under that covenant.

Part of the leasehold property was taken compulsorily by the London School Board, and the purchase-money had been invested in £1,862 11s. 10d. South Australian Stock. The rest of the property remained in the same state as at the date of the settlement.

The trustee in bankruptcy claimed to have the property subject to the trusts of the settlement transferred to him: the defendant Tagart claimed that the trustees ought not to make such transfer until the liability of Edward Weston under his covenant in the deed was satisfied.

*Eustace Smith*, for the trustee of the separation deed and one of the executors of Mrs. Weston.

*Jenkins, Q.C.*, and *Martelli*, for the other executor.

*Upjohn, Q.C.*, and *Whinney*, for the assignee in bankruptcy.

STIRLING, J., after stating the facts, said it was admitted in argument that the trustee in the bankruptcy was in no better position than Edward Weston would have been if he were now claiming the property.

The contention on behalf of the trustees is, that Weston's right to the property subject to the trusts of the deed was equitable only and was derived under the deed; and that he could not claim in a court of equity any benefit under the deed without fulfilling his obligations under the same instrument, one of which is to pay what is due under his covenant.

Assuming for the moment that the title of Weston is derived under the deed, I shall first consider whether the rest of the contention is well founded.

In *Priddy* v. *Rose*, 3 Mer. 86, by a settlement made on the marriage of Mr. and Mrs. Hunt, two sums of money, the property of the wife, were assigned to trustees; the husband covenanted with the same trustees to pay to them a sum of £4,000; under the trusts, the husband took a first life interest both in his wife's property and in the investments of the £4,000. The husband afterwards absconded without having paid the £4,000 in accordance with the covenant: it was held that the trustees were entitled to retain the income of the wife's property towards satisfaction of the covenant. Grant, M.R., says: "I apprehend it to be clear that he" (Hunt) "could not have claimed a benefit under the settlement without making good his part of it." In that case the fund of which the income was impounded was derived from the wife, the defaulter was the husband. In *Smith* v. *Smith* (1835), 1 Y. & C. Ex. 338, the husband in contemplation of marriage executed in favour of the trustees of his marriage settlement a bond and also a mortgage of real estate by way of security for £15,000 to be held upon trusts under which he took the first life interest. He failed to pay the £15,000 in accordance with the bond; the mortgage was realized and produced less than £15,000; it was held that the trustees were entitled to retain the income arising from the investment of the purchase-money until the whole of the £15,000 should be made good.

*Burridge* v. *Row* (1842), 1 Y. & C. Ch. Cas. 183, was also a case of a marriage settlement. The trust property consisted of two sums of £5,000, one secured by the covenant of the husband and policies of assurance on his life, the other by the bond of the father-in-law. The trusts of the former were for the wife for life, with remainder to the husband for life, with an ultimate remainder in default of children of the marriage (which event happened) for the husband, his executors, administrators, and assigns. The husband became bankrupt, and the father-in-law purchased the husband's interest in the £5,000 coming from his son-in-law, and afterwards himself became bankrupt. It was held that the assignee in the bankruptcy of the father-in-law could not take any interest in the fund, which had arisen from the policies brought into settlement by the husband without satisfying what was due under the father-in-law's bond.

These cases have been followed in many others, among which I may mention one in the Court of Appeal in Ireland, *Corr* v. *Corr*, 3 L. R. Ir. 435, 28 W. R. Dig. 196.

Various reasons were urged why the right claimed by the trustees should not have effect given to it in the present case. In the first place it was said that whereas these cases are all decided upon marriage settlements, the separation here in question contains no covenants by or on behalf of the wife, and must be treated as voluntary. On this I may remark that it is nowhere laid down that the right does not exist in favour of the trustees of a voluntary settlement, which has been so completed as to be enforceable by the court. It exists in the case of trusts arising under

a will, provided these are equitable and not legal: see *Fox* v. *Buckley*, 25 W. R. 170, 3 Ch. D. 508. It extends even to legal estates, provided the right arises by virtue of a contract contained in the instrument creating the legal estate, or another instrument forming part of the same transaction: see *Woodyatt* v. *Gresley*, 8 Sim. 180; *Fox* v. *Buckley*. It is not, however, necessary to express a concluded opinion on this point, because, in my judgment, the separation deed was not voluntary. It contains a recital that the husband and wife had agreed to live separate, and that recital is evidence of the existence of such an agreement. By such an agreement a married woman can bind herself: see *Besant* v. *Wood*, 12 Ch. D. 605, 27 W. R. Dig. 95; *Clark* v. *Clark*, 33 W. R. 405, 10 P. D. 188; *Aldridge* v. *Aldridge*, 37 W. R. 240, 13 P. D. 210. The husband and wife did from the execution of the deed live apart; and consequently the husband received the full consideration for the assignment and covenant on his part contained in the deed. He cannot be heard to say that the deed was not executed for value.

It was, however, urged that in *Woodyatt* v. *Gresley*, and also in most, if not all, of the cases on marriage settlements, property was brought into settlement on the part of the wife, and it was argued that this was necessary. I fail to see why this should be so. If it is once made out that the deed is given for valuable consideration, the *quantum* of it is immaterial: see *Gravely* v. *Barnard*, 22 W. R. 891, L. R. 18 Eq. 518. It was also urged that the right only applied where there was a fund in the hands of the trustees on the one hand, and a debt due to them on the other. In this case the leaseholds ought to be conveyed on the death of the widow so that under the settlement there would be such a fund in the hands of the trustees.

It was said that in the events which happened E. Weston had become the sole owner in equity and was entitled to require the trustees to convey to him. No doubt he might elect to take the property in specie, so long as he did not thereby derogate from the rights of others, but I apprehend that a court of equity would not allow him so to elect to the prejudice of another. In truth, however, the right in its strictest form appears to me to be wider than is asserted on behalf of the trustee in bankruptcy: it is that a person entitled to property legally vested in trustees cannot compel those trustees to hand over the property to him until he has satisfied a debt due to those trustees and arising under the instrument which creates the trust. This is shown by the form of the order made in *Burridge* v. *Row* and *Corr* v. *Corr*.

It was, however, contended that though Edward Weston's interest was equitable he did not derive it under the separation deed, and for this *Hallett* v. *Hallett*, 28 W. R. 621, 13 Ch. D. 232, was relied on.

That case is entirely distinguishable; the bonuses there in question were in terms excluded from the operation of the deed; here the deed contains an express trust in favour of Edward Weston. The settlor having executed the deed could not, in my opinion, disclaim the benefits under it (see *Standing* v. *Bowring*, 34 W. R. 204, 31 Ch. D. 282), and the express trust excludes any implied or resulting trust. This appears to be in accordance with the decision in *Burridge* v. *Row*. In my judgment, therefore, the trustees are entitled to retain the trust property until the arrears due under the covenant are satisfied. There will be a declaration that the trustees of the indenture of the 1st of September, 1864, are entitled, as against the defendant, Herbert Kelly as assignee in bankruptcy of the late Edward Weston, to retain the property now subject to the trusts of the said indenture until the amount payable to the said trustee under the covenant of the said Edward Weston therein contained shall be satisfied, and that the defendant, the said assignee, without making good such amount, is not entitled to claim the said property or any part thereof.

Solicitors, *Poole & Robinson; Surtees & Surtees.*

---

Chan. Div.
Cozens-Hardy, J. } Feb. 27; March 9.

GARDNER *v.* HODGSON'S KINGSTON BREWERIES CO. (*a.*)

*Easement—Payment of rent—Uninterrupted enjoyment of over forty years—Parol licence—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 2.

*Where a licence to use a way across a yard was given by parol more than forty years before action brought, and where such licence was subject to the payment of an annual rent,*

*Held, that, in the absence of any proof of a "consent or agreement expressly given or made for that purpose by deed or writing," the uninterrupted enjoyment of the easement for over forty years gave an absolute and indefeasible right to the use of the way.*

The plaintiff in this action was Cordelia Gardner. Under her father's will she was entitled as trustee to a freehold messuage and premises at No. 206, High-street, Sutton. These consisted of a shop, wherein a saddler's business had been carrried on for eighty-nine years, a yard, a stable and other outbuildings at the rear, which had been used as a livery stable for a like period.

The only access to these premises was through a gateway from the plaintiff's yard opening into the yard of an adjoining public-house, called the Red Lion Inn, and thence into High-street. The right of way to the yard at the back of the house had been openly and regularly enjoyed without interruption during the whole period of eighty-nine years.

The defendants were the owners of the Red Lion Inn and of the yard in rear of it.

The plaintiff now claimed a declaration that she was entitled to a right of way from the backyard of her premises to a pump in the yard of the Red Lion Inn, and to take water from the pump; and also to a right of way for carts and horses to and from High-street through the Red Lion yard. The defendants did not contest the plaintiff's rights as far as the pump and the way to it were concerned, but they denied the existence of a right of way from High-street across the yard of the inn. The defendants alleged that a sum of 15s. a year by way of rent was paid by the plaintiffs for the exercise of the right of passing to and from the yard. The plaintiff denied this, and asserted that the money was paid for the repair of the road. It was not denied by the plaintiff that this payment had been made since 1855.

On the 31st of March, 1898, the defendants served notice in writing upon the plaintiff requiring her to give up the use of the yard of the Red Lion and to close the gate.

*Micklem, Q.C.*, and *E. S. Ford*, for the plaintiff, contended that the plaintiff had acquired a good title to the use of the yard under the second portion of section 2 of the Prescription Act, 1832, seeing that the user of the yard for more than forty years was admitted. It was true that payment had been made, but payment is not "an interruption" within the meaning of the Act: *Plasterers' Co.* v. *Parish Clerks'*

(*a.*) Reported by J. H. DAVISTER-at-Law.

*Co.*, 6 Ex. Ch. 630. The enjoyment mentioned in the second portion of the section as "so enjoyed as aforesaid" need not be "as of right," but only "without interruption": *Dalton* v. *Angus*, 30 W. R. 191, 6 App. Cas. 740. In this case the enjoyment was "as of right": *Kinloch* v. *Nevile*, 6 M. & W. 795; *Tickle* v. *Brown*, 4 A. & E. 369; *Bewley* v. *Atkinson*, 27 W. R. 452 28 *ib.* 638, 13 Ch. D. 283.

*Hon. E. Macnaghten, Q.C.*, and *G. Cave*, for the defendants.—The payment of the 15s. a year was in respect of rent. The user was not therefore enjoyed "as of right": *Chamber Colliery Co.* v. *Hopwood*, 32 Ch. D. 549, 35 W. R. Dig. 76; *Monmouthshire Canal Co.* v. *Harford*, 1 Cr. M. & R. 614; *Beasley* v. *Clarke*, 2 Bing. N. C. 705; *Tone* v. *Preston*, 32 W. R. 166, 24 Ch. D. 739.

*Micklem, Q.C.*, replied.

COZENS-HARDY, J., stated the facts and then proceeded: Upon these facts I think the inference I ought to draw is that a licence or permission to use this way across the yard was given by parol more than forty years before action brought, and that such licence was not gratuitous but was subject to the payment of 15s. a year. I do not find that there was any fresh application for permission during the currency of the forty years, or anything to suggest a change in the original arrangement when first the licence by parol was granted. In these circumstances it is asserted by the plaintiff and denied by the defendants that a right has been acquired under section 2 of the Prescription Act. It is necessary to consider carefully the language of the Prescription Act, and it will be convenient first to attempt to construe it without reference to the authorities. [His lordship, after reading section 2 of the Prescription Act, 1832, continued:] The effect of this section seems to be this. There must be actual enjoyment for twenty years "without interruption," which is defined in section 4.

It is not necessary that "any person claiming right thereto" should during the whole period have claimed to be legally entitled against the owner of the servient tenement. An easement within section 2 which has been actually enjoyed without interruption during the prescribed period without any shred or tittle of justification is rendered valid; there is, however, a difference between uninterrupted enjoyment for twenty years and for forty years. The former is only *primâ facie* evidence of the title of the owner of the dominant tenement, and his title may be defeated in any other way by which in 1832 it was liable to be defeated. Proof of a consent or agreement, whether by parol or in writing, will suffice to defeat the title. But uninterrupted enjoyment for forty years is absolute and conclusive evidence of title with one exception only—namely, if the owner of the servient tenement can establish that the enjoyment was "by some consent or agreement expressly given or made for that purpose by deed or writing." A parol agreement will not suffice. [His lordship then read and considered the effect of section 5 of the Act, which relates to pleading, and was not, in his opinion, material to the present case.] In the present case there has been actual uninterrupted enjoyment for more than forty years under a parol licence, and, according to the construction, which, apart from authorities, I should adopt, that establishes the plaintiff's right to the easement.

It remains to consider whether this view is consistent with the authorities by which I am bound. In the cases of *Bright* v. *Walker*, 1 Cr. M. & R. 211, and *Monmouthshire Canal Co.* v. *Harford* a somewhat narrow construction was put on the Act. If, however, they mean that the Act only applies where, during the whole of the prescribed period the enjoyment was, apart from the Act, rightful, they cannot now be regarded as good law. In *Tickle* v. *Brown* a more liberal construction was put upon the Act, and it was decided that evidence of an application for leave, within the forty years, was admissible evidence to negative the enjoyment for forty years. *Beasley* v. *Clarke* and *Kinloch* v. *Nevile* are both consistent with the decision in *Tickle* v. *Brown*. In *Warburton* v. *Parke*, 2 H. & N. 64, 5 W. R. Dig. 224, Bramwell, B., pointed out that the proviso at the end of section 2 "supposes there may be an enjoyment as of right though by consent or agreement." This seems tersely to affirm the view which I have expressed. Lastly, in the well-known case of *Dalton* v. *Angus*, Lord Selborne says: "It is undoubtedly true that under the 2nd section there is an important difference between a forty years' and a twenty years' user. Forty years' user has the same effect which (under the 3rd section) twenty years' user has as to light; it makes the right absolute and indefeasible, unless it is shown to have been enjoyed by consent or agreement in writing."

The above authorities seem to me to lay down that actual uninterrupted enjoyment of a way for forty years suffices to establish the easement; unless it can be shown to have been enjoyed under some written consent or agreement. And, further, that a parol licence is of no moment, unless it was applied for and granted within the period of forty years, in which case it may probably be used to negative the enjoyment of the easement for forty years. This principle must, in my judgment, apply whether the parol licence is gratuitous or for a consideration. The continued payment of an annual sum is attributable, as in *Bewley* v. *Atkinson*, to the original parol agreement or licence given more than forty years ago, and is not evidence of a fresh application each year for a fresh licence. Although I prefer to base my judgment on the Prescription Act, I wish to add that I think this is a case in which, if necessary, a lost grant ought to be presumed of the right to the pump and of the right of way through the yard, and any requisite amendment to the pleadings ought to be allowed. Such a grant might be subject to payment of 15s. a year. This nominal payment is of no real importance to either party. The only substantial question is as to the existence of this right of way, which is vital to the enjoyment of the plaintiff's property. The result is that, in my opinion, the plaintiff is entitled to the relief claimed, and I must make the declaration and grant the injunction asked.

Solicitors for the plaintiff, *Spencer, Gibson, & Co.*

Solicitors for the defendants, *Lovell & Broad.*

---

Q. B. Div.
(Bigham and Phillimore, JJ.) April 3.

CANNAN v. EARL OF ABINGDON. (a.)

*Bicycle—Tolls—Toll bridge—Toll on "cart, car, or other carriage whatsoever"—Liability of bicycles and tricycles as carriages—7 Geo. 3, c. lxiii.*

*A statute imposed certain tolls in favour of the owner of a certain bridge for passage over the bridge in respect of "every coach, . . . cart, car, or other carriage what-*

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

*soever," with four wheels, the sum of 4d., and with less than four wheels, the sum of 2d.*

*Held, that bicycles and tricycles are "carriages" within the meaning of the above statute, and are liable under the terms of the statute to the toll of 2d each on passing over the bridge.*

Special case stated for the opinion of the court by consent of the parties pursuant to the order of a master.

In pursuance of an Act passed in the seventh year of the reign of King George III. (c. lxiii.), intituled "An Act for building a bridge across the River Thames from Swynford in the county of Berks to Eynsham in the county of Oxford," the Earl of Abingdon, the defendant's predecessor in title, erected the bridge now known as Swinford Bridge in the highway leading from Oxford to Cheltenham in lieu of an ancient ferry across the river of which he was the owner and proprietor.

By this Act it was—amongst other things—enacted as follows: "For and in consideration of the great charges that the said Earl of Abingdon, his heirs and assigns, will be obliged to defray in erecting the said bridge, and repairing and supporting the same, and also the loss which he and they will sustain by the ceasing of the tolls of the said ferry, the said bridge when built shall be and is hereby vested in the said Earl of Abingdon, his heirs and assigns, for ever, and it shall and may be lawful to and for the said Earl of Abingdon, his heir and assigns, from time to time, and at all times hereafter, to erect, or cause to be erected, a gate or gates, turnpike or turnpikes, and also a toll-house or toll-houses at, near, or upon the said bridge, and there to ask, demand, receive, recover, and take . . . before any passage over the said bridge shall be permitted, the several sums following, that is to say—For every coach, chariot, berlin, hearse, chaise, chair, calash, waggon, wain, dray, cart, car, or other carriage whatsoever with four wheels, the sum of fourpence, and with less than four wheels the sum of twopence; which said respective sums of money shall be demanded and taken in the name of pontage, or as a toll or duty . . . and the said Earl of Abingdon, his heirs and assigns, shall and may deny and refuse to permit any passage over the said bridge until payment thereof. . . . Provided always that no toll shall be taken for the driver of any coach, cart, or other carriage aforesaid drawn by horses or other cattle, or for any person or persons riding in and *bonâ fide* belonging to the same, but all and every person and persons not *bonâ fide* belonging to such coach, cart, or other carriage, as aforesaid, shall be liable to pay the same tolls and duties as if he, she, or they were passing on foot."

The defendant was the owner of the bridge and entitled to take the aforesaid tolls.

On four several occasions on the 3rd of December, 1898, the plaintiff, who was a member of the council or committee of the Cyclists' Touring Club, passed over the bridge. On one occasion he was riding on a bicycle without any luggage or luggage carrier. On another occasion he was riding on a bicycle having a valise or bag fitted to its frame for carrying luggage. On another occasion he was riding on a tricycle without any luggage or luggage carrier. And on another occasion he was riding on a "tradesman's tricycle," having a box fitted to its frame for conveying goods.

On the 17th of December, 1898, the plaintiff again passed over the bridge. He was then riding on a tricycle having a wicker chair fitted to its frame, commonly known as a "bath-chair tricycle," in which another person was seated.

On each of the five occasions the defendant's servant (the keeper of the toll-gate on the bridge) refused to allow the plaintiff to pass over the bridge without payment of the sum of twopence as a toll, and the plaintiff paid that sum to the keeper on each of such occasions under protest in order to obtain passage over the bridge; and he then brought the present action to recover back the sums he had so paid for passing over the bridge.

The plaintiff contended that the Act did not authorize the defendant to charge him any toll on any of the first three occasions, or in the alternative that it did not authorize the defendant to charge him with a greater toll than the sum of one halfpenny (the toll for a foot passenger) on any of those occasions.

The plaintiff also contended that the Act did not authorize the defendant to charge him any toll on either the fourth or fifth occasion, or in the alternative that it did not authorize a greater toll than the sum of one halfpenny on the fourth occasion, or than the sum of one penny on the last occasion.

The defendant contended that all the bicycles and tricycles were chairs, cars, or carriages within the meaning of the Act, and were respectively liable to the toll of twopence.

The questions for the opinion of the court were with what tolls, if any, was the defendant entitled to charge the plaintiff by virtue of the Act when riding over the bridge in manner above set forth—(*a*) On a bicycle without any luggage or luggage carrier; (*b*) on a bicycle having a valise or bag fitted to its frame for carrying luggage; (*c*) on a tricycle without any luggage or luggage carrier; (*d*) on a tradesmen's tricycle having a box fitted to its frame for carrying goods; (*e*) on a bath-chair tricycle in which another person was seated.

Judgment was to be entered for the plaintiff or defendant according to the answers of the court to the above questions.

*Alexander Glen* (*Macmorran, Q.C.*, with him), for the plaintiff.—Tolls were not payable on any one of the five occasions. Bicycles and tricycles are not "carriages," and are not within the Act at all. The tolls under the Act are clearly not exhaustive; it was not intended that everything or everybody should pay toll; for instance, a man passing over on a camel would not be liable, and there many animals which are not included. The words "or other carriage whatsoever" must be construed *ejusdem generis* with the things previously specified, and bicycles or tricycles are not *ejusdem generis* with the things already specified, such as coaches, cars, carts, &c. The things that come within the Act are wheeled carriages, and such things as bicycles were never contemplated when this Act was passed. The case is really a *casus omissus* in the Act. The authorities on the point show that when we have in a statute certain specified kinds of carriages, followed by the general words "other carriage whatsoever," then these latter words are to be construed *ejusdem generis* with the previous things: *Taylor* v. *Goodwin*, 27 W. R. 489, 4 Q. B. D. 228; *Williams* v. *Ellis*, 28 W. R. 416, 5 Q. B. D. 175; *Hatton* v. *Treeby*, 46 W. R. 6, [1897] 2 Q. B. 452; *Plymouth, &c., Tramways Co.* v. *General Tolls Co.*, 14 Times L. R. 531. At the very utmost the plaintiff would be liable as a foot passenger.

*A. B. Shaw*, for the defendant, was stopped.

BIGHAM, J.—I think that all the things enumerated in the questions put to us are within the meaning of this particular Act of Parliament, carriages with less than four wheels, and that, therefore, they are liable to pay a toll of twopence. The framers of the Act, of course, never contemplated anything in the nature of bicycles; but the Legislature has, I think, used words which do cover those things like bicycles which have

come into existence since the Act was passed. The bicycle is a thing that carries; it may carry a man as a horse or a carriage does, or it may carry luggage as the tradesmen's tricycles do. It is therefore, in my opinion, a carriage; and being a carriage it is made by the terms of this Act liable to pay the toll. I do not think any distinction ought to be made between the different classes mentioned in the case. It seems to me that they are all equally liable to pay the toll in question.

PHILLIMORE, J.—I am of the same opinion. I think that in this case, as in the *Plymouth case*, the intention was that all vehicles should pay toll, and I think that the bicycle is a vehicle or is a carriage. Any mechanical contrivance which carries weights or people over the ground, taking the weights off the ground or the people off their feet so that the feet and body of the man do not support either the man himself or the burden he is bearing, is a carriage; and I do not think it matters that the man himself who is carried gives his own propulsion to the carriage. I think that it makes no difference that in fact he uses his feet for the purpose of pedalling, and that in this way he propels himself by a different operation to that of walking or running, in which cases he bears his own weight at the same time that he moves himself. Therefore I think that a bicycle is a carriage. I conceive that it is impossible to say that the two last things are not carriages. Even if I thought that a bicycle itself was not a carriage when carrying a man, I should scruple very much in saying that a bicycle when carrying luggage was not a carriage. However, all these difficulties are avoided by our saying that a bicycle is a carriage for all these purposes.

*Judgment for the defendant, with costs.*

Solicitor for the plaintiff, *Leslie J. Williams.*

Solicitors for the defendant, *Witham, Roskell, Munster, & Weld.*

---

Q. B. Div.
(Ridley and Darling, JJ.) April 2.

BUXTON LIME FIRMS CO. (LIMITED) (*Appellants*) v. JAMES HOWE (*Respondent*). (*a*.)

*Master and servant—Dispute—Summons to recover fine—Employers and Workmen Act,* 1875—*Truck Act,* 1896, *s.* 1, *sub-section* 2 (b).

*By a contract of service in writing the appellants were to be entitled to deduct* 2*s.* 6*d. from the wages of the workman for each day he was absent without leave.*

*The respondent having so absented himself for two days,*

*Held, that, whether the contract was good or bad under the Truck Act,* 1896, *the justices should have proceeded to hear and determine on its merits a summons taken out by the appellants under the Employers and Workmen Act,* 1875, *to recover from the respondent* 5*s. as "a fine or penalty, or alternatively, by way of damages for such abstention," and that the justices were in error in holding that the appellants had lost their right to sue under the Act of* 1875 *by reason of the fact that the Truck Act of* 1896 *ousted the jurisdiction of the justices to determine disputes under the Act of* 1875 *in all cases where the contract in question fell within its provisions.*

Special case stated by justices of the peace of the Bakewell division of the county of Derby.

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

On the 2nd of January, 1899, the respondent, James Howe, entered into the service of the appellants, and was employed by them under an agreement of that date signed by him, and by William Brierley on behalf of the company.

By the terms of the agreement the respondent agreed to serve the company exclusively for twelve calendar months from the 1st of January, 1899, until the 31st of December, in the work of getting limestone and breaking it to the required size. The agreement contained a clause that the workman should be "subject to a fine, or penalty, or drawback of 2s. 6d. for each and every working day on which he was absent without leave, except in case of sickness."

The company agreed to pay the workman, on the usual fortnightly pay days, the sum of 7¼d. for every 2,240lbs. of limestone got and properly loaded into the company's wagons, and the agreement concluded "in the event of the breach of any of the conditions of this agreement on the part of the workman then, and in every such case, it shall be lawful for the company to dismiss the workman without any notice or without being liable to make any payment by way of damages or otherwise for dismissal without notice, but all wages earned shall be paid up to the time of such dismissal less any amount then due for fines, penalties, or drawbacks for absence as aforesaid, should the company insist thereon."

A notice setting out the terms of the contract as to absence without leave and the penalties therefor, was posted up in the cabin where the respondent had his meals.

On the 13th of September, 1899, the respondent applied for leave of absence from his work on the 14th, 15th, and 16th of September, and leave was granted for the first and refused for the other two days.

On hearing that leave on the 15th and 16th was refused, the respondent said he should take French leave, and he absented himself without permission on the days in question. By reason of his absence the company sustained a greater loss than 2s. 6d. for each day he was absent.

The respondent after this continued in the employment of the appellants, and received wages from them, but no demand was made upon him for any penalties under the agreement for absenting himself from his employment, or for damages consequent thereon, until he received the particulars of claim attached to the summons to appear before the magistrates.

The company preferred their claim under the Employers and Workmen Act, 1875, and claimed 5s. as a fine or penalty, or alternatively by way of damages, from the respondent for having absented himself from his work on the 15th and 16th of September, 1899, being at the rate of 2s. 6d. a day.

It was contended on behalf of the respondent before the magistrates that the agreement brought the case within the Truck Act, 1896—that Act provided, under section 1, sub-section 2, clause (*b*), that the giving of particulars in writing was to be a condition precedent to the levying of a fine or penalty such as was claimed—that the appellants had their remedy for the respondent's misconduct in their own hands by deducting the penalties from his wages as provided by the agreement; and that their only remedy was by so deducting the amount claimed after complying with the requirements of the Truck Act.

For the appellants it was argued that the case was not governed by the Truck Act, but that if it were the service of the claim in the form of particulars attached to the justices' summons was sufficient notice under the Act, and that the deduction from

the respondent's wages was not obligatory. The justices held that the appellants by their agreement with the respondent had the remedy for the offence in their own hands, and that their proper course was to have deducted the penalty from the next payment of wages as they had done in similar cases; that the agreement came within the Truck Act and that the proceedings to recover a penalty under it could only be brought after a strict compliance with the terms of that Act; that, in their opinion, section 1, sub-section 2 (*b*), of the Truck Act, 1896, had not been complied with, and that the particulars of claim attached to the summons was not a compliance with the Act, and they, therefore, dismissed the summons.

The question for the court was whether the justices were right in dismissing the summons on those grounds; if they were wrong their order was to be quashed and the case was to be remitted to them.

*Hextall*, for the appellants.

*H. Jacobs*, for the respondent.

RIDLEY, J.—I think in this case that the justices have come to a wrong decision. To decide it one must bear in mind that the Employers and Workmen Act, 1875, was passed by the Legislature expressly to give a court of summary jurisdiction the power to determine disputes between employers and workmen, and that it was under that Act that the summons in the present case was taken out. The Truck Act, 1896, contains certain provisions as to contracts made between employers and workmen which contain any agreement under which deductions are to be made from the wages to be paid, and requires that certain forms must be complied with; the terms of the contract must be contained in a notice, and that notice must be put in some place open to the workmen. And there are other conditions, all of which, so far as material, seem to me in substance to have been complied with in this case. By section 1 (2) the employer is not to make any deduction unless the deduction is made in accordance with the terms of the contract, and unless particulars were put in writing and given to the workman. Now both those conditions have been complied with here, and the justices appear to have thought that because the Truck Act of 1896 contained these provisions, it ousted the jurisdiction of magistrates to determine disputes in all cases where the contract in question fell within the Truck Act. In other words, they seem to have thought that employers and workmen must make use of the Truck Act to decide all disputes that arose out of contracts which provided for a deduction in wages; and if they did not comply with the provisions of that Act then they were without a remedy and no deduction could legally be made. To put such a construction on the scope of the Act it would be necessary to read into its provisions a good deal that is not there. For example, the word "receive" in this sub-section must be read as "receiver." In my opinion the Legislature never intended this Act of 1896 to interfere with the powers in these matters given to magistrates by the Act of 1875. If that had been intended some provision to that effect would have been found in the Truck Act. It might be that the agreement came within the Act, but it does not follow that proceedings to recover the penalty could only be taken when the contract complied with the requirements of the Act. The magistrates went on to find that under section 1, sub-section 2 (*b*), particulars had not been delivered to the workman and therefore under the Truck Act the claim could not be maintained. With that conclusion I do not agree as I think there was a notice given to the workmen. Then it was argued that damages could not be recovered because penalties were provided for in the agreement itself. I am not sure of that, but I do not wish to decide if that is or is not the proper view to take of that part of the Act. I think the matter must be sent back to the magistrates for them to determine it on its merits under the Employers and Workmen Act, 1875.

DARLING, J.—I am of the same opinion. Here the employers and workmen entered into a contract for the payment of a fine or penalty or for the making of a deduction, and therefore the contract would be bad in law if it did not comply with the provisions of the Truck Act, 1896. And it is not disputed that the employers could have deducted 5s. when the wages were paid. But, instead, they thought fit to proceed before the magistrates under the Act of 1875 to recover that amount as a fine or penalty, or alternatively, by way of damages for such abstention.

It was argued that because that was a penalty under the Truck Act it could not be recovered before the magistrate by means of that summons. In my judgment this was a good contract under the Truck Act. Section 1, sub-section 2, of the Act says "that an employer shall not make any such deduction"—he does not make any deduction, so that does not apply—"or receive any such payment." It was argued that if he proceeded before the magistrates and got judgment in his favour and received the proceeds, he was receiving a payment and must comply with sub-section 2 of section 1, which prevents him from recovering "unless particulars in writing . . . are supplied to the workman." Such an argument cannot avail the present appellants, for the statute provides that particulars are to be given when payment is made, and therefore it seems to me that the requirements of the statute would be satisfied if particulars were given even after the justices had given their decision awarding the sum claimed. I think there are circumstances under which the master might well recover for loss occasioned by the wrongful absence of a workman at law, although there was no contract subsisting that gave the master a right in that case to impose a fine or make a deduction. But however that may be, it would not conclude this case, for here the summons is to recover unliquidated damages, and it was said that because a penalty was agreed upon, unless proceedings were taken to recover the penalty no right to recover damages remained. That is a view I do not accede to. The Truck Act does not deal with damages, and I fail to see either by means of the Truck Act or by the contract the master has given up his right to sue for any damages he has sustained by the conduct of this workman.

The magistrates, I think, were misled by not understanding that the Truck Act applies to the making of a good contract, and if the parties had made a bad contract, neither thereby would have lost his rights under the Employers and Workmen Act, 1875.

For these reasons I agree that the case should go back to be tried on its merits under the earlier Act.

Solicitors for the appellants, *Cree & Son*, for *Sidney Taylor*, Buxton.

Solicitors for the respondent, *Steadman & Van Praagh*, for *Arthur Neal*, Sheffield.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Grantham and Phillimore, JJ.) March 27, 28.

REG. v. GRAY. (a.)

*Contempt of court—Abuse of judge in his conduct as judge—Power to punish on summary process.*

*The publication in a newspaper, after the conclusion of a trial in court, of an article containing scurrilous abuse of the judge in his character of judge in the hearing of the case, is a contempt of court which may be punished by the court on summary process.*

Order made by a Divisional Court that Thomas Lancaster do attend the court to answer for contempt of court committed by him on the 16th of March, by publishing in a certain newspaper styled the Birmingham *Daily Argus*, an article headed "A Defender of Decency."

The proceedings were originally taken against Thomas Lancaster, the printer and publisher of the newspaper, but it appeared from the affidavits that he was at the time in question, and still is, abroad, and Howard Alexander Gray, the editor of the newspaper and the writer of the article, now appeared and assumed the whole responsibility for the article; and he appeared in obedience to the order and submitted himself to the jurisdiction of the court.

The facts were as follows:

The Birmingham Spring Assizes began on the 13th of March, 1900; and on Thursday, the 15th of March, a man named Wells was to be tried in the Crown Court at Birmingham, in which Darling, J., was the presiding judge, for unlawfully and indecently publishing and uttering certain obscene and filthy words, and for unlawfully publishing and selling an obscene libel contained in a book. Before the case of Wells was commenced Darling, J., addressed some observations to the reporters in court as to their not reporting any details of the case that might be of an indecent nature. The learned judge said: "Before this case of Wells is gone into, I wish to say a word for the benefit of the press. This is a case which, whatever may be the rights of it, is bound to involve the giving in evidence or the discussion of matters which it would be wholly inexpedient to have published in anything like detail. . . . However I will say this one word in case any newspaper should be inclined not to act upon the advice I now give them, and it is this. Although a newspaper has the right to publish accounts of proceedings in a law court, and although for many purposes they are protected in doing so, there is absolutely no protection to a newspaper for the publishing of objectionable, indecent, and obscene matter, and any newspaper which does so may be as easily prosecuted as anybody else, and if I find my advice disregarded I shall make it my business to see that the law is in that respect enforced."

Wells was tried on the 15th of March; his trial was concluded on that day and he was convicted and sentence had been passed upon him. After the conclusion of the trial, and whilst the Birmingham Assizes were still going on and Darling, J., was still sitting as one of the judges of assize, the defendant wrote and published in the Birmingham *Daily Argus*, of which paper he was editor, an article headed "A Defender of Decency," referring to the observations made by the judge before the trial of Wells. This article was described by Lord Russell, C.J., in his judgment, as a personal scurrilous abuse of the judge as a judge.

An affidavit was filed on behalf of the defendant (Gray) in which he expressed his sincere regret for the terms in which he had referred to the learned judge, and apologized to the court and to the judge for the same. The concluding portion of his affidavit is set out in the judgment.

*Sir Richard Webster, A.G.* (*H. Sutton* with him), for the Public Prosecutor, argued that the publication by the defendant of this abusive language was a contempt of court, and that the procedure adopted—namely, by summary application or process, was the right one under the circumstances. [He was stopped by the court.]

*Hugo Young, Q.C.* (*Gilbertstone Tangye* with him), for the defendant, said that he did not take objection to the form of the procedure, but desired to deal with the case on its merits. The defendant had filed an affidavit expressing his regret for the language he had used, and he now did not wish to justify his language, but apologized to the court.

He referred to *Reg.* v. *Castro*, L. R. 9 Q. B. 219.

The defendant was ordered to appear before the court on the following morning.

March 28.—The judgment of the court was delivered by

Lord RUSSELL, C.J.—In this matter the Attorney-General on Friday last moved for a rule calling upon Thomas Lancaster to show cause why he should not be committed for contempt by reason of the publication of an article in a paper called the *Daily Argus*, published on the 16th of March. It then appeared that Thomas Lancaster was the printer and also the secretary and manager of a limited company which published at Birmingham the paper called the *Daily Argus*. Yesterday, when the matter again came before the court the Attorney-General informed the court, and an affidavit was referred to evidencing the fact, that Thomas Lancaster was abroad at the time at which the article in question appeared, and that he is still abroad. At the same time it was announced that Howard Alexander Gray was the editor and the writer and the person solely responsible for the appearance of the article of the 16th of March, which is impugned as a contempt of court. Howard Alexander Gray appears here in person and is represented by counsel, and submits himself to the judgment of the court. The court, therefore, is seised of this matter, and is now able to deal with it. The facts of the case are these. One Wells was indicted at the Birmingham Assizes for certain indecent publications. The case came to be tried before Darling, J., sitting under the Queen's Commission of Oyer and Terminer at Birmingham, and before the trial the learned judge thought it right to call public attention to the nature of the trial and to the character of the evidence which would be necessarily brought forward, evidence of various indecent matters very undesirable from every point of view for publication. The learned judge thought it right to warn all concerned, including the press at Birmingham, against the publication of any of those indecent details, taking care at the same time that his observations should not in any sense prejudge the matter to be tried, because he was careful to point out that although necessarily indecent matter was to be put in evidence, it did not follow that the publication of it under the circumstances in the actual case would not constitute a criminal offence. The learned judge proceeded, after giving this warning, to point out the means existing in point of law for the punishment of persons

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

who did publish any of the indecent matter which might be given in evidence. I do not think for one single instant that the learned judge meant thereby to insult the press of Birmingham. His warning may have been unnecessary; he may not have been aware of the fact which evidenced the good sense and the propriety of conduct of that press, that there was no publication of indecent details in this case during the preliminary proceedings before the magistrates and before the defendant was committed for trial. There is a popular, but erroneous impression, that there is impunity for the publication of any matter that transpires in a court of justice. The above facts having taken place upon the 15th of March, on the evening of the next day, and after the trial of the man Wells had taken place resulting in his conviction, the article in question was published. It was read yesterday, and I do not propose to read it again. Of its character there can be no question, and no one has described it in stronger language of condemnation than Howard Alexander Gray himself in the affidavit which he has filed. It is not too much to say that it is an article of scurrilous abuse of the judge in his character of judge; scurrilous abuse in reference to his conduct when acting under the Queen's Commission, and scurrilous abuse published in the town in which he was still sitting in discharge of the Queen's Commission. It cannot be doubted, and it has not been doubted or argued to the contrary, that it does constitute a contempt of court; but as these applications are happily of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of court, and what are the means which the law has placed at the disposal of the Judicature for checking and punishing contempt of court. Any act done, or writing published, calculated to bring the court or a judge of the court into contempt, or to lessen his authority, is a contempt of court. That is one class of contempt. Another class is any act done, or writing published, calculated to obstruct or interfere with the due course of justice or the lawful process of the court. That is another class of contempt. The former class belongs to that category which Lord Hardwicke characterized as "scandalizing the court or judge": *In re Read and Huggonson*, 2 Atk. 469. That description of that class is to be taken subject to one qualification, which is an important qualification. Judges and courts are alike open to criticism if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good. No court could or would treat that as contempt, and the courts would not be, and ought not to be, astute in such cases to criticize adversely what in such circumstances and with such an object is said; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. No one would, I think, suggest, and no one has here suggested, that this is not a contempt of court, and that it does not fall within the right of public criticism in the sense that I have described. I repeat that it is personal scurrilous abuse of the judge as a judge. We have therefore to deal with it as a case of contempt, and we have to deal with it *brevi manu*. This is not a new-fangled jurisdiction. It is a jurisdiction as old as the common law itself, of which it forms part; a jurisdiction the history, the purpose, and the extent of which are admirably treated in the opinion of Wilmot, C.J., then Wilmot, J., in the case of *Rex* v. *Almon* in his Opinions and Judgments, at p. 243. It is a jurisdiction, however, to be exercised with scrupulous care; to be exercised only when the case is clear beyond reasonable doubt, but if it is not a case beyond reasonable doubt, the courts ought to, and will, leave the Attorney-General to proceed by criminal information. How then are we to deal with this matter? That it is a serious case no one can doubt, and I do not hesitate to say, speaking for myself and for my brethren, that if it had not been for the conduct of the defendant since the publication, and especially if it had not been for the affidavit which he has put before the court for its consideration, we all think that it would have been our duty to have sent the defendant to prison for a not inconsiderable period of time. But he has come forward and frankly acknowledged his own individual and sole responsibility in the matter. He has done more; he has in his affidavit, we believe sincerely, expressed his regret for what he has done. In that affidavit he makes reference to the fact that other publications and other newspapers in Birmingham had made comments upon the conduct of the learned judge. In regard to that I have but to make this observation. So far as they have been at all adverted to they were obviously comments of a very different character. They are not before us, and we must assume that they are not before us because the Attorney-General in his discretion did not think that they were sufficiently serious to be called to the attention of the court in order that the punitive jurisdiction of the court should be exercised in regard to those responsible for their publication. After referring to this matter the defendant in his affidavit says that he wrote the article under a strong feeling that the learned judge had not in effect shown sufficient confidence in the judgment and good taste and discretion of the press in Birmingham; and he then proceeds: "That was the only motive present to my mind in writing the article, and I wrote it on the impulse of the moment. In doing so I used language referring to Mr. Justice Darling in terms which were intemperate, improper, ungentlemanly, and void of the respect due to his lordship's person and office. The expressions applied to Mr. Justice Darling were not deliberately intended to bring discredit upon his lordship, but were the outcome of my strong feeling. I know they cannot be justified, and I do not seek to justify them. I am entirely responsible for the article and for everything which it contains. I deeply regret the publication of the article and the inexcusable and insulting language in which it referred to one of her Majesty's judges, and I humbly apologize to his lordship and to the court for my conduct, which I now upon consideration see reflected not only upon the individual judge, but upon the bench of judges, and the administration of justice, and I submit myself to the merciful consideration of the court." Howard Alexander Gray, the judgment of the court is that you be fined £100 and a further sum of £25 for costs, and that you be detained, and, if necessary, lodged in Holloway Gaol until these sums be paid.

*Judgment accordingly.*

Solicitor for the Public Prosecutor, *The Solicitor to the Treasury.*

Solicitors for the defendant, *Pepper, Tangye, & Co.*, for *Pepper, Tangye, & Winterton*, Birmingham.

## Court of Appeal.

From Q. B. Div. (A. L. Smith, Collins, and Romer, L.JJ.) March 2.

DURANT & CO. v. ROBERTS AND KEIGHLEY, MAXSTED, & CO. (a.)

*Principal and agent — Undisclosed principal — Unauthorized agent — Ratification—Contract made by person in his own name on behalf of another without authority.*

*A contract made by a person in his own name, but intending to act for another in making it, though without authority from him, can be ratified by that other person, although the intending agent did not disclose at the time of making the contract that he was acting for someone else.*

*So held by the* Court of Appeal (Collins *and* Romer, L.JJ.; A. L. Smith, L.J., *dissenting*).

Application for a new trial of an action tried before Day, J., and a jury.

The action was brought by the sellers of wheat to recover damages from the purchasers for breach of contract in failing to take delivery.

The contract of purchase purported to be made with the plaintiffs by the defendant Roberts on his own account. Roberts had authority from the defendants, Keighley, Maxsted, & Co., to make a contract on their behalf, but in making the contract in question he exceeded their authority as to price. It appeared, however, that at the time when he made the contract he intended to apply to Keighley, Maxsted, & Co., to adopt the contract as their own, and that they subsequently expressed their willingness to adopt it.

The question was whether in law it was possible for Keighley, Maxsted, & Co. to ratify the contract made by Roberts.

Roberts having allowed judgment to go by default, the action proceeded against Keighley, Maxsted, & Co. Day, J., held that there could be no ratification by Keighley, Maxsted, & Co., and directed that a verdict and judgment should be entered for them.

The plaintiffs applied for a new trial.

*Robson, Q.C.*, and *Scrutton*, for the plaintiffs.

*Carver, Q.C.*, and *Danckwerts, Q.C.*, for the defendants.

*Cur. adv. vult.*

March 2.—A. L. SMITH, L.J., read the following judgment: The question in this case is whether a contract made by a principal with, what I will call, an unauthorized agent in the latter's name, which contract does not purport or profess to be made by the unauthorized agent on behalf of any one excepting himself, and as regards which contract he has not when he made it assumed to be acting on behalf of any one excepting himself, is capable of being ratified by a stranger, if it be shown that the unauthorized agent had at the time he made the contract the undeclared intention in his own mind of making the contract for a person who had never authorized him to make it.

It was said by the learned counsel for the appellants that this question had never been decided, and that the law was that, if an unauthorized agent—that is, any one—had in his own mind, when he entered into a contract with another, the undeclared intention of making it on behalf of himself and of some other person, or of some other person alone, that other person could ratify the act of the unauthorized agent and thus become as if he had been a party to the contract *ab initio*. It struck me, when I heard this proposition put forward by the appellants' counsel (that is by the plaintiffs' counsel), that it was not in accord with my recollection of the law; for I thought it had been long ago well engrained into the law of England that a stranger in such circumstances could not ratify; and, having had my memory refreshed at great length by the cases upon the subject, I find that my recollection has not played me false. It will be seen hereafter that very learned judges over and over again have stated the law as regards ratification to be that, unless the contract made by the unauthorized agent purports or professes (which in my judgment is the same thing) to have been entered into on behalf of another, or the unauthorized agent, when he made the contract, assumed to be making it on behalf of another, then the contract made by the unauthorized agent is not capable of being ratified by a stranger to it; for to be capable of being ratified the contract must purport or profess to have been entered into by the unauthorized agent on behalf of another, or the agent must have assumed by what he did when he entered into the contract to have been acting on behalf of some person who afterwards proposes to ratify. I find that every learned judge who has dealt with the question during the last three-quarters of a century at least, has affirmed the doctrine of ratification to be as above stated, with a most remarkable unanimity of opinion, and there is only one solitary instance to the contrary to be found in the books—viz., the judgment of Cockburn, C.J., in the case of *Matheson* v. *Kilburn*, only reported 1 Sm. L. C. (10th ed.), p. 349, which I will refer to hereafter, and in which Lord Cairns and Brett, L.J., differed from the Lord Chief Justice, and, in my opinion, decided the point now raised in this case adversely to the appellants.

Before I deal with this consensus of judicial opinion I would point out that the learned junior counsel for the appellants, in order to meet this undeniable difficulty in his way, with a courage which distinguishes him, roundly asserted that the statements by the judges to be found in the books were mere *obiter dicta*, and should be discarded as worthless, and were not decisions upon the point. This struck me as remarkable, but I find that my brothers Collins and Romer are of opinion that this doctrine of ratification has never yet been decided, and they think that it is therefore necessary to begin *ab ovo*, and go back to the Roman law and other ancient works to try and ascertain what is or ought to be the law upon the subject and to see whether what all the learned judges (with the one exception) have been saying throughout the last century is correct or not.

The point argued is that is an anomaly that the law relating to contracts entered into by an unauthorized agent without any principal behind him should not be the same as that relating to contracts entered into by an authorized agent with an undisclosed principal behind him, and it is said that, according to first principles the law should be the same as regards each. In my opinion, as I will hereafter point out, it is far too late to deal with this case upon such considerations; and, indeed, it seems to me, if it were not so, that the law relating to authorized agents with undisclosed principals behind them is far more anomalous than that relating to unauthorized agents with no principals behind them; and therefore the argument that the law should be held to be the same in each case does not appear to me to be of any weight, and I do not see why the law applicable to an unauthorized agent

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

should be levelled down to that applicable to an authorized agent.

In my judgment to call the phalanx of judicial authority to which I must necessarily refer mere *dicta* is a misnomer altogether; and I must point out that, with the exception of Cockburn, C.J., the appellants cannot produce a single decision or even a *dictum* of a single judge in opposition to what they had called mere *dicta*, and which are all adverse to the appellants' contention.

I will now state how the present case arises. Roberts, one of the defendants, by contracts in writing in the months of April and May, 1898, purchased certain wheat of the plaintiffs. The only material part of these contracts as regards the point in hand is as follows: "Bought of Messrs. Durant & Co., London, . . . for F. O. Roberts, Esq., Wakefield, five hundred tons of wheat. Signed, Burgett & Newson, Brokers." The contract, it will be noticed, is made solely in the name of Roberts, so far as the buyer is concerned, and gives no intimation that it is made on any other person's behalf (which in fact it was not), nor did Roberts or the brokers assume that he or they were acting on any person's behalf excepting that of Roberts, when the contracts were made. Roberts having failed to take the wheat purchased by him, the plaintiffs, Durant & Co., thereupon sued him and also the firm of Keighley, Maxsted, & Co. for damages for breach of these contracts. Roberts let judgment go by default, and the question is, Can the plaintiffs now make Keighley, Maxsted, & Co. liable upon these contracts? It is admitted that Roberts had no authority whatever to enter into these contracts on behalf of Keighley, Maxsted, & Co. He had no principal behind him whatever. Roberts says that in his own mind he intended, when he entered into the contracts, that they should be on the joint account of himself and Keighley, Maxsted, & Co.; in other words, he expected and hoped that Keighley, Maxsted, & Co. would join him in the contracts after he had made them, as he in fact did, in his own name and on his own account.

To raise the point of law which has been argued before us, I will take it that Roberts is to be believed when he states what he expected and hoped Keighley, Maxsted, & Co. would do after he (Roberts) had entered into the contracts with the plaintiffs—that is, take a joint venture in the wheat speculation, and there is evidence fit to be left to a jury that Keighley, Maxsted, & Co. did afterwards desire to do so.

The question argued before us is this: In those circumstances are the contracts made by Roberts, not professing or purporting to be made for any one excepting himself, capable of being what is called ratified by Keighley, Maxsted, & Co. so as to make them parties to the contracts made by Roberts, in which case the plaintiffs, Durant & Co., can sue Keighley, Maxsted, & Co. upon those contracts, and the latter could sue Durant & Co. thereon?

To see how the law stands as to this, I will take the case of *Saunderson* v. *Griffiths*, 5 B. & C. 909, decided over seventy years ago, in the remarkable and unbroken sequence of authority which I am now coming to. There the question arose whether A., who was no party to the contract sued on, could take advantage of and sue upon the contract. The doctrine of ratification was resorted to on his behalf. The contract sued on purported to be made by an agent on behalf of B. and C., not of A. Holroyd, J., when dealing with the doctrine of ratification, at p. 915, said: "It was said, however, that he" (A.) "at a subsequent time assented to that agreement, and that such subsequent assent made it his agreement *ab initio*. There might have been some weight in that argument, if the agent at the time when he made the agreement had professed to have authority to act for the husband" (A.), "because then the subsequent ratification would have been a recognition of the authority which the agent assumed to have when he made the agreement. But here the husband never previously authorized the agent to make the agreement on his behalf, nor is he named as a party for whom the latter professed to act." It is said that this case is not in point, but I do not agree, for it shows that Holroyd, J., when dealing with ratification, distinctly says that the argument as to ratification would have had weight, if the agent had professed to act for A. at the time when he made the contract. In my judgment a man keeping an intention locked up in his own mind is not "professing" to act for another when he makes the contract, and to hold otherwise would not, I think, be in accord with plain language. Many years afterwards, in *Bobbett* v. *Pinkett*, 24 W. R. 711, 1 Ex. D. 368, at p. 375, Amphlett, B., expressly recognized what Holroyd, J., had said in *Saunderson* v. *Griffiths*, saying: "Suppose B., professing to act as A.'s agent, but in fact not authorized, enters into a contract with C.; would not A., by subsequently ratifying B.'s act, be entitled to sue C. on the contract in his own name?" This is a *dictum*, but the learned baron fully recognizes the judgment of Holroyd, J., which, I think, was no *dictum* at all, and again he lays stress upon the phrase "professing to act." In the year 1829 in the case of *Vere* v. *Ashby*, 10 B. & C. 288, Parke, J. (afterwards Parke, B.), states the rule as to ratification thus. He says: "The rule as to ratification applies only to the acts of one who professes to act as the agent of a person who afterwards ratifies. Here Rowland at the time when the first bill was discounted did not profess to act as the agent of Shaw." I have already said what I think is the meaning of the word "profess." It does not describe an undeclared intention locked up in a man's own mind. The appellant's counsel may call this a *dictum* if he likes. In my judgment it is a deliberate declaration of a most learned judge as to what is the rule of ratification according to the law of England, and, as will be seen hereafter, is repeated by the learned judge, when Lord Wensleydale, in the House of Lords. In *Wilson* v. *Tumman*, 6 M. & G. 236, in 1843, the question arose whether the defendant was liable for a seizure of the plaintiff's goods by the sheriff, and it was argued that, although the defendant had given no precedent authority to the sheriff to take the plaintiff's goods, yet he had ratified the taking after it was made. The sheriff when he took the plaintiff's goods did not purport to do so on behalf of Tumman, and Tindal, C.J., in delivering the unanimous judgment of the Court of Common Pleas, said: "The question, therefore, is a dry question of law, whether the subsequent ratification by this defendant of a taking under such circumstances is the same, in its consequences, as a precedent command of the defendant. And we think, under the authorities, and upon the reason of the thing itself, that it is not. That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority." The Chief Justice then cites the Year Book 7 Hen. 4 and Godbolt's Reports 109, and he adds: "They (the sheriff's officers) did not assume to act at the time as agents or bailiffs of the

then plaintiff Tumman." The court therefore held the defendant not liable. The appellant's counsel calls this a mere *dictum* of the Court of Common Pleas. He may say so, but I do not agree with him. Moreover, twenty years afterwards, in the year 1862, in *Woollen* v. *Wright*, 10 W. R. 715, 1 H. & C. 554. in the Exchequer Chamber, consisting of Wightman, Williams, Crompton, Willes, Byles, and Blackburn, JJ., Wightman, J., delivering the unanimous judgment of the Exchequer Chamber, expressly approved of the decision in *Wilson* v. *Tumman*, and stated that it had "not been disputed until the present case." In the year 1850 Rolfe, B., when delivering the unanimous judgment of the Court of Exchequer in *Bird* v. *Brown*, 4 Exch. 786, again dealt with the doctrine of ratification. He said: "The doctrine *omnis ratihabitio retrotrahitur et mandato æquiparatur* is one intelligible in principle and easy in its application when applied to cases of contract. If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be . . . In cases of tort there is more difficulty. If A. B., professing to act by my authority, does that which *primâ facie* amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser unless I can justify the act, which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the doctrine of ratification even in cases of tort. . . . But the authorities go much further and show that in some cases where an act which, if unauthorized, would amount to a trespass, has been done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and to treat it as having been done by his direction." In the year 1857 Lord Wensleydale in the House of Lords, in *Ridgway* v. *Wharton*, 5 W. R. 804, 6 H. L. Cas. 238, at p. 296, said: "If a man, professing to act for another, makes a contract for him, and authority is afterwards given by that other, the authority given subsequently is equal to authority given before, according to the old maxim, *Omnis ratihabitio retrotrahitur et mandato æquiparatur*." Here I find the learned judge as Lord Wensleydale reiterating in the House of Lords what, as Parke, J., he had declared eight and twenty years before to be the rule as to ratification in the case of *Vere* v. *Ashby*. Again, in 1862, in *Watson* v. *Swann*, 11 C. B. N. S. 756, 31 L. J. C. P. 210, 10 W. R. C. L. Dig. 46, which was an action upon a policy of insurance entered into by John Smith in his own name, Erle, C.J., and Willes, J., deal with ratification as follows. The Chief Justice says: "It is clear law that no one can sue upon a contract unless it has been made by him or has been made by an agent professing to act for him, and whose act has been ratified by him." (There was no question in that case nor in the present of an authorized agent acting for an undisclosed principal.) "Now here the contract was not made by the plaintiff, nor did it purport to be made on his behalf; it purported to be made by Smith on his own behalf." Willes, J., said: "To entitle a person to sue upon a contract it must clearly be shown that he himself made it, or that it was made on his behalf by an agent authorized to act for him at the time, or whose act has been subsequently ratified and adopted by him. The law obviously requires that the person for whom the agent professes to act must be a person capable of being ascertained at the time. It is not necessary that he should be named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract." In the same year, 1862, in *Ancona* v. *Marks*, 10 W. R. 251, 7 H. & N. 687, and apparently when the judgment in the Exchequer Chamber in *Woollen* v. *Wright* had been delivered, Wilde, B., adopts and distinctly approves of the case of *Wilson* v. *Tumman*, and Martin B., in his judgment does the same and adds: "In the note to *Armory* v. *Delamirie* in Smith's Leading Cases there occurs the following passage: 'And on similar reasoning seems to rest the well-known doctrine that a subsequent ratification is tantamount to a prior command of an act done in the name of the party who ratifies. So, that, where a person, if present at the time, could lawfully command any act to be done, any other person, though either wholly without authority or exceeding the limits of his authority, would be justified in doing that act, provided he did it in the name, or as one acting by the authority, of the person entitled (whether to his advantage or not), and obtained his subsequent ratification.'" In 1868, Blackburn, J., in the case of *Lord* v. *Lee*, 16 W. R. 856, L. R. 3 Q. B. 404, when dealing with a question involving that of ratification, is in line with all those who had preceded him upon this point. That learned judge says: "Now it is also a principle of the common law that whenever an act is done by a person professing to act for another, though in reality he had no authority at the time, (subject to exceptions which do not affect the present case), the ratification of the other had the same effect as if the authority had been originally conferred, so as even to effect the vested rights of third persons. . . . It was argued for the defendant that such an enlargement of the time amounted only to the making of a fresh submission; but that is not so. The act having been done under the professed authority of the previous submission, the enlargement of the time is a ratification in the shape of a continuation of the original authority."

Are all the above mere *dicta*? I cannot think so.

In 1877 the point now taken was expressly raised and, as it seems to me, determined by Lord Cairns and Brett, L.J. (*dissentiente* Cockburn, C.J.), in the case of *Matheson* v. *Kilburn*, 1 Sm. L. C. (10th ed.) 349. In that case a person intending to buy on behalf of another, but without authority, and without avowing that he was acting for another, bought goods in his own name. Lord Cairns and Brett, L.J., were of opinion that a contract so made was incapable of ratification by the person for whom the buyer intended to buy, as the latter did not assume to buy on behalf of another. I know that Cockburn, C.J., dissented; but can anything be clearer than what the majority, Lord Cairns and Brett, L.J., held to be the law. This case is, I believe, only reported in 1 Smith Leading Cases (10th ed.), 349. The last case which I will cite, for those which I have cited are, in my opinion, ample, is that of *Falcke* v. *Scottish Imperial Insurance Co.*, 35 W. R. 143, 34 Ch. D. 234, at p. 249. In that case Bowen, L.J., states clearly what I believe to be the law, and what, in my opinion, is shown by the cases I have had to cite at such length to be the law. The very learned Lord Justice said: "There is nothing more vague than the way in which the word 'adoption' is used in arguments at law, and sometimes ambiguous language, used about adoption, is imported into arguments about ratification. There is no such thing in law as adopting or ratifying anything except where there is the sanctioning of an

act professedly done on your behalf in such a sense as to make you liable for it. A man can ratify that which purports to be done for him, but he cannot ratify a thing which purports to be done for somebody else. . . . There have been many attempts to make people liable by what is called adoption of a contract or of some other act which never purported to be made or done on their behalf, and such attempts have failed."

It will be seen that every one of the learned judges whose judgments I have cited from, when dealing with the question of ratification, have always used the following expressions as to when a contract made by an unauthorized agent is capable of being ratified by a stranger. The contract must (*a*) have "professed" to have been made on behalf of another; (*b*) have "purported" to have been made on behalf of another; (*c*) have been made "on behalf of another"; (*d*) have been made "in the name of another"; or (*e*) the agent must have "assumed to act on behalf of another"; every one of which expressions, in my judgment, is wholly inconsistent with an unauthorized agent keeping locked up in his own mind a mere undeclared intention that another shall afterwards participate in the contract.

It is not necessary, I think, to go through the text-books in which, as far as I have gone, I have found nothing inconsistent with what I believe to be the law as regards this doctrine of ratification, but I will cite two: one is Story on Agency, s. 251*a*, where it is laid down "that a ratification can only be effectual between the parties when the act is done by the agent 'avowedly' for or on account of the principal"; and the other is Kent's Commentaries, vol. 2, p. 616, note 1, Ratification, where the author says: "A person cannot ratify acts done without his authority unless they were done for him by a person assuming to act as his agent," and for that he cites *Wilson* v. *Tumman* and *Watson* v. *Swann*, both of which are now said to be mere *dicta*.

The appellants, in my judgment, as I have said before, are unable to produce a high authority during the last two or three hundred years, even if they can produce one before, which I doubt, excepting the judgment of Cockburn, C.J., dissented from by Lord Cairns and Brett, L.J., in support of the proposition they now contend for. They do produce the case of *Soames* v. *Spencer*, 1 D. & R. 32, in which it does not appear what was the form of contract sued on, and they also seize upon an expression of Parke, B., in the case of *Foster* v. *Bates*, as reported in 12 M. & W. 226, at p. 233, which is inconsistent with what I have cited of the learned judge's expressions as Parke, J., and Lord Wensleydale; but it appears from the contemporaneous reports of the case in 1 D. & L. 400, 3 L. J. Ex. 88, 7 Jur. 1093, that the expression of the learned judge is not accurately reported in 12 M. & W., for a material omission has therein been made, and when the accurate report of it is read, it is not in the appellants' favour.

In my judgment upon this doctrine of ratification the law has been settled for years. If I am to accede to the appellants' contention I should have to differ from and disagree with Lord Wensleydale in the House of Lords; the Exchequer Chamber, which I could not do even if I had desired to do so, which I do not; the Court of Appeal, consisting of Lord Cairns, Cockburn, C.J., and Brett, L.J., presided over by Lord Cairns, to which the same remark applies; the full Court of Common Pleas, presided over by Tindal, C.J.; the full Court of Exchequer, presided over by Rolfe, B.; and Parke, B., before he went to the House of Lords, Holroyd, J., Erle, C.J., Willes, J., Blackburn, J., Wilde, B., Martin, B., and Amphlett, B., and last but not least Bowen, L.J. With all submission to my learned brothers who disagree with me, I think even if I had the courage to try to differ from all these very learned judges, which I have not, it would not only be useless, but it would be most mischievous at this date to try to overturn what for years has been laid down as law by these most eminent judges without a single discordant voice, with the exception of Cockburn, L.J.; and in my judgment, for the reasons above, this appeal should be dismissed. As my brothers, however, disagree with me, the action must go down for a new trial.

COLLINS, L.J., read the following judgment: The question raised by this appeal is whether a contract made by a person in his own name, but intending to act for another in making it, though without authority from him, can be ratified by that other person, unless the intending agent disclosed to the other party at the time of making the contract that he was acting for someone else.

Roberts, the intending agent in this case, did not disclose to Durant & Co., the sellers, that he was acting otherwise than for himself, and Day, J., appears to have held that such non-disclosure rendered the contract incapable of ratification by the other defendants. In other words, that there can be no ratification by an undisclosed principal—I mean undisclosed in the sense that the existence of *a* principal has not been disclosed at the time of making the contract. This being the ground of decision, it is immaterial to consider whether there would be any difference as to the possibility of ratification where the intending agent who contracts as principal knows that he has no authority or that he is exceeding a given authority, and the case where he is under a mistaken belief that he has authority, since the right of ratification is negatived in either case. For reasons which I will give more in detail later on, I think the point has never been actually decided, though there are numerous *dicta* upon it, which have become the foundation of statements in text-books more or less adverse to the appellants' contention; but it is raised now for actual decision, and I think it cannot be satisfactorily determined without examining how far these *dicta* are consonant with principle, and if not, whether they have been acted upon for so long as to render it undesirable for this court, at all events, to interfere with them.

It is clear law that an act done or a contract made by a person stating that he is acting for another, but without authority, can be ratified by that other. What, then, is the essence of this right to ratify? Does it depend on the intention with which the act was done by the would-be agent, of which what he says at the time is merely evidence, or is the open avowal of the fact by him not merely evidence, but itself an essential condition of the right to ratify? Ratification is equivalent to a prior command, and, as between the would-be agent and the person ratifying, it can make no possible difference whether the former has avowed his intention or not. The ratifier's command, had it been given beforehand, would have been equally effectually carried out, whether the agent had contracted in his own name or in terms on behalf of the principal. The intention to contract for the principal must certainly exist in the mind of the agent, since in our law the act of a mere stranger cannot be ratified. That would be, not ratification, but adoption, which our law does not admit. But, given intention existing in the mind of the would-be agent, it seems impossible to suggest any reason why from the standpoint of the agent and the ratifier avowal of it to the other contracting party should be essential, unless the rights of the

principal against the other contracting party are affected by it. It would seem, then, that the reason, if any, must be sought in some difference caused to the other contracting party by reason of the non-disclosure. But where the law admits, as our law does admit, a person who has authorized another to make a contract on his behalf, to sue and be sued upon it, although he is not named in the contract and his agent contracts as principal without disclosing that he has a principal, every person who makes a contract with another (excluding, of course, certain special personal contracts) must be taken to know that he may have to deal with some other person on whose behalf the contract is made. He cannot complain, therefore, of non-disclosure. He loses nothing, and gains an option of suing either the party named in his contract or the principal behind him. Indeed, any ground of supposed alteration of the position of the other contracting party that might be urged in support of the view that disclosure as well as intention on the part of the agent is necessary, is succinctly disposed of by Rolfe, B., in a well-known passage in delivering the judgment of the court in *Bird* v. *Brown*, 4 Exch., at p. 798, a passage other parts of which are usually relied on in support of the necessity of disclosure by the agent. He says: "If A. B. unauthorized by me makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be, or, if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue which he would have had against A. B." It would seem, then, that neither from the point of view of the ratifier or of the other party to the contract is there any solid reason why disclosure by the would-be agent should be essential.

But it has been suggested that the nature of ratification itself presupposes a contract purporting to bind the ratifier. I can find no such limitation in the word. I think it does involve the idea of something which was intended to be done on behalf of the ratifier, and which needs nothing but confirmation, not to create it *ab integro*, but merely to give it validity. It does not involve the existence of a contract stating anything more on its face than would have been necessary if there had been actual prior authority. Is there anything in the word "ratification" itself to make it inapplicable to a case where an agent, believing he has authority, has made a contract intending to do it for a principal but in his own name and without disclosing that he is agent? It is clear law that a contract may be ratified by a person unknown to the would-be agent himself, who contracting in his own name discloses the fact that he is acting for another. It cannot be contended, therefore, that it is essential to ratification that all the terms of the contract (in cases of contract) should have been already expressed either by words or in writing. This shows that what is essential is what is intended, and not what is expressed, and, so long as the form is capable of covering what was really intended, there is nothing in the nature of ratification itself to make it inapplicable to such a case.

The doctrine of ratification would seem, as its name imports, to have come into our law from a Roman source; but, so far as I am aware, no argument can be drawn from the Digest that the person acting without authority in the affairs of another must avow that he is acting for him in order to let in ratification. On the contrary, it would seem that the *contemplatio* was, in that as in many analogous cases, the essential point. In Dig. 3, 5, ss. 11, 12, we find the phrase—*Ratihabitio constituet tuum negotium quod ab initio tuum non erat sed tuâ contemplatione gestum.* The instance to which this observation is appended, the collection of a debt, may have involved avowal, though I am not clear that it did, but the point is that *contemplatio* is made the test.

Another illustration is given: "If I exact payment from a debtor of Titius, believing that you are the heir of Titius, whereas in fact Seius was his heir, and you afterwards ratify it, reciprocal rights will arise between you and me. For, though the affair was not really yours, ratification gets over this, and it is deemed to be yours as though you were in fact the heir." It seems here that there could have been no avowal of intention to act on the part of the person whom he thought to be heir; but the ratification was effective to constitute it the act of the person for whom he in fact intended to act, though the person was not the heir. In the same article it is pointed out that the rights of a *negotiorum gestor*—that is, a person who intervenes without authority in the affairs of another (*cf.* Hunter's Roman Law (3rd ed.), 661, 664), will depend on the *contemplatio*—*i.e.*, the intention with which he acted, whether, for instance, in a given case he has acted from friendship for a son or slave, *vel eorum contemplatione*, or looking to the father or master. His mental attitude is made the criterion of his rights, and this is so likewise where ratification has followed.

In the case of torts the Digest does not support the view that the act must avowedly be done on the part of the ratifier. After dealing with the case of a true and a false procurator, it says (43, 16, 1, s. 14): "*Sed et si quod alius dejecit, ratum habuero; sunt qui putent secundum Sabinum et Cassium (qui ratihabitionem mandato comparant) me videri dejecisse, interdicto que isto teneri: et hoc verum est. Rectius enim dicitur, in maleficio ratihabitionem mandato comparari.*" This is repeated in effect in 50, 17, 152; and in 50, 17, 60, which apparently applies to tort or contract, the words are *pro se gestum*, which would cover the case of intention without avowal. Indeed, so far from the Digest supporting the view that there must be actual statement of intention to contract for the ratifier, it was a moot point among the commentators whether even a thing done *alieno nomine* might not be ratified; and some were of opinion that it could: see Van Leeuwen's Corpus Juris Civilis, edition of 1663, 3, 5, note 98, p. 109. Later on, however, the doctrine was expressed in the Papal Decretal mentioned in Serjeant Manning's note to *Wilson* v. *Tumman* in the form, *Ratum quis habere non potest quod ipsius nomine non est gestum.* This in its ordinary meaning does not necessarily imply avowal on the part of the agent, since by a common Latin idiom a thing may be said to be done *nomine alicujus* where merely "on account of" is meant, and the possibility even of actual naming is excluded. That would be the name under which he would enter it in his books, if he had to record it, and was frequently necessary in Roman law. Instances of this usage are given in Facciolati. No doubt the commentator quoted in the same note regards it as requiring the name of the proposed principal to be actually stated, giving reasons from the supposed hardship on the other party to the contract which I have already shown can have no place in our law. This maxim is apparently the foundation of the paragraph in Story cited for the respondents. Pothier, Obligations (Part I, c. 1, s. 1, Art. 5, s. 4 (75)) in one passage uses the phrase "in the name of," and in another (*ibid* 77) "assuming to do so on my (the ratifier's) behalf." "Assuming," of course, is a neutral word amounting merely to

"taking upon himself" to act for me, and "in the name of" is open to the observations already made. But, if these authorities do make the avowal of the name essential, they would seem to have gone a step beyond the Roman law, while purporting to follow it; and the early English authorities seem to be more consonant with what I conceive to be the Roman law.

In the *Anon. case*, Godbolt 109, following the case 7 Hen. 4, Hil. 34 (*b*), emphasis is laid on the intent with which the act sought to be ratified was done. "Can he," says Anderson, C.J., "so father his misdemeanour upon another? He cannot, for once he was a trespasser, and his intent was manifest." This seems to point to the intention being the essential and the manifestation being only the evidence of it, and I think this view is confirmed by later authorities. In *Fuller* v. *Trimwell*, 2 Leon. 215, an action of replevin, decided on the authority of the case in 7 Hen. 4, it was objected that the averment that the defendant took as bailiff to another could not be traversed. The court say, "and as to that which has been objected, that if this traverse be allowed the meaning of the party shall be drawn in question—*i.e.*, the meaning of him who took the cattel, the same is not any mischief, for so it is in other cases as in the case of recaption." *Buller's case*, 1 Leon. 50, is to the same effect. These cases seem conclusive that the issue to be tried is the intention. If so, what was said or done at the time would only be material as evidence of the intention of which there might be other conclusive evidence. And this quite accords with the attitude of our older lawyers in analogous cases. For instance, in the case of a person who, entering under a licence given by law afterwards abused it; "for," says Coke in the *Six Carpenters' case*, 8 Rep. 146 (*a*), "the law adjudges by the subsequent act *quo animo*, or to what intent, he entered, for *acta exteriora indicant interiora secreta*, citing 11 Hen. 4, 75 (*b*). The passage in the Institutes, 4 Inst., c. 73, p. 317, where Lord Coke quotes the maxim in the form in which it is current in England is quite consistent with these early authorities, and gives no support to the notion that actual statement by the agent is necessary. "He that receiveth a trespasse and agreeth to a trespasse after it be done is no trespasser, unless the trespasse was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case *omnis ratihabitio retrotrahitur et mandato æquiparatur*."

Of the more modern cases, the earlier ones follow on the same lines. *Hull* v. *Pickersgill*, 1 B. & B. 282, decided in 1819, is really an authority that avowal is not necessary, if from the facts, of which the subsequent application for ratification is itself some evidence, "the interests of the ratifier were remembered in the seizure." There creditors, who had become such subsequent to the bankruptcy, seized the goods of the plaintiff. They knew the property in the goods was in the assignees, but did not know who they were, and "hazarded" their consent. There was no evidence that they avowed their intention to seize for the assignees, and the citation by Parke, J., from the Year Book, whether correct or not, shows that the court were dealing with the case on this footing. Nevertheless the court held the inference to be properly drawn that they intended to act for the assignees, and upheld the ratification. *Soames* v. *Spencer*, decided in 1822, a case of contract, seems to support the same view. There one of two joint owners sold goods through a broker without authority, and without giving any indication, so far as can be gathered from the report, of an intention to act in any interest but his own. His co-owner at first refused to ratify, but afterwards consented, and joined in suing the vendees, who denied his right. The ratification was upheld. Holroyd, J., cited a maxim which is material in the present discussion: "*omne actum ab agentis intentione est judicandum.*" In *Foster* v. *Bates*, decided in 1843, the question was whether the administrator of an intestate could ratify a sale made by the agent of the intestate after the death of the latter for the benefit of the estate. It was held that he could, and Parke, B., in delivering the judgment of the court says: "The sale was made by a person who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate; and it was ratified by the plaintiff after he became administrator; and, when one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown at the time to the person who intended to be the agent." This case, therefore, also gives no countenance to the view that avowal on the part of the intending agent is necessary, nor do the words added in the report in the *Jurist* relied upon by the respondents—viz., "and acts accordingly," seem to me to make any difference. But two cases decided before *Foster* v. *Bates* were said to be authorities for the necessity of avowal. It will be found, I think, when examined, that they do not touch the point. In the first, *Saunderson* v. *Griffiths*, decided in 1826, an agreement of letting had been made in writing by one Murray "agent for and on behalf of" two named ladies, one of whom, Mrs. Saunderson, was married. The question was whether the husband of Mrs. Saunderson, who had received rents under the agreement, had thereby become a party to it, so as to be properly joined as plaintiff in an action against the tenant for breach of some of the stipulations. It was held that he had not. It was held that no parol evidence was admissible to explain or vary the contract, and Bayley, J., adds: "The husband does not appear to have had any authority himself to enter into an agreement or to authorize anybody to execute it on his behalf. He was a mere stranger to the instrument." Holroyd, J., after stating that the agent was authorized to act for the two ladies only, says: "If, indeed, he had assumed the power of including the husband as a party, the subsequent assent of the latter might have had relation back." Apart from the objection to admitting evidence to vary the written contract, it was quite clear that the agent had no intention whatever of contracting on behalf of the husband. The case has no bearing, therefore, on this discussion, neither do any phrases in the judgments support the respondents' contention. The word "assume" is neutral. The second case is *Vere* v. *Ashby*, decided in 1829. The point there was whether a person who had become a partner in a firm after a bill had been indorsed by one of the partners in the then partnership name (which had not been changed on the introduction of the new partner) had made himself liable on the bill by ratification. It was held that he had not. Here again it was quite clear that the partner who indorsed could not have intended to indorse on behalf of a person who was not a member of the firm. It is in reference to these facts that Parke, J., says: "The rule as to ratification applies only to the acts of one who professes to act as the agent of a person who afterwards ratifies," and I think it is straining the meaning of the learned judge to suggest that in such connection he meant by using the word "profess" to indicate more than that the agent had no intention, did not in fact take upon himself to contract on behalf of a stranger. Clearly no more was necessary. In 1843, the same year as *Foster* v. *Bates*, was decided *Wilson* v. *Tumman*, which was much relied upon by the respondents. This case again, so far as the

decision itself is concerned, does not touch the present case. The point was whether an execution creditor could by ratification make himself liable for a trespass by the sheriff's officer in executing the writ. It was held that the sheriff was the agent of the law and not of the creditor—*i.e.*, that he did not in fact act on behalf of the creditor, but of someone else, and therefore that the creditor could not ratify what was not done on his behalf. The decision therefore is in full accordance with the earlier cases above mentioned; but some of the expressions used in the judgment of Tindal, C.J., might, apart from their context, seem to go further. He says: "An act done for another by a person not assuming to act for himself, but for such other person, may be ratified." He cites the cases in the Year Book and the cases in Godbolt above referred to in support of this proposition, showing that what he is really dealing with is the case where the alleged agent has made clear his intention of acting for someone other than the ratifier. He does not, as it seems to me, intend to decide or pronounce an uncalled-for opinion on the question that was left open in that case, as appears by the words in Godbolt, *ad hoc non fait responsum*. Speaking of the sheriff's officers, he goes on to say, "They did not assume to act as agents or bailiffs of the then plaintiff Tumman, but they acted as the servants of another—namely, the sheriff, by virtue of the process directed to him by the court." It is perhaps doubtful whether by "assume" in this passage he means more than "take upon themselves," which is the literal meaning of the word. Next comes *Bird* v. *Brown*, decided in 1850, also much relied on by the respondent. There, again, the point now raised did not come in question. The act ratified had been done in terms on behalf of the person who ratified, and the only question was whether the ratification could undo the rights already acquired in the interval. Rolfe, B., makes a general statement of the law of ratification both in the case of contract and of tort. So far as he deals with contracts there is nothing to hurt the appellants or support the respondent's case. He says simply, "If A. B., unauthorized by me, makes a contract on my behalf with J. S., I may ratify it." He then adds a sentence already cited in the latter part of this judgment by which he shows that by "on my behalf" he does not mean in terms expressed; for he adds, "or if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal, &c." Now since he could not sue A. B. as principal, if A. B. had in terms contracted "on behalf of"—*i.e.*, as agent only, and as he did not believe A. B. was contracting for me, there could have been no avowal. This, therefore, seems so far to be a clear authority that an undisclosed principal on whose behalf the agent had not avowed intention to contract could nevertheless ratify. In dealing with torts, however, he uses the phrases "professing to act by my authority," and further on "in the name and on behalf of another," which last phrase at all events seems to contemplate in the case of torts actual statement of the name. I think the explanation is that his attention was not really directed to the point, and that the words are somewhat loosely used. He is certainly right in saying, as he does, that ratification may take place in such circumstances, which indeed were the actual circumstances in the case before him, but this, of course, falls very far short of saying that it cannot take place, if those precise conditions do not concur. *Woollen* v. *Wright*, decided in 1862 in the Exchequer Chamber, also cited for the respondents, merely affirms the proposition of *Wilson* v. *Tumman*, that the sheriff's officers do not act as agents of the execution creditor, and adds nothing to this controversy. In the same year, 1862, *Watson* v. *Swann*, also cited for the respondents, was decided. In that case, also, the facts did not raise the present question. Smith, whose act the plaintiff claimed to ratify, had effected a policy to cover risks in which he had no reason to suppose the plaintiff was interested, and had no intention whatever of contracting on his behalf. It was held, therefore, that the plaintiff could not claim any benefit by ratification; but again some phrases in the judgments are relied on by the respondents. Erle, C.J., says in the report in the *Law Journal*: "No one can sue on a contract but the person who made it or the person who ratified what purported to be a contract made by his agent"; but in the next sentence he uses a phrase which shows that after all the intention, the "contemplation" of the Roman law, is the governing consideration. He says: "A very wide extension has been given to the principle to which I have adverted of the parties to a contract in respect of a policy of insurance, and persons who could not be named at the time, if intended to come within it, and so capable of being ascertained, have been allowed to be entitled to the benefit of the same; but they must have been such as were contemplated at the time the policy was made." This view, which seems to be in entire accord with the Roman law and the early English authorities—namely, that the right of any particular individual to ratify, in the case of contracts, at all events, depends on the "intention," the "contemplation," of the agent—leaves very small place for the operation of avowal; since, provided a sufficient general description be given, the particular individual who may take the benefit of the contract will depend on the unavowed intention of the agent. Indeed, the agent need not even have any particular individual in his mind, since it is assumed that he could not name him. Then comes the phrase used by Willes, J., which was so much pressed by the respondents. He says: "The law obviously requires that the person for whom the agent professes ('purports' in the *Law Journal*) to act must be a person capable of being ascertained at the time. It is not necessary that he should be named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract. . . . In the ordinary policy the broker who effects it declares that he does so as well in his own name as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain, &c.; and the person who sues upon it must be either the broker by whom it is effected or the person on whose behalf it was intended to be effected; no subsequently acquired interest will give a stranger a right to sue upon the policy." Here, again, the governing factor is made to be the intention. What the learned judge's mind is addressed to is the impossibility of introducing under general words wide enough to cover him, some person who was really not contemplated—intended—at the time. He adds further on, "It is necessary that underwriters should know with whom they are contracting," an observation which may well be applicable to the peculiar contract of insurance, which contains in it some of that personal element which I have before referred to, but is certainly not applicable to ordinary cases of purchase, such as we are now concerned with, where the law undoubtedly is that the seller need not know whether he is dealing with anyone behind the buyer or not. Looking, then, at the nature of the cases these learned judges were dealing with, the limited scope which they leave to avowal, and the supreme importance which they give to intention, even in the special contract of insurance, they seem to support rather than oppose the contention of

the appellants in a case where any notion that it is necessary that the seller should know who the buyer is must be eliminated from the discussion. The passage from the speech of Lord Wensleydale in *Ridgway* v. *Wharton*, must be read with reference to the case with which he was dealing, which was that of an agent contracting in terms for another person from whom he had no authority, and who did not, as the learned lord considered, ratify. His words are: "If a man professing to act for another makes a contract for him, and authority is afterwards given by that other," there is effectual ratification; and he adds: "If a contract is made by an agent, whether by authority before given or afterwards by ratifying the contract, it legally binds the principal." Read in the light of the facts he was considering, it is obvious that these remarks have no bearing on the present question. I now come to the observations of Bowen, L.J., in *Falcke* v. *Scottish Imperial Insurance Co.*, cited by the respondents. There, also, the question raised had no relation to the point before us. There Emanuel, who had mortgaged a policy of life assurance to Falcke, paid a premium thereon on his own account without any authority or request from Falcke. Falcke's representative afterwards attempted to take the benefit of the policy, and the question to which Bowen, L.J.'s, observations were addressed was whether Emanuel under these circumstances could recover the premium from Falcke's representative on the footing that by claiming a benefit on the policy she had ratified the payment of the premium. This premium having been in fact, as the court held, paid by Emanuel as owner of the equity of redemption, and not for Falcke's estate, the present question never arose for discussion; and when Bowen, L.J., says that you can only ratify an act "professedly done on your behalf in such a sense as to make you liable for it," he is distinguishing adoption of an act not done on your behalf, which is impossible, and ratification of an act which was done on your behalf, which the law permits. It is doubtful whether by the words "professedly" and "purporting," which he uses in the next sentence, he meant to deal with anything but the actual intention, which in the case before him was to pay it for Emanuel's own benefit. He says: "A man can ratify that which purports to be done for himself; but he cannot ratify that which purports to be done for somebody else." The "purporting" in the case before him was that Emanuel being owner of the equity of redemption paid the premium. He does not appear to have accompanied it with any statement at all, but the circumstances founded the inevitable inference that he paid it for himself and no one else. Purporting, therefore, in the last line of the sentence cannot be intended to mean more than "assuming" or "meaning."

I have now, I think, examined all the cases relied on by the respondents except *Matheson* v. *Kilburn*, of which there is no report except the short note in Smith's Leading Cases, and this is the only case, so far as I know, in which the point before us was actually raised for decision. It was not, however, decided, though two very eminent judges seem to have favoured the respondent's contention, while Cockburn, C.J., took the other view.

No doubt the law has been laid down repeatedly in text-books in language copied from the various judgments in the cases which I have just examined, but I have not found the point explicitly raised and considered in any of them. There may also, no doubt, be other cases where language similar to that quoted has been used, but I think the passages cited are the fountain-head from which these observations are drawn. One general observation applies to them and to the text-books. They profess to deal with the circumstances under which ratification may take place, and name the most obvious conditions; and in similar general language they describe when it cannot, of which the most obvious instance would be where the act is professedly done for another person. Hence the antithesis which so frequently recurs between an act "purporting" to be done for someone else, and purporting to be done for the ratifier; while the intermediate case of an act neutral in itself, and carrying no indication on whose behalf it is done, is left unconsidered. I have already pointed out that the passage in Story, s. 251 (*a*), is founded on *Wilson* v. *Tumman*, and Serjeant Manning's note thereon, having been added to the original after the decision of that case. *Wilson* v. *Tumman* I have, I think, shown does not justify it, and there are, I think, good grounds for supposing that the Latin words *nomine ipsius* in the rule quoted in the note were not meant to convey more than "on behalf of," or to do more than express the law of the Digest, though the commentator quoted in the note puts the literal interpretation upon them. That the learned serjeant himself did not treat the present point as settled in English law would seem clear, since in a special note to Tindal, C.J.'s, citation of the case in Godbolt he calls attention to Shuttleworth's question, "What if he distrain generally not showing his intent," to which *non fait responsum*.

It seems to me, therefore, that the supposed rule is not based on any sound reason; that, though supposed to be drawn from Roman law, it finds no support in Roman law; that it is opposed to the early English authorities; that there is no actual decision where it was raised and decided against the appellants; that the *dicta* which are supposed to establish it were pronounced *alio intuitu*, and in many instances, when carefully examined with their context, either do not support it or involve the contrary; and that if it is to be supported at all it must be rested on grounds of convenience only, and not of principle.

As to convenience, it is, no doubt, a rule of English law that a contract really made for one person cannot be adopted by another, and there may be room for violations of this rule, if it is to depend on what is passing in the mind of the person who makes the contract, who is to be bound by it. But if this be an inconvenience, it is one which the law already tolerates, in that it allows a contract for an undisclosed principal by a person who contracts as principal himself; furthermore, the case would be rare where no other evidence would be available but the statement of the agent himself. But, even if there were inconvenience, it would not equal that which would be caused by an arbitrary limitation in the case of contracts for undisclosed principals. That it is arbitrary seems to be obvious, when it is realized how far the law has admittedly gone, and where it is that, according to the contention of the respondents, it stops short. A person may contract in his own name, and yet give rights to and against a third person from whom he had prior authority, though he gave no indication whatever to the other party to the contract that such person existed. He may by a similar contract, but without prior authority, if he avows that he intends to act for someone else, give a right to ratify to a person whom he could not name if asked, provided such person is capable of being ascertained, and that he answers the description of person for whom he intended to contract (see passage from the judgment of Erle, C.J., above cited). What substance is there then in avowal as a vital fact when the party of whom avowal is required is not obliged to know the name of the person for whom he intends to act, and the

standard by which the right to ratify is to be tried is what description of person the unauthorized agent contemplated at the time of the contract? The doctrine of undisclosed principal is a substantive part of the law of agency, and, as far as I can trace it, it is as old in our law as the doctrine of ratification itself. There is no reason, therefore, why it should be subject to an anomalous exception. On the whole, therefore, though I am sensible of the great weight due to the opinion of the two judges who formed the majority in *Matheson* v. *Kilburn*, 1 Sm. L. C. (10th ed.) 349, as well as that of my brother A. L. Smith in the present case, I cannot regard that as a decision binding this court, though it is the only case in which the point was ever actually raised for determination. I am bound therefore to decide the case in accordance with what I regard to be principle and common sense.

ROMER, L.J., read the following judgment: The judgments already delivered have dealt so fully with all the cases in any way bearing on the question of law arising in this case that it would be useless for me again to review in detail those cases. I need only say that, having considered the authorities referred to, I come to the same conclusion as Collins, L.J. I think that the question is open to us for decision, and ought to be decided by us according to principle. So far as I can ascertain the question has not been decided in any case contrary to the view expressed by Collins, L.J.; and, in my opinion, the many observations of learned and distinguished judges relied on by the respondents, when carefully considered, and when the circumstances of the cases in which they were made are remembered, do not amount to expressions of judicial opinion which render it undesirable for us to treat the question as an open one. With the exception of what was said in *Matheson* v. *Kilburn* almost all the observations were made in reference to facts which did not give rise to the question we have to decide, and were not made in contemplation of the question; and I think the reason why in those observations you find it often stated that, for his act to be capable of ratification, the agent must have "professed" or "purported" to act on behalf of, or must have acted in the name of the principal is because the judges wished to guard themselves against the supposition that where in fact a person did not contract on behalf of a particular principal he could afterwards at his own will and pleasure create or select a principal. In the case of *Matheson* v. *Kilburn* the question we have to decide was treated as an open one, and was left undecided; and I certainly cannot assume that, had it fallen to be decided, Lord Cairns, C., and Brett, L.J., would have decided it contrary to the view herein expressed.

I wish, further, to observe that the question ought not to be stated as one depending merely on what passes in the mind of the person said to be an agent at the time he contracts. Such a statement only tends to obscure the real question we have to decide. It may well be, if a person has nothing to support his contention that he contracted on behalf of a principal beyond his assertion that he had it in his mind so to contract, that he will fail to prove his contention as a matter of fact. The question of law, to deal with it fairly, may be stated as follows: Where a person makes a contract which is not under seal or by bill of exchange, without disclosing to the person with whom he contracts that he is acting as agent, and it is proved or admitted that in fact he entered into the contract on behalf of a principal, but without authority, cannot that principal ratify the act of the agent so as to place himself in the same position he would have been in as an undisclosed principal if he had previously authorized the agent to make the contract? That is really the question we have to decide, and it is one which, in my opinion, ought to be decided according to the principles of law applicable, and ought not to be treated as concluded by authority.

In order to illustrate what I have mentioned is the true question to be decided, I will give an example of a case clearly raising the point of law as stated by me. Some of the directors of a limited company discover that certain goods are for sale, and that it is of importance that the company should buy the goods at the price at which they are offered; but time presses, and the contract of purchase has to be made at once. The directors in question have no time to convene a meeting of the board, and there are other directors besides themselves. They feel no doubt that the contract is one beneficial to the company, and one sure to be duly ratified. They accordingly resolve that one of their number shall enter, and he does enter, into the contract, in his own name but on behalf of the company. The fact that he has contracted on behalf of the company is not disclosed to the vendor, but the director acknowledges in writing, signed at the time and addressed to his co-directors, that he has bought on behalf of the company. The company subsequently, at a board meeting duly convened, purports to ratify the directors' act, and adopt the contract. After that, when the vendor discovers the facts, can he not treat the company as an undisclosed principal and liable on the contract, or must it be said that it was impossible for the company to ratify?

This being the nature of the question we have to decide, it appears to me that on principle it ought to be held that ratification is possible, and that to hold the contrary would be to establish an anomaly in the law, and moreover a useless one. Collins, L.J., has dealt fully in his judgment with the reasons why ratification should be allowed by law in such a case, and I do not intend to travel again over all the ground covered by him. I agree with him in his observations and conclusions, and will only add the following remarks.

It is of course settled law that in a contract between A. and B., not being one under seal or by bill of exchange, if B. had at the time authority to do so, he might contract on behalf of an undisclosed principal. It is equally clear that if a person contracts on behalf of a principal, but without authority at the time, then, as a rule, the principal may subsequently ratify what has been done, and we know that at law ratification relates back, and puts the agent in the same position as he would have been in if he had originally acted with authority. It seems to me to follow that, in the case we have to consider, we ought to hold, on principle, that ratification should be allowed, so as to place the ratifier in the position of an undisclosed principal. To hold otherwise would certainly establish an exception to the general law of ratification. I quite agree that it does not of necessity follow, because a certain view would appear logically to be the proper deduction from previously decided cases or from well-known principles, that that view ought to be the law. But I think that a logical inference ought not to be disregarded, an exception to a general rule ought not to be established, unless on strong grounds. In the case I am considering I can find no sufficient reason why ratification should not be allowed. The agent cannot complain if ratification be allowed, nor the principal. They both knew what they were doing when they assumed the positions they did. Nor is the person contracted with really injured. It makes no real difference to him whether an undisclosed principal had previously or subse-

quently authorized the agent. It is rather to his advantage if he discovers subsequently to the contract that there is a previously undisclosed principal at the back of the person with whom he contracted. He has his option which to sue; and, if he be sued, he has the same rights against the undisclosed principal as he had against the agent. It has been decided to be no legal hardship on him to allow the undisclosed principal to appear where the agent had been previously authorized, and it cannot be any hardship on him to allow the appearance of the undisclosed principal who has subsequently ratified the act of his previously unauthorized agent.

It is said that a difficulty may arise in proving whether a party to a contract did or did not in fact contract on behalf of another when not previously authorized; for that fact might depend simply on what was passing at the time in the mind of the party. But to this objection there are several answers. First, in most cases of ratification of the kind I am considering there would be no such difficulty of proof of intent on the part of the agent; as, for example, in cases like that of the directors of a limited company suggested above, and cases when it is clearly shown that the agent thought he had authority at the time but subsequently found that he was mistaken: and the mere difficulty of proof in certain cases ought not to prevent ratification as a rule being allowed, especially seeing (as already mentioned) that ratification is really not injurious to anyone concerned. Secondly, as previously pointed out, the difficulty of proof in special cases is met by the consideration that, if the proof of the agent's intent be challenged, those who allege the intent must satisfactorily prove it, and it may well be, if no evidence is forthcoming beyond the agent's statement as to what he had in his mind at the time, that the intent will be held not established; and thirdly, similar difficulties of proof might arise in the case of an agent alleged to be acting at the time with authority on behalf of an undisclosed principal. That authority might be verbal, and the principal might be dead when the question of authority has to be proved, or he might refuse to give evidence, or say he did not remember, or deny the agent's statement that he had authority; and the fact whether or not the agent did really contract on behalf of the alleged principal as well as the fact of authority to do so might both be very difficult of proof, and depend as to the first fact upon his evidence as to his intention. Yet such difficulties of proof afford no ground for impeaching the established rule of law as to undisclosed principals whose agents act at the time with authority. So that, even viewing the question from the mere standpoint of convenience, I can find no sufficient reason for refusing to allow the doctrine of ratification to be applied in the case we have to decide. I ought perhaps to refer to the suggestion that, because in the contract no principal is mentioned, it must be taken that there is a representation that no such principal exists. That suggestion, in my opinion, cannot be supported. Had it been well founded, the courts would never have recognized the existence of the undisclosed principal even in cases of his having previously given authority to the agent. For those reasons it appears to me that the question of law falling to be decided by us ought to be decided in favour of the appellants.

In the special circumstances of this action I think we are all agreed that, if the point of law is not against the appellants, there was evidence which should have been left to the jury in support of the plaintiffs' contention that the defendant Roberts contracted on behalf of himself and his co-defendants. This being so, in my opinion there should be a new trial.

*Application granted.*

Solicitors for the plaintiffs, *Thorowgood, Tabor, & Hardcastle.*

Solicitors for the defendants, *Chester, Broome, & Griffithes*, for *Holden, Sons, & Hodgson*, Hull.

---

App. Bankruptcy.
(Lindley, M.R., and Rigby and Collins, L.JJ.) April 27; May 4.

*In re* A. B. & Co.
*Ex parte* J. M. RICHARDSON. (*a.*)

*Bankruptcy — Petition —* Interim *receiver — Special manager—Petition ultimately dismissed—Account of special manager—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 10, 12.

*The official receiver in bankruptcy is entitled out of the debtor's estate to all expenses properly incurred by him during the pendency of a bankruptcy petition, whether by himself personally in the capacity of* interim *manager under section* 10 *of the Bankruptcy Act,* 1883, *or by a special manager appointed by him under section* 12 *of the same statute. And this is true even in cases in which the petition is ultimately dismissed for lack of jurisdiction.*

*Where a bankruptcy petition is presented, and an* interim *receiver and a special manager of the debtor's property are appointed pending its hearing, the validity of these appointments and of acts done under them, so long as they endure, is not affected even in cases in which the petition is ultimately dismissed for lack of jurisdiction.*

This was an appeal from a decision of Mr. Registrar Linklater, given on the 2nd of April, 1900.

The appeal raised an important question as to whether the official receiver is entitled out of the debtors' estate to the expenses properly incurred by him whilst acting as *interim* receiver during the pendency of a bankruptcy petition, in cases in which the petition is ultimately dismissed.

On the 18th of January, 1900, a bankruptcy petition was presented against A. B. & Co., an American firm trading both in America and England. Pending the hearing of the petition, the official receiver was appointed *interim* receiver of the debtors' property under section 10 of the Bankruptcy Act, 1883; and on the application of the petitioning creditors, he appointed a special manager of the debtors' business in England under section 12 of the same statute. The special manager carried on the business till the 28th of February, when the petition was finally dismissed by the Court of Appeal on the ground that in this particular case the English court had no jurisdiction (*ante*, p. 424, [1900] 1 Q. B. 541).

On the 2nd of April Mr. Registrar Linklater ordered that the sum of £409, which had been paid over to the official receiver by the special manager during his managership and represented the gross receipts of the business for the period in question, should be handed over to A. B. & Co., without allowing any deduction for wages and other necessary sums of money which had been paid by the special manager out of his own pocket, and which he had not been recouped.

From this order the special manager and the petitioning creditors now appealed.

---

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

*Muir Mackenzie*, for the appellants.—Two courses only are open to the respondents. (1) They are free to ignore altogether the special manager's trading and its results (including the whole sum of £409), to treat him as a trespasser, to demand back their property, and to claim damages for its conversion. Such an action, however, will not lie against even those creditors on whose initiative the special manager was appointed, for the manager is in no sense their agent, but the officer of the court: *Peruvian Guano Co.* v. *Dreyfus Bros.*, [1892] A. C. 166, *per* Lord Field, at p. 199, 40 W. R. Dig. 69; *Ex parte Vaughan*, 33 W. R. 151, 14 Q. B. D. 25. (2) Or they may agree to recognize, and to take the benefit of, the manager's trading; but in that case they must allow him his properly incurred expenses, and the accounts must be passed in the ordinary way just as are the accounts of a receiver: *Dowse* v. *Gorton*, 40 W. R. 17, [1891] A. C. 190, *per* Lord Macnaghten, at p. 203; *Whitmore* v. *Black*, 13 M. & W. 507; *In re Taylor, Ex parte Board of Trade*, 51 L. T. Rep. 711, 1 Morrell 264, 33 W. R. Dig. 20.

*C. A. Russell, Q.C.*, and *Carrington*, for the respondents.—There was never any jurisdiction to make these orders, and the official receiver and the special manager are alike mere trespassers. Meanwhile our business has produced in their hands this sum of £409, and we say that it belongs to us. We ought not to be compelled to treat these gentlemen as our agents, and so allow them to bring their expenses into account.

LINDLEY, M.R.—This is a matter of some little difficulty, and of more than a little interest. I do not attach much importance to the question whether the receiving order in this case was discharged simply on the ground that the order was erroneous, or because there was never any jurisdiction to make it. In my opinion this order was an erroneous order rather than an order without jurisdiction. The line between the two is, no doubt, a very fine one; but I am not going to discuss it now. The petition has been dismissed; and that being so, the official receiver has no longer any authority to carry on the busines. But it does not follow that the official receiver is therefore to be treated as though no such order had ever been made. His accounts must be passed in the usual way—his account alike of the moneys he has received, and of those he has paid away. Now what is this sum of £409 which is now in the hands of the official receiver? It is money which represents gross receipts, and is not a balance at all. The learned registrar has made an order that this sum is to be handed over, just as it stands, to the debtors. That, in my opinion, would be grossly unjust. Even if the order appointing the receiver had been made, in the proper sense, without jurisdiction, yet the court would never allow its officer to pay more than the balance due from him on taking the account. No injustice will be done to anybody, and the appeal must be allowed.

RIGBY, L.J.—As to the general principle, I agree entirely with the Master of the Rolls. As to the appointment of the official receiver, I wish to add a word or two. I do not think it is open to anyone to say that he was wrongly appointed in the sense that there was no jurisdiction to appoint him. As soon as a petition is presented, there arises at once the power to appoint a receiver, whatever the result of the petition may be.

COLLINS, L.J.—I agree. The question has been raised as to whether the debtor is entitled to treat the special manager as a wrongdoer. If he is entitled, there is then much to be said for the respondents' point of view. But I do not myself think that the special manager can be so treated. His appointment by the court was perfectly good till it was set aside.

*Appeal allowed.*

Solicitors, *Bentwitch, Watkin-Williams, & Gray; J. H. Moggridge.*

---

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — April 25.

MUTTON v. PEAT. (a.)

*Banker—Separate accounts—Deposit of securities for debt due on one account—Rights of third parties.*

*Securities belonging to the clients of a firm of stockbrokers were deposited with a bank to secure a debt due from the stockbrokers to the bank. The stockbrokers had two accounts with the bank—a loan and a current account. This debt was due on the loan account, but there was no agreement that the securities were deposited to secure the loan account exclusively. The stockbrokers became bankrupt. At the date of the bankruptcy they had a balance in their favour on the current account, which was at any rate partly made up of money they had received from clients for investment. The bank did not set off the balance due on the current account against the indebtedness on the loan account, but sold the securities and discharged the debt.*

*Held, that the securities were deposited to secure the indebtedness of the stockbrokers to the bank, and that this indebtedness was the amount due on all their accounts. Consequently, the clients of the stockbrokers were not entitled to be repaid out of the balance on the current account money which had been paid by them to the stockbrokers for investment and paid by the stockbrokers into their current account.*

*Decision of* Byrne, J. (ante, *p.* 62, [1899] 2 *Ch.* 556), *reversed.*

This was an appeal from a decision of Byrne, J. (reported *ante*, p. 62, [1899] 2 Ch. 556).

The facts were as follow: Messrs. Tatham & Co., stockbrokers, had two accounts with their bankers, Messrs. Glyn, Mills, Currie, & Co., a current account and a loan account. On the latter account Messrs. Tatham owed on the 30th of December, 1895, £7,500, and to secure this debt they had deposited with the bank certain securities which really belonged to some of their clients, one of whom was the plaintiff in the present action.

On the 11th of January, 1896, Messrs. Tatham paid into their current account £790 4s. 6d., which they had received from one Parker for investment. Two days afterwards they were declared defaulters on the Stock Exchange.

On the 21st of January a receiving order was made against them, and on the 24th of January they were adjudicated bankrupt.

On the 20th of January the bank closed Messrs. Tatham's current account and transferred the credit balance of £1,362 10s., partly made up of Parker's £790 4s. 6d., into a new account, which they also credited with a sum of £3,342 15s., produced by a sale of some of the before-mentioned securities.

On the 22nd of January the debit side of the new account showed: "Loan (part discharged) £3,340; twenty days' interest to the 20th of January, £3 13s. 2d." Further sums were similarly received and entered in the new account by the bank in respect of sales of others of the said securities, so that on the

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

30th of January, 1896, on the debit side there appeared, "Loan (balance) discharge, £3,590; thirty days' interest, £5 17s. 11d." No part of the £1,362 10s., which had been the credit balance on Messrs. Tatham's current account, was applied in the reduction of the debt on the loan account, but the proceeds of the sales of the securities were specifically appropriated in discharge of this debt, leaving a small balance in the hands of the bank. Some question arose on a letter and affidavits of Mr. Harvey, the secretary to the bank, whether the bank had or had not appropriated this sum towards the reduction of the debt, but the court concluded that they had not.

Parker then took out a summons claiming to be repaid the £790 4s. 6d. out of the £1,362 10s., the balance on the current account transferred to the new account.

Byrne, J., held that, having regard to the fact that the bank had appropriated specific receipts to payment of a specific debt due from a customer, Parker had established his claim, and that the rule in *Clayton's case* did not apply, and that the *cestuis que trustent* of the deposited securities had no equity against Parker to enforce the rule.

The plaintiff appealed.

*Levett, Q.C.*, and *Hull*, for the appeal.—However many accounts a banker may have with his client they are all at law one account, and no appropriation which the banker may make as between himself and his client can affect the rights of third parties.

They referred to Grant's Law of Banking (5th ed.), p. 250; *Pedder* v. *Preston Corporation*, 10 W. R. 773, 12 C. B. N. S. 535; *Thomas* v. *Howell*, 22 W. R. 676, L. R. 18 Eq. 198; *In re European Bank*, 21 W. R. 45, L. R. 8 Ch. App. 41.

*G. Lawrence, contrâ.*—The cases cited are cases between a banker and his customer, but this is a question of what are the rights between two parties both claiming under the customer. The rule in *Clayton's case*, 1 Mer. 572, does not apply here.

He referred to *Marquis of Bute* v. *Cunynghame*, 2 Russ. 275; *Dunlop* v. *Dunlop*, 31 W. R. 211, 21 Ch. D. 583.

*Kenyon Parker*, in the same interest.

LINDLEY, M.R.—I do not think we need hear a reply, Mr. Levett. Your point is unanswerable when it is grasped. I agree with Mr. George Lawrence and Mr. Kenyon Parker on the accounts as they stand—that is to say, I agree that the bank had two accounts with Tatham & Co., the deposit account and the current account, and I agree that when Tathams became defaulters on the 13th of January, 1896, the bankers closed the current account; at that time there was £1,362 odd standing to Tatham's credit on that account. I agree that the accounts were not then closed by transferring that £1,362 to the deposit account, thereby reducing the amount due on that deposit account, but the £1,362 was carried to the bankruptcy ledger, some other account; in other words, they are right when they contend that according to the books of the bank the £1,362 was kept to an account in the bankruptcy ledger. Now what follows from all that? What was the plaintiff's position? His securities had been deposited by Tatham with the bank in December, 1895. What were the terms of that deposit? It appears to me that everything in this case turns upon that. There was no special agreement in writing about the matter, they were deposited for the indebtedness of Tatham, they were a security to the bank for what Tatham owed the bank, including, of course, what Tatham owed on the loan account. What is important and is, to my mind, the key to the whole case is that there was no agreement at the time those securities were deposited that the two accounts—the loan account and the current account—should be kept separate so that the indebtedness for which the securities were deposited should be ascertained by looking at the loan account alone; in other words, there was nothing agreed to the effect that these securities should be a security for anything except that which on taking an account between Tatham and the bank under all heads of all accounts should be found ultimately due from Tatham to the bank. That has its advantages and its disadvantages. That there were two accounts is plain, and I feel satisfied that Mr. Lawrence is right in saying that the £1,362 was, as a matter of book-keeping, kept in the way he mentioned.

Now, to return to the question, what are the rights of Mr. Mutton, the plaintiff, as regards these securities? He says: "I cannot deny the right of the bank to retain the securities for the amount of the indebtedness. What is the indebtedness? It is the amount, taking the deposit account and current account (you cannot separate them), which is due to the bank on those two accounts, and this is the amount my securities must stand charged with. Now, I do not know how the bank have manipulated their books or how many accounts they have kept. When you come to ascertain what is the amount due from Tatham to the bank, the answer admits of only one solution, that is the lesser sum and not the greater sum which is in dispute here." Then the plaintiff says, Give me back my security. Now, what answer can Mr. Parker have to that? This is one of those unfortunate cases in which the court has to decide on which of two or three innocent parties a loss has to fall, but when once you grasp the principle that the securities were granted or deposited for the amount which Tatham should be found to owe to the bank, it is impossible to say that the amount is to be ascertained by setting one account against the other. It is the right of the depositor of the securities to say, "You cannot hold my security except for the ultimate balance." There is no answer to it, and Mr. Parker has no right to dispute that, nor Mr. Kenyon Parker's client either. It is no answer to say, "If you look at the accounts as they are kept you will find that this £790 4s. 6d. is still in the hands of the bankers." I think that Byrne, J., has gone wrong on a question of fact. He has tried this case and adjudicated upon it, upon the theory which, I think, is erroneous in point of fact, that the securities were deposited to secure the loan account exclusively and without reference to the other account. This was not so; there was no agreement which entitled the bank or Tatham to say that these securities should be treated as a security for what is due on the loan account alone. Apart from that there is no answer to Mr. Levett's case, and I think the appeal must be allowed.

RIGBY, L.J.—If I thought it was in anyway within the powers of the bank to mix up these accounts or not to mix them up as they thought proper I should have to decide something I should be very glad to be free from—that is to say, the effect of Mr. Harvey's affidavits as contrasted with his letter, but I think I may assume that there has been for the purpose of this case no appropriation *de facto* of that balance of £1,362. Then I inquire what is the effect of that? The answer seems to me it does not matter in the least whether they appropriated it or not, if we are able to say they ought to have appropriated. I take it we are bound to say that the bank ought to have appropriated that £1,362 in reduction of the £7,500 loan, or rather perhaps the more correct statement would be that they were bound to allow it

in account whether they appropriated it or not, even if they tried not to appropriate it. The indebtedness of Tatham was what the securities were given for and not anything else. That indebtedness was the £7,500 minus the £1,362, and that and that only.

COLLINS, L.J.—I am of the same opinion.

Solicitors, *Longbourne, Stevens, & Co.; Bower, Cotton, & Bower*, for *H. B. Bradley*, Folkestone; *Foyer & Hordern.*

---

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) March 22, 23, 26.

THOMSON v. CLANMORRIS (LORD). (a.)

*Limitations, Statute of—Company—Prospectus—Untrue statements—Action by shareholder for compensation—Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3—*Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3.

*An action for compensation for loss or damage sustained by a shareholder in a company by reason of untrue statements in a prospectus under section* 3 *of the Directors' Liability Act*, 1890, *is not an action "for penalties, damages, or sums of money given to the party grieved" within the meaning of section* 3 *of* 3 & 4 *Will.* 4, *c.* 42, *and consequently need not be brought within two years after the cause of action accrued.*

*The Directors' Liability Act*, 1890, *does not impose a penalty, but merely a liability to make compensation for a loss sustained.*

*In such an action the cause of action accrues and the time begins to run from the time when the plaintiff subscribes for shares.*

Semble, *the period of limitation would be six years under the Act* 21 *Jac.* 1, *c.* 16.

*Held, also, on the merits of the case, that the plaintiff was entitled to succeed.*

*Judgment of* Kekewich, J. (ante, *p.* 39, [1899] 2 *Ch.* 523), *affirmed.*

Appeal from the judgment of Kekewich, J., reported *ante*, p. 39, [1899] 2 Ch. 523, where the facts in the case are set out.

By that judgment Kekewich, J., decided that one important statement at least in the prospectus was untrue in fact, and that the defendants (the directors) had not reasonable ground for believing it to be true; that the plaintiff subscribed for shares on the faith of this statement as much as any other statement in the prospectus; that the action was not one within the meaning of section 3 of the Act of 1833 (3 & 4 Will. 4, c. 42); and that the cause of action arose on the loss or damage being sustained by actual payment of the money, so that, as to the last payment on the shares made by the plaintiff in November, 1898, the statute, even if it applied, was no answer.

One of the defendants and directors, J. W. Wilson, now appealed from that decision.

The question as to the applicability of 3 & 4 Will. 4, c. 42, s. 3, to an action brought under the Directors' Liability Act, 1890, was first argued.

*Lawson Walton, Q.C.*, and *T. Willes Chitty*, for the appellant.—The Act 3 & 4 Will. 4, c. 42, applies to actions for damages or compensation under any subsequent Act, and therefore applies to a claim for statutory compensation brought under section 3 of the 1890 Act by a "party grieved" within the express meaning of section 3 of the 1833 Act. There is no direct authority upon the point here raised, but see *Cork and Bandon Railway Co.* v. *Goode*, 1 W. R. 410, 13 C. B. 826. The Act 21 Jac. 1, c. 16, does not apply. The last decision on the 1890 Act is *Greenwood* v. *Leathershod Wheel Co.* (*Limited*), [1900] 1 Ch. 421. The language of the 1890 Act covers a case under the 1833 Act; although it does not use the word "damages," it uses the word "compensation," which is equivalent to measure of damages: see 2 Co. Litt. 257*a*. As to when the statute begins to run, see *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127, 34 W. R. Dig. 108, affirming 32 W. R. 947, and *Gibbs* v. *Guild*, 30 W. R. 591, 9 Q. B. D. 59. Under the Employers' Liability Act there is a special limitation fixed; otherwise the 1833 Act would apply to cases arising thereunder. [They referred also to *Howell* v. *Young*, 5 B. & C. 259, at p. 264; Mayne on Damages (6th ed.), pp. 6, 514; and Darby and Bosanquet on the Statutes of Limitations (2nd ed.), p. 512.] [VAUGHAN WILLIAMS, L.J., referred to *Godefroy* v. *Jay*, 7 Bing. 413; and LINDLEY, M.R., to the Statute of Marlebridge, 52 Hen. 3.]

*Renshaw, Q.C.* (*George Henderson* with him), for the respondent.—The time under the Statute of Limitations begins to run when the plaintiff sustained loss, by reason of the misrepresentations in the prospectus, on the company being ordered to be wound up. No limit of two years is provided by the 1890 Act; the time allowed is six years (21 Jac. 1, c. 16); unless it be the Act of James I., there is no Statute of Limitations applicable to this case. The plaintiff's right of action under the 1890 Act is a statutory right to sue for "compensation," and the sum recoverable thereby is not a penalty within the meaning of section 3 of the 1833 Act. An instructive case is *Saunders* v. *Wiel*, 40 W. R. 594, [1892] 2 Q. B. 321. [LINDLEY, M.R.—I have looked at that and compared it with *Adams* v. *Batley*, 35 W. R. 437, 18 Q. B. D. 625.]

*T. Willes Chitty* replied.

LINDLEY, M.R.—We will not take time to consider this point, having had an opportunity of looking into it. The point is a new one to all of us and no doubt there is a difficulty about it. The first thing that I will deal with is the 3rd section of the Act of 1833 (3 & 4 Will. 4, c. 42), which has been so much relied upon. In construing that enactment, as in construing any other enactment, you must look not only at the words used, but at the history of the Act, and consider what were the reasons that led to its being passed. You must look at the mischief that had to be cured as well as the cure afforded. And when you have looked at the state of the law previous to that Act, you see pretty well what it was that had to be dealt with. There were certain causes of action as to which there was no defined time of limitation. Some of them were alluded to in the earlier part of the section—actions for debt or specialties and other things which are there enumerated. They were not provided for by the existing Statutes of Limitations, and they are brought in. That was defect number one. There was another class of actions as to which there was no definite time for suing. Those were actions for penalties and damages and sums of money given by various Acts of Parliament by way of penalty or punishment and not by way of compensation. But as was pointed out by the late Master of the Rolls, Lord Esher, when commenting on the case of *Saunders* v. *Wiel* in *Adams* v. *Batley*, the punishment was there an object, and whether you call it penalty, damages, or sum of money, it was not assessed with a view to compensate the plaintiff, although he might put some of it in his own pocket. In other words

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

they were what are popularly called "penal actions." You get at that from the history of the legislation and from knowing what the state of the law was and what the defect was. Now, then, if we take that as our guide, it is quite obvious to my mind that the Directors' Liability Act, 1890, does not come within that class at all. If you leave out any consideration of the history of the legislation there is some difficulty in saying that the language of the Act of 3 & 4 Will. 4, c. 42, does not cover cases arising under the Directors' Liability Act, 1890. If you look at the words very critically I do not think they do, because if you look at the frame of the Directors' Liability Act, 1890, you do not find that an action is given or that damages are given or that a penalty is given. Nothing is given. This is, to my mind, rather hypercritical, but it is none the less true. What you find in the Directors' Liability Act, 1890, is a liability imposed—a liability to make compensation; and the money payable under the Directors' Liability Act, 1890, is obviously compensation to the plaintiff for the loss which he has sustained. It must be estimated and awarded with reference to that. It is not in the least like a penalty, damage, or sum of money imposed by statute as a punishment without referring at all to the injury sustained by the person who sues for it. Therefore it appears to me that, whether you look at it hypercritically—which I never like to do—or whether you look at the good sense of the thing and the history of the legislation, it is plain to my mind (although there is a little difficulty about the language) that it is not an action for a penalty, damage, or sum of money within the meaning of section 3 of the Act 3 & 4 Will. 4, c. 42.

That brings us to the next question, what time, if any, is limited. If we get rid of the question of two years under the Act of 3 & 4 Will. 4, c. 42, we can reserve that for further consideration. My own impression—I speak now of my own view only—is this, that the true view to take of this enactment of the Directors' Liability Act, 1890, is that if we were in the old days of pleadings not under the Judicature Acts, an action on the case for breach of duty would be the proper remedy, and six years would be the time. But we need not decide that, because whether twenty years or six years is the period which is limited, this writ has been issued in plenty of time to avail the plaintiff. In other words there can be no Statute in Limitations which can be pleaded having regards to the dates, the cause of action having arisen, if at all, at the outside three years before the issue of the writ, and the writ being issued as late as December, 1898. Passing that over, we come, I think, to this conclusion, that whatever the Statute of Limitations may be, if there is one applicable at all, there is none to this action. And if so, we need not trouble ourselves much about the cause of action or the time when that accrued.

Here, again, as the case has been argued and the point is new, I may say at once my own view is that Mr. Willes Chitty is right and that the cause of action accrues and the time begins to run from the time when the shares were subscribed for. I get at that rather by an exhaustive process. I cannot adopt Mr. Renshaw's suggestion that you must wait till the company is wound up to see what loss is sustained. The company may never be wound up at all and yet there may be an action. Then I do not think it is at all in accordance with ordinary rules of procedure and ordinary views respecting the Statute of Limitations to say that there is a separate action every time a man has to pay a call. That would bring about a state of things to which we are not accustomed. It is foreign to our habits of thought. I cannot help thinking that the true view is that the limitation is six years by analogy to the old actions, and that the time begins to run when the public subscribes for and take shares on the faith of the untrue statements in the prospectus. Those are my own views. It is quite sufficient to say here that the only point that we have to decide is whether this particular action is barred by any Statute of Limitations. To my mind it is plain that it is not. Therefore we must hear the case on the merits.

RIGBY, L.J.—I agree that there is no statutory limitation which applies to this case.

VAUGHAN WILLIAMS, L.J.—I agree. As the point is a new one, I should like to say a word or two upon it myself, and it is my duty to do so. One has to consider what really is the nature of the enactment contained in the Directors' Liability Act, 1890. I wish to say with regard to that, that if one reads section 3 it seems to one that what that section does is this: although it does not in form give a new action, all that it does being to say that persons who have done certain things shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures or debenture stock on the faith of such prospectus or notice "for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof," yet what really is done by the section is to give a new action on the case. It really creates a new negative duty. These persons, be they directors or promoters, or whatever class they come under which is included in this section, have really cast upon them a new duty in respect of prospectuses and similar notices. That duty one finds in clauses (*a*), (*b*) and (*c*) of the section. Speaking generally, one may say that this Act of Parliament creates a new statutory duty as to accuracy, a new statutory duty to abstain from inaccurate and untrue statements. Then in effect it gives a new action on the case to those persons who may have been injured by the neglect of that statutory duty, and it seems to me therefore that really this is a case which is provided for by the statute of James I. It is an action on the case, and, of course, if it is an action on the case the six years' limitation would apply. But then it is said that this is not an action on the case; that this is an action on the statute, and the case of *Cork and Bandon Railway Co.* v. *Goode* is relied on for that proposition. But it is to be remembered that that was an action for a statutory debt, and the sole question there was whether that debt was within the terms of the statute of James I. founded on specialty or not. It does not seem to me that the decision in that case really is material to the case that we have here to decide. Maule, J., points out that there is a difference between an action which is given by a statute and an action on the statute. The case of *Cork and Bandon Railway Co.* v. *Goode* was an action of debt on the statute, and as I have already pointed out the only real question in the case there was whether that action of debt came within the words of the statute of James I., "contract not founded on specialty." In the present case it seems to me that you have merely a new duty of accuracy created in respect of the preparation and issue of prospectuses, and an action on the case given to those persons who are injured by it. It is said that this is a new form of statute. But it does not seem to me that in substance this statute differs from the Statute of Marlebridge, a very old statute (52 Hen. 3), because there in respect of not only illegal but irregular and excessive distresses, notwithstanding the liability to punishment, it is provided in the earlier part of the

section that there shall be full amends made to those who have sustained loss. I will give the exact words of the section, which says: "Nevertheless, amends shall be made fully and sufficiently to them that have sustained loss by such distress." And it seems to me that here the effect of this section is that amends shall be made to those that have sustained loss by being induced to subscribe for shares or debentures by reason of the misstatement in the prospectus or other similar document. In these circumstances it is not really necessary to go on to decide the other question, from what time the statute is to run. But I agree with the Master of the Rolls that the statute does not run from the sustaining of each piece of damage, neither does it run from the time of the wrongful act, whether the preparation or the issue of the document containing the untrue statement. It cannot run from that time by reason of two well-known principles of law regarding all Statutes of Limitation. The Statute of Limitations cannot begin to run unless you have two things present, a party capable of suing and a party liable to be sued. Now, in the case of this Act of Parliament it is perfectly plain that inasmuch as the compensation is given to those persons who have subscribed for shares in respect of the damages sustained thereby by them, you cannot have any cause of action whatever until you have had the subscriptions for the shares. That to my mind decides the first point—that is, that the statute does not run from the time of the preparation or issue of the incorrect document. Then it is said that, even if it does not, inasmuch as the compensation is given for the loss, must not a fresh cause of action accrue as each fresh item of loss accrues. It seems to me that it is untrue to suggest that in fact the whole loss is not assessable the moment that the subscription for the shares has been made upon the faith of the prospectus. Generally speaking, it is obvious that you can assess that loss by going into the market and selling the shares for which the subscription has so been made. It is said that in some instances the shares may not be saleable, or that the shares may carry such a liability for uncalled capital that you positively have to pay somebody to relieve you of those shares. It is further suggested that if there is a winding up, there may be a liability to be put upon the B. list of contributories within twelve months of the sale of the shares. But all those matters, supposing they appear in any case, although they may not be capable of perfectly exact computation of the damage, are clearly so capable of computation that according to the well-established principles of the English law in favour of finality of litigation you would have amply sufficient evidence and means of proof such as to not only make it a duty to claim in respect of those more difficult matters at the time when you bring your action, but also to debar you from any further action if you did not so claim.

The appeal was then heard upon the merits.

*T. Willes Chitty*, for the appellant.

The respondent's counsel were not called upon.

LINDLEY, M.R.—I give Mr. Wilson credit for being perfectly honest and in believing, and perfectly honestly believing, that the statements made about the 7,000 square miles were true. But then that is not enough. We have to consider whether he had reasonable ground to believe that that was true. Seven thousand square miles is an extensive tract of land, and when I come to sift the grounds of his belief, I must say that they seem to me, to say the least of it, to be extremely unsatisfactory. He was told by Sir Alfred Kirby, and he says that he was told by another person. When you look at the matter and go into it, do you find that those persons knew about it? They knew uncommonly little about it. They knew something about the country where this land is situated. But as to the dimensions, they knew no more about that matter, or very little if anything more, than anyone who knew nothing about it. If you go to the concessions you cannot find that they comprised 7,000 square miles of land. It is not a question of a few miles merely. It is a question between 600 or 700 and 7,000. Making every allowance for exaggeration, and every allowance for difficulty of survey and so on, the difference is so enormous that there is no accounting for it. The truth is that somebody or other, I do not know who, put this misstatement into the first prospectus and there it has passed muster, and Mr. Wilson has been misled. I have myself no doubt that what he says is true, that he has been thoroughly taken in. Very likely he has, but unfortunately he has made himself responsible for this prospectus, and he is liable for this scandalous untruth unless he can satisfy the court that he had reasonable grounds to believe that the statements were true. I cannot see those grounds at all, and I cannot possibly differ from the learned judge in the court below on this point. The appeal will therefore be dismissed with costs.

RIGBY, L.J.—I agree.

VAUGHAN WILLIAMS, L.J.—I agree. I am very sorry for Mr. Wilson. When one has to ask oneself the question, Was there reasonable ground for this belief? I am afraid that there can be only one answer to it—namely, that it is not a reasonable ground for this belief that Mr. Wilson believed the statements which were made to him. Although that is the only answer one can give to this question, one cannot help being sorry at having to arrive at this conclusion, because it involves a confusion of a man who is a victim and has been robbed with the robbers themselves. I cannot help feeling that it is very hard that Mr. Wilson should be put in that category.

*Appeal dismissed.*

Solicitors, *Morten, Cutler, & Co.; Herbert Toomer.*

---

From County Palatine of Lancaster. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 8.

*In re* MANCHESTER REAL ICE SKATING AND SUPPLY CO. (*a.*)

*Practice—Palatine Court of Lancaster—Taxation—Costs—Scale.*

*The order of the 28th of November, 1884, of the Chancery Court of the County Palatine of Lancaster, "as to court fees and solicitors' costs" only introduces a modification of the lower scale of costs established by the order of the 27th of November, 1884, and has no application to any cases to which that lower scale did not apply.*

This was an appeal against an order dated the 5th of February, 1900, of the Vice-Chancellor of the Chancery Court of the County Palatine of Lancaster directing that certain fees and costs should be allowed on the higher scale. Leave to appeal had been given by the Court of Appeal.

On the 14th of November, 1899, the Vice-

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Chancellor dismissed with costs to be taxed as between party and party an originating motion on behalf of M. C. Bannister asking that the register of members of the above company might be rectified by removing his name therefrom as the holder of 200 shares of the nominal value of £1 each in the company. The rules as to the taxation of costs in the Palatine Court are as follow:

The Order as to Court Fees of the 27th November, 1884, provides by rule 7 that "the fees and percentages set forth in the column headed 'Lower Scale' in the first part of the schedule hereto are to be taken and paid in the cases mentioned in the second part of the same schedule, and the fees and percentages set forth in the column headed 'Higher Scale' in the said first part of the said schedule are to be taken and paid in all other cases."

The second part of the schedule mentions eight classes of cases. The first seven classes comprise cases (none of which includes such a case as the present) in which the matter in question is "under the amount or value of £1,000." The eighth class is "All proceedings by original special case, originating petition, or notice of motion, and all proceedings relating to funds carried to separate accounts, and all proceedings under any railway or any private Act of Parliament, or under any other statutory or summary jurisdiction, and generally all other cases where the estate or fund to be dealt with shall be under the amount or value of £1,000."

By another order dated the same day and entitled Order as to Solicitors' Costs, it is provided (rule 1) that "solicitors shall be entitled to charge, and be allowed, the fees set forth in the column headed 'Lower Scale' in the schedule hereto, in the following cases"—namely, the eight cases mentioned in the second part of the schedule to the Order as to Court Fees.

By rule 2: "Solicitors shall be entitled to charge, and be allowed, the fees set forth in the column headed 'Higher Scale' in the schedule hereto in all actions for special injunction to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property, and infringement of rights, easements, patents, and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed 'Lower Scale' are hereby made applicable."

Rule 3: "Notwithstanding these rules the court or the Vice-Chancellor may in any case direct the fees set forth in either of the said two columns to be allowed to all, or either, or any of the parties, and as to all or any part of the costs."

By another order as to Court Fees and Solicitors' Costs dated the 28th of November, 1884, rule 1: "Notwithstanding such of the provisions of the order as to fees and percentages, dated the 27th of November inst., and those of the order as to solicitors' costs of the same day as relate to cases in which the several lower scales of fees and costs therein respectively set forth are thereby made applicable, the fees appointed to be taken by the registrars or other officers of the court, and authorized to be charged by and allowed to the solicitors of the court upon foot of the several scales headed 'Lower Scale' in the several schedules to such orders respectively, shall not, until further order be taken, charged, or allowed in any case in court which shall be under the amount or value of £300; but in all such cases the fees to be taken and to be charged and allowed as aforesaid respectively shall be one half of the fees specified in the several higher scales of the said orders respectively, except in the instances following—namely, except that this rule is not to apply in any case, so as to increase the amount of any fees authorized to be taken or to be charged or allowed on foot of the said lower scales respectively; and is not to apply to any fee authorized to be taken or to be charged or allowed for copies, or any *ad valorem* fee."

Rule 2: "Except in the particulars specified in the last preceding rule, all cases in court under the amount or value of £300 shall, until further order, be regulated by such of the provisions of the said orders of the Chancery of Lancaster Rules, 1884, as are applicable to cases to which the said several lower scales mentioned in the said orders are thereby made applicable."

On the taxation of costs under the order of the 14th of November, 1899, the registrar taxed the costs on the lowest scale provided by the orders of the Palatine Court. The company objected that the costs ought to have been taxed on the higher scale, and the Vice-Chancellor allowed the objection. He was of opinion that rule 1 of the order of the 28th of November, 1884, applied only to those cases to which under the orders of the 27th of November, 1884, the lower scale of costs and fees is applicable—that is, to the cases mentioned in the second part of the schedules to these orders, and that the effect of rule 1 of the order of the 28th of November was only to substitute the scale of fees and costs mentioned in it in those cases coming within the second part of the schedules which were under the amount of £300. And the Vice-Chancellor held that at any rate he had a discretion in the matter, and that the case was one in which fees and costs ought to be allowed on the higher scale.

The shareholders appealed.

*Warrington, Q.C.*, and *Austen Cartmell*, for the appellant, cited *Harrison* v. *Leutner*, 31 W. R. 837, 24 Ch. D. 594.

*P. O. Lawrence, Q.C.*, and *R. B. Lawrence, contrà.*

*Warrington, Q.C.*, replied.

LINDLEY, M.R.—I do not think there can be any doubt as to the true construction of the order of the 28th of November, though the key to its construction is not at first sight easy to find. The order of the 27th of November is evidently founded on the Rules of the Supreme Court under the Judicature Acts. The order of the 28th of November only introduces for cases under £1,000 in amount or value a modification of the lower scale of costs established by the order of the 27th of November and it has no application to any cases to which that lower scale did not apply. The appeal must be dismissed with costs.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

Solicitors, *Pritchard, Englefield, & Co.*, for *Simpson, North, & Co.*, Liverpool; *Arthur S. Mather*, Liverpool.

---

From Chan. Div.
(Lindley, M R., and Rigby and Vaughan Williams, L.JJ.) March 7.

BURCHELL v. WILDE. (*a*.)

*Partnership—Dissolution—Goodwill—Name of old firm—Partner's name.*

*On the dissolution of a partnership, where no provision is made about the use of the firm name, but the goodwill, apart from the benefit of the firm name, is not to be sold, but is to be divided between the partners, each partner is at liberty to use the firm name so long as he does not*

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

*thereby hold out his late partner as his partner in business.*

*A man does not necessarily hold out his late partner as his partner in business by using the old firm name, even though the old firm name is the name of his late partner.*

This was an appeal from a decision of Byrne, J., refusing to make any order on a motion brought to restrain the defendants from carrying on business as solicitors under the name or style "Burchell & Co.," or under any other name or style of which the name of "Burchell" or "Burchells" formed part.

In 1847 Wm. Burchell the elder (an uncle of the plaintiffs) was carrying on business as a solicitor in partnership with two gentlemen named Kilgour and Parson, under the style of Burchell, Kilgour, & Parson.

In 1851 Kilgour and Parson retired from practice, and Wm. Burchell the elder practised alone in his own name until 1857, when a new partnership was constituted between Wm. Burchell the elder, James Burchell (father of the plaintiff James Ward Burchell), and Wm. Burchell the younger.

These partners carried on business at No. 5, The Sanctuary, Westminster, under the style of "Burchells."

In 1874 James Burchell retired, and the plaintiff James Ward Burchell was admitted a partner.

The firm so constituted continued in business still as "Burchells" till 1882.

In that year a new partnership was constituted, the partners being Wm. Burchell the elder, Wm. Burchell the younger, the defendant Wm. George Wilde, and the plaintiffs James Ward Burchell and C. T. D. Burchell, and they carried on business under the style of Burchell & Co. Wm. Burchell the younger retired from the firm in March, 1884, and Wm. Burchell the elder died in 1888.

By an agreement dated the 21st of June, 1893, the plaintiffs and the defendant Wm. George Wilde agreed to continue in partnership as solicitors in continuation of their then partnership for the term of ten years from the 31st of March, 1893, under the style of Burchell & Co. at No. 5, The Sanctuary.

The defendant Wm. Wilde, who was a son of the defendant Wm. George Wilde, had been admitted as a solicitor, and an agreement was at the same time made for the introduction by any partner with the consent of the other partners of a son who had been admitted upon certain terms, and that if Wm. George Wilde should not during his life have introduced a son into the firm, the defendant William Wilde should on the death of his father be admitted as a partner upon certain terms. In the year 1899 differences arose between the partners, and the partnership was dissolved by consent as from the 9th of December, 1899. Heads of an agreement for dissolution were on the 15th of September, 1899, signed by the partners, various points being left to the determination of an arbitrator. In the opinion of the Court of Appeal the effect of the agreement coupled with the arbitrator's award afterwards made was that the goodwill of the business was not to be sold for the benefit of the partners, but was to be divided between them in so far as it was incident to the possession of the client's documents, and no provision was made as to the use of the firm name. The plaintiffs acquired the office of No. 5, The Sanctuary, at a valuation. At the date of the dissolution the defendant W. G. Wilde was entitled to a larger share of the profits than any of the other partners, and he had been a partner in the successive partnerships since 1882, when the style was changed from Burchells to Burchell & Co. Notice of dissolution was duly signed and gazetted, and independent circulars were sent by the plaintiffs and the defendant W. G. Wilde respectively to every client of the old firm stating the fact of the dissolution and also respectively giving notice of the names of the partners constituting the new firms respectively and the addresses of the new firms and the styles under which they respectively intended to carry on business. The plaintiffs, with a new partner also named Burchell, continued to carry on business at the old offices as Burchells & Co. and the defendants (the defendant Wm. Wilde having been taken into partnership by his father) began to carry on business at 36, Victoria-street, Westminster, under the style of Burchel, & Co., and both the plaintiffs and the defendants were willing to make some modification in their respective firm names so as to render the resemblance less close; but the plaintiffs claimed the exclusive right to use the name Burchell or Burchells and to restrain the defendants from using either of these names in any way as part of their firm name. The motion came on for hearing before Byrne, J., on the 19th of January, 1900, who dismissed the motion.

The plaintiffs appealed.

*Swinfen Eady, Q.C.*, and *Vernon*, for the plaintiffs.—The defendants are not entitled to trade as Burchell & Co. because their name is not Burchell. Burchell & Co. was the name of the old firm, and the defendants are trading as if they had bought the goodwill of the old firm: *Gray* v. *Smith*, 38 W. R. 310, 43 Ch. D. 208; *Thynne* v. *Shove*, 38 W. R. 667, 45 Ch. D. 577; *In re David & Matthews*, 47 W. R. 313, [1899] 1 Ch. 378. [VAUGHAN WILLIAMS, L.J.—That case was the case of a sale.] True, but the principle is that you are not entitled to represent yourself as having that which you have not. The defendants represent that they have the old business, but they have not acquired the goodwill under the contract.

They also referred to *Scott* v. *Rowland*, 20 W. R. 508; *Chatteris* v. *Isaacson*, 57 L. T. Rep. 177; *Banks* v. *Gibson*, 13 W. R. 1012, 34 Beav. 566; *Chappell* v. *Griffith*, 53 L. T. Rep. 459, 34 W. R. Dig. 184.

*Levett, Q.C.*, and *Norton, Q.C.*, for W. G. Wilde, and *Alexander, Q.C.*, and *Napier*, for W. Wilde, were not called on.

LINDLEY, M.R.—We must first ascertain the facts and then see whether the learned judge was right in the view which he has taken. [His lordship stated the facts, and continued:] The agreement of the 15th of September, 1899, as expounded by the award, amounts to this, that the clients and the documents were to be divided, some of them going to the Burchells and some to W. G. Wilde. There were also provisions for the books of the firm being handed over to a Mr. Gardiner with liberty to either of the partners to inspect. Some of the older books were to be left with the Burchells, they being under an obligation to give extracts to Wilde if he should want them. What does that arrangement mean? It involves this, that the goodwill of the business was not to be sold for the benefit of the partners. The goodwill was to be divided between them in so far as it was incident to the possession of the clients' papers. That is a most important fact. It was left entirely undecided what was to be done about the use of the name of the firm. But if you come to the conclusion (about which there can be no doubt) that the goodwill, apart from the benefit of the firm name, as to which nothing is said, was not to be sold but was to be divided between the partners, what is the result? It appears to me to follow that such partners could use the name of the old firm. They have become

tenants in common of that asset, and each partner was entitled to enjoy that asset subject only to a limitation which I will mention presently. I cannot see any legal answer to this position, and this, I think, explains the decision of Lord Romilly, M.R., in *Banks* v. *Gibson*, and clearly distinguishes the present case from *Gray* v. *Smith* and the other cases which have been cited. The limitation to which I have referred is this—and I think Byrne, J., has fully recognized this. Apart from some express stipulation, a man has no right to hold out his late partner, or, indeed, anyone else, as his partner in business, and if it could be shown that the defendants were holding out the plaintiffs as their partners, I should think, subject to what the defendants (whom we have not heard) might say, that the plaintiffs would be entitled to an injunction. But, in my opinion, the plaintiffs have not established anything of the kind.

What are the defendants doing? They have been using the name of the old firm, "Burchell & Co." They are, in fact, now carrying on business under the name of "Burchell, Wilde, & Co," and there is no reason to suppose that they intend to go back from that. They have not undertaken to use that name; it would have been more satisfactory if they had, and perhaps they will not object to do so, after hearing the judgment of the court. How does that hold out these particular plaintiffs as the defendants' partners? Considering the history of the use of the name "Burchell," it does not hold them out as the defendants' partners at all; and even if it could do so, let us see what the defendants have done. They have taken care by their circulars and by the letters which they have sent to the best of their ability to all the old clients of the firm to tell those old clients who are the members of the firm of "Burchell & Co.," who are carrying on business in Victoria-street. There is no holding out in any business-like sense of the plaintiffs as their partners, and I cannot see any substantial or practical risk which the plaintiffs will incur by reason of the conduct of the defendants. I do not say that you cannot imagine a possible case in which someone might be foolish enough to bring an action against the Burchells upon the ground that they are continuing partners with the Wildes. But, bearing in mind the nature of a solicitor's business, and that the old clients if they continued to employ the Wildes would see from their letters who the partners are this imaginary possibility ought, in my opinion, to be discarded. There is practically no risk at all.

I think that Byrne, J., has decided the case upon the correct principle. I agree with him that, although you may imagine possible risks, they are not substantial in a business sense. As to the goodwill of the business and the use of the firm name, apart from any liability to which they may be exposing the plaintiffs, the defendants are in the right, and to my mind that liability is so shadowy that the appeal ought to be dismissed.

I repeat that it would be more satisfactory for every one if the defendants would undertake to continue to use the name "Burchell, Wilde, & Co."

As to Wm. Wilde, the son, his father has a right to take him into partnership if he chooses to do so.

RIGBY, L.J.—I agree.

VAUGHAN WILLIAMS, L.J.—I also agree.

Solicitors, *Burchells & Co.; Burchell, Wilde, & Co.*

## High Court of Justice.

Chan. Div. Kekewich, J. — April 27, 28.

*In re* MASON.
OGDEN *v.* MASON. (*a.*)

*Will—Residuary devise—Gift of "all other my freehold" property—Restriction as to tenure—Wills Act,* 1837 (1 *Vict. c.* 26), *s.* 25.

*A testator devised all other his freehold messuages and tenements at W. and elsewhere.*

*Held (following the decision in* Springett *v.* Jenings, 19 *W. R.* 575, *L. R.* 6 *Ch.* 333), *that this was not a residuary devise, there being no gift of copyholds.*

*A gift restricted as to tenure is not, any more than a gift restricted as to locality, a residuary gift.*

This was an originating summons taken out to determine the question whether a freehold property devised by the will of T. W. J. Mason to his son Thomas (which devise failed) was comprised in a subsequent devise of all other the testator's freehold messuages and tenements at Wimbledon and elsewhere, or was undisposed of and went to his son as heir-at-law.

By his will made on the 27th of January, 1862, the said T. W. J. Mason devised all his freehold house and shop and all and singular other the premises used by him at the time of his decease at Wimbledon to his son Thomas, and the will continued "and as to all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere and all my leasehold estates whatsoever and wheresoever I give, devise, and bequeath the same unto my wife for her life for her own use and benefit." And after the death of his wife the testator gave the last-mentioned freehold and leasehold hereditaments upon trust as therein mentioned. The will was attested by the son Thomas, and the devise to him consequently failed.

The testator died in May, 1865, possessing at the time of his death certain freehold houses at Wimbledon as well as the house and shop specifically devised, and also some freehold property at Kingston. The testator had no copyhold property.

*Renshaw, Q.C.*, and *C. H. Sargant*, for the plaintiff, argued that this was a good residuary devise, and referred to *Bernard* v. *Minshull*, 1 John. 276, 7 W. R. Ch. Dig. 104; *Blight* v. *Hartnoll*, 31 W. R. 535, 23 Ch. D. 218; *Hensman* v. *Fryer*, 16 W. R. 162, L. R. 3 Ch. App. 420.

*Warrington, Q.C.*, and *George Henderson*, for the defendants (the executors of the son Thomas), argued that the devise was specific, being restricted to freeholds, and referred to *Springett* v. *Jenings*, 19 W. R. 575, L. R. 6 Ch. App. 333; *In re Brown's Will*, 3 W. R. 542, 1 K. & J. 522; *Wainman* v. *Field*, Kay 507, 2 W. R. Dig. 117.

*Renshaw, Q.C.*, replied.

KEKEWICH, J., said: If free from authority I should have wished to hold that this was a residuary devise, but I do not see how I can do that without departing from the principle which I understand to be laid down in *Springett* v. *Jenings*. It was distinctly argued in that case (L. R. 6 Ch. App. at p. 334) that a restriction as to locality could not take away from the gift the character of a residuary gift, and, further, that section 25 of the Wills Act, 1837, carried out the idea of section 24, and that taking the will as speaking from the death of

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

the testator, the gift must be treated as residuary. That argument was expressly negatived by the decision of the Court of Appeal. No doubt something turned there upon the use of the word "rest," which may be not improperly compared with the use of the word "other" in the present case. But I think it is impossible to read the judgments of the Lords Justices without seeing that they negatived the proposition that a gift restricted as regards locality could be a residuary gift. If that is so, it seems to follow that a restriction as regards tenure must make this devise also fail to be residuary. I do not logically see any difference between the two. The principle upon which the court seems to have proceeded was that the gift must be universal to be residuary. At first I thought that a distinction might be drawn between a restriction as regards locality and a restriction as regards tenure, and it is quite possible that to other minds a distinction of that sort may present itself. But I must accept what I understand to be the decision of the Court of Appeal and apply it as well as I can. I think that if I decided now that a devise of freeholds, there being no copyholds, was residuary, it would be logically inconsistent, though, of course, not verbally inconsistent, with the decision of the Court of Appeal. The two things seem to me to hang together so closely that I do not see my way to decide according to my present impression without deciding against the principle of that authority. The question which I have to consider is whether, according to the law, the words of the will, and the authorities bearing upon the point, there is what Mellish, L.J. (p. 338), calls a "real residuary devise," and he explains that by saying that it must be a devise "so worded as to apply to all land that is not otherwise disposed of." If that particular point had not been argued about the restriction as to locality it might have been said that "land" meant all land vested in the testator at the time of his death when the will operated, but the words of the Lord Justice, which I have quoted, prevent that argument from being adduced. This particular gift is not so worded as to apply to all land that is not otherwise disposed of, if the testator had or might have had any copyholds. I think that if the Lords Justices had had this very point before them they would, on their own reasoning, have been obliged to conclude that this gift is not residuary. Mellish, L.J., accentuates it again in the very concluding words of his judgment, where, in commenting on the words of section 25 of the Wills Act, he says: "That appears to me to show that the Legislature intended the section to apply only where there was what may be called an universal residuary devise—that is to say, a devise of all the residue of the testator's lands." In the event which was contemplated by the Wills Act it is a devise of all the testator's land, but it is not so worded. No doubt the word "other" deserves special consideration, but I need not dwell upon that as I propose to decide the case simply on the ground which I have stated, that this gift, according to the principle of the decision in *Springett* v. *Jenings*, is not a real residuary devise. Therefore the particular property in question which is given to the son, and which he could not take under the specific devise because he was a witness to the will, is not included in the gift of "all other the freehold messuages and tenements at Wimbledon aforesaid and elsewhere." The word "elsewhere" is, of course, important, but it does not get over the difficulty that the description is of freehold. There must be a declaration that the freehold house in question descended upon T. F. Mason as the heir of the testator and was not comprised in the subsequent devise.

Solicitors, *H. S. Bridge*; *H. J. Manning*.

Q. B. Div.
(Channell and Bucknill, JJ.) Feb. 16.

UPPERTON (*Appellant*) v. RIDLEY (*Respondent*). (a.)

*Police—Pension on retirement—Mode of computation—Annual pay—Special allowance—Police Act*, 1890 (53 & 54 *Vict. c.* 45), *s.* 1; *Schedule I., Parts* 1, 3.

*A constable in the Metropolitan Police force had received for five consecutive years before the date of his retirement a special allowance of seven shillings per week (in addition to his ordinary weekly pay) in respect of his employment on special duty at the Houses of Parliament throughout those years.*

*Held, by* Channell, J. (Bucknill, J., *dissenting*), *that, in calculating the amount of the retiring pension to which he was entitled, the amount of the special allowance was not "pay," and ought not to be reckoned as part of his "annual pay" within Schedule I., Part* 1, *of the Police Act.* 1890.

*Held, also* (*by* Channell *and* Bucknill, JJ.), *that "annual pay" means the entire amount received as pay in the course of the year, and not fifty-two times the weekly pay.*

Case stated by the Quarter Sessions for the County of London.

Upon an appeal by the appellant (a constable in the metropolitan police) to the general quarter sessions for the County of London against the decision of the police authority for the metropolitan police district under the Police Act, 1890 (viz., the Secretary of State for the Home Department, Sir Matthew White Ridley), refusing to reconsider the claim of the appellant for an increased amount of pension, the court on the 1st of July, 1899, dismissed the appeal, subject to the opinion of the High Court upon this case.

The appellant joined the metropolitan police force on the 30th of December, 1872, and on the 1st of January, 1899, he had completed not less than twenty-five years' approved service as a police-constable. He had previously signed an acceptance of the provisions of the Police Act, 1890. He had given notice to retire, and he was entitled as of right by the Police Act, 1890, to retire and receive a pension for life of two-thirds of his annual pay at the date of his retirement.

On the 11th of March, 1894, the appellant, having already served for nine years as a police-constable at the Houses of Parliament, was selected by the Commissioner of Police for permanent duty at the House of Lords, and continued to serve in that capacity until the 2nd of January, 1899, the date of his retirement. Nineteen constables were appointed for this special duty for the session of Parliament only; but six constables, of whom the appellant was one, were appointed permanently for the whole year.

The duties which the appellant had to perform at the House of Lords were to preserve the peace, to keep order, to protect the person and property of the High Court of Parliament and persons resorting thereto, to attend fire drill, and protect the premises from fire, and generally to act as a police-constable.

From March, 1894, up to the 2nd of January, 1899, the date of his retirement, the appellant was paid every week the sum of 39s., which was made up as follows: 32s. being the ordinary pay of a constable of his rank and service, and an additional sum of 7s. in respect of the special duty on which he was employed.

It was stated in evidence that the commissioners of police were under no obligation to pay the appellant

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

the additional sum of 7s. even while he remained on special service, though that is done partly as a recognition of the good conduct for which a constable is placed on special service, and partly because by being withdrawn from ordinary duty he loses to some extent his chance of promotion. The entire cost of the police employed on special duty is paid out of moneys provided by Parliament in each year.

From the above sum of 32s. the sum of 7d. was deducted as a contribution towards the Pension Fund in accordance with section 15 of the Police Act, 1890; but the sum of 7s. was paid without any deduction for pension being made therefrom.

The appellant signed the weekly pay list. The sum of 32s. appears therein in the column headed "Amount of pay," and the sum of 7s. in the column headed "Allowances for special duties."

By section 15 of the Police Act, 1890, the police authority of every police force is authorized and directed to deduct from the pay of every constable such stoppages during sickness as may be provided by the regulations respecting the force.

In the metropolitan police force during absence owing to sickness one shilling a day is usually stopped from the ordinary pay of a constable, and in the case of a constable employed as the appellant was on special duty and receiving special allowance in respect thereof, such allowance is usually stopped in addition to the stoppage of 1s. a day from his ordinary pay. During the period of such absence the amount of the allowance would be paid to the constable who actually performed the special duty.

A good service allowance of £25 per annum is granted to each of the eight senior superintendents of the metropolitan police force, and the allowance is taken into account in the calculation of pensions.

Upon the appellant's retirement the respondents awarded him a pension of £55 9s. 4d. a year, payable in quarterly instalments. This sum of £55 9s. 4d. was fifty-two times the sum of £1 1s. 4d., which sum of £1 1s. 4d. was two-thirds of the above-mentioned sum of £1 12s.

Upon behalf of the appellant it was contended: (*a*) That he was entitled to receive a pension at the rate of two-thirds of the sum of £1 19s. per week, and that the sum of 7s. which was expressly voted by Parliament as a special duty allowance, and had been paid to the appellant for a period of nearly five years, was "pay" within the meaning of the 1st Schedule, Part 1, to the Police Act, 1890, and that the purpose of that Act would be defeated if a police authority could treat as non-pensionable a special duty allowance attached to a permanent appointment. (*b*) That the appellant's "annual pay," within the meaning of the Police Act 1890, did not mean fifty-two times his weekly pay, but 365 times his daily pay. In support of the latter contention, a return to Parliament signed by the Commissioners of the Metropolitan Police was put in. This return comprises a statement of the salaries or pay per annum of each class of the metropolitan police force, including constables who are paid weekly, and the salaries or pay per annum of these constables are calculated at fifty-two times the weekly pay, plus one day's pay. The special duty allowances of the police employed on special duty at the House of Lords are similarly calculated in the estimate of the money voted by Parliament.

On behalf of the respondents it was contended: (*a*) That the appellant was only entitled to a pension at the rate of two-thirds of £1 12s. a week, and that the sum of 7s. was not part of his pay as a constable, but was only an allowance in the nature of a gratuity, and that this sum of 7s. was properly not taken into account in arriving at the pension due to the appellant. (*b*) That, as the appellant was paid weekly, his "annual pay" meant fifty-two times his weekly pay, and not plus one day's pay, and that the pension of £55 9s. 4d., was the proper yearly pension due to the appellant. The majority of the court were of opinion that the appeal should be dismissed, and the appeal was dismissed accordingly, subject to the opinion of the court upon this case.

The questions for the opinion of the court were (*a*) Whether the sum of 7s. though called an allowance, was "pay" within the meaning of the Police Act, 1890, and as such ought to have been taken into consideration in arriving at the amount of the pension due to the appellant; and (*b*) whether "annual pay" means fifty-two times the weekly pay, or 365 times the daily pay.

The Police Act, 1890 (53 & 54 Vict. c. 45), provides:

Section 1.—"Subject to the provisions of this Act, every constable in a police force—(*a*) if he has completed not less than twenty-five years' approved service, . . . shall . . . be entitled without a medical certificate to retire and receive a pension for life."

Schedule I., Part 1.—(1) The pension to a constable on retirement shall be within the maximum and minimum limits following; that is to say—(*c*) if he has completed twenty-five years' approved service, an annual sum not less than thirty sixtieths, nor more than thirty-one fiftieths of his annual pay, with an addition of not less than one-sixtieth, nor more than three-fiftieths of his annual pay for every completed year of approved service above twenty-five years, so however that the pension shall not exceed two-thirds of his annual pay"; Part 3 (11) "In estimating any pension, gratuity, or allowance for the purposes of this Act—(*a*) a pension or gratuity to a constable shall be calculated accordingly to the amount of his annual pay at the date of his retirement."

*Pickersgill*, for the appellant.—The allowance for special service is part of the constable's pay. "Pay" includes more than mere "salary": 2 & 3 Vict. c. 47, ss. 9, 22; Police Act, 1890, ss. 14, 15. The fact that in the pay list the special allowance was not treated as pay does not affect the question. The allowance was regularly paid to and received by the constable for five years and ought therefore to be regarded as part of his pay for the purpose of calculating his pension: *Reg.* v. *Postmaster-General*, 26 W. R. 322, 3 Q. B. D. 428. As to the second point, annual pay in Schedule I, Part 1 (*c*) of the Police Act, 1890, means 365 times the daily pay—the whole sum received by the constable for his services in the course of the year—the fact that it is paid weekly is immaterial.

*Macmorran, Q.C.* (*J. P. Grain* with him), for the respondents.—Section 11 of the Police Act, 1890, makes the decision of the quarter sessions final, but that point is waived. There is a distinction between "pay" and "emoluments" both in this Act, s. 32 (5), and in other Acts, such as the Superannuation Act, 1859 (22 Vict. c. 26), and the Poor Law Officers Superannuation Act, 1896 (59 & 60 Vict. c. 50). The appellant's pay was 32s. per week, and the 7s. per week is an additional emolument or gratuity; the commissioners were not bound to pay it, nor could the constable have maintained an action respecting it. The special employment and the allowance for it might have ceased at any time. On the second point the payment was a weekly payment and the annual amount is properly calculated at fifty-two times the weekly amount.

*Pickersgill* replied.

CHANNELL, J.—Upon one point in this case we

each of us have some considerable difficulty, and we must give our own opinions, though they are not quite identical. We have to consider the Police Act of 1890, and the main difference between that Act and the prior Acts is that in certain cases it gives to constables their pension as of right. The sections of the Act which give that pension as of right do not themselves define the amount of the pension. The pension that the constable is entitled to is a pension in accordance with the pension scale for the force. As to this pension scale, the statute says that the fixed scale to be adopted by the police authority must be within the maximum and minimum limits set forth in Part 1 of the first schedule to the Act. We have not had put before us the words of the scale for the metropolitan police; but it is stated to us, and I assume accurately stated, that what was adopted there was the maximum of this schedule, so that we must deal with the question as to what pension the appellant is entitled to, according to the words of the maximum of this scale. The only words that are important in this connection are the words in Part 1 of Schedule I., which, after dealing specially with the pensions in reference to various years' services in section 1, (*c*) ends thus: "So, however, that the pension shall not exceed two-thirds of his annual pay." The appellant in this case has been granted a pension upon the footing of its being two-thirds of what, for that purpose, was assumed to be his annual pay; so that what we have to find out is what was his "annual pay" within the meaning of those words in the schedule. "Annual pay," so far as I see, is only used in the schedule, and it is used in several other places in the schedule both in Part 1 and Part 3. But "pay" is used in other places throughout the Act, and I think that "pay" and "allowances" are shown by the Act to have been, at the time of the passing of the Act, separate matters, separately treated by prior statutes and in this statute. In the case of certain persons in the metropolitan police, by virtue of the Metropolitan Police Staff (Superannuation) Act of 1875, relating to the superannuation allowances of certain officers of the staff of the metropolitan police—not of all constables, but of certain officers of the staff—those officers appear to have had pensions calculated both upon their pay and upon their allowances, and in section 32 of the Police Act of 1890 provisions are made for applying that Act to the metropolitan police force. Section 32 says: "This Act shall apply to the metropolitan police force, subject as follows: (5) The rate and conditions of pension of the chief commissioner of metropolitan police and of the assistant commissioners of metropolitan police shall be regulated by the provisions of this Act, and not by the provisions of the Metropolitan Police Staff (Superannuation) Act, 1875, but the said chief commissioner and assistant commissioners shall be entitled to pension under the provisions of this Act in respect of any emoluments in respect of which they are entitled to a superannuation allowance made under the Metropolitan Police Staff (Superannuation) Act, 1875." So that those particular officers were to come under this Act and have a pension, not upon their pay only, but they were to have the additional benefit that the Act of 1875 gave them, and that benefit was preserved to them. That seems to me to show that "pay" meant pay strictly so called, and that there were other things that might possibly be treated as pay, but which in fact were not treated as pay. Pay in itself would, I suppose, cover any money remuneration for services, and consequently such sums as we have got to consider in this case would *primâ facie* come within the ordinary meaning of the word pay, but the question is, whether they come within the meaning of the word "pay" in this Act. If it is the fact that pay is distinguished from allowances, and that it had been so distinguished prior to the passing of this Act, then I think when the word "pay" is used in this Act one would treat it as having the special meaning which it had at that time between police-constables and the people who pay them. In this particular case the question arises as to the pay of a constable attending at the House of Lords on permanent duty for the whole year. A considerable number of constables attend at the House of Lords and the House of Commons also during the session only. Let us deal first with those persons. They attend so many weeks, not all the year, and they have one shilling a day while they attend. They are paid it weekly, and a sheet is made out, which they sign, and in that sheet there is their regular amount of pay which has been offered to them when they entered the service, increased, of course, as they have increased in rank; but the pay—pay which is properly and strictly pay—is put in one column, and then from that there is deducted the proportion for the superannuation fund. Then there is added to that, to show the amount they are to receive every week, certain allowances. Some of those things, allowances in lieu of uniform, allowances in lieu of coals, allowances in lieu of boots, and allowances in lieu of other things, it is agreed are not matters that come within the words "annual pay" for the purpose of calculating the pension. This additional one shilling a day for special duties is entered as one of those allowances, and is not entered as an amount of pay. It seems to me, therefore, that when that is given to the constable week by week, it is offered to him not in the character of pay, but in the character of an allowance, such as the other allowances which are there added to it. It is true that it is paid to him in one sense as a money remuneration for his services, and, therefore, if we had nothing else to guide us we should say that it came within the ordinary meaning of the word "pay." But here we have got pay and allowances distinguished, and this money that is given to the constable is given to him as an allowance and not as pay, and is received by him as such, and the deduction is not made from it which would be made from it if it were pay proper. I think, therefore, it is a money payment which is given to him, not as pay within the strict meaning of the word pay, but is given to him in the same way as his allowance in lieu of coals and other things; and it seems to me to be the same in the case of the man who only serves temporarily—the man who serves at the House of Lords and the House of Commons during the session only—and it is the same in the case of the man who goes to a race meeting, or goes to some other special duty, and who, in consequence of so going, through serving perhaps longer hours, gets an additional shilling a day or some other additional sum. In the cases of those temporary employments, even if the sum so given is pay, I do not think it can possibly be said to be "annual pay." Consequently, in reference to those constables I should have no difficulty whatever in saying that in those cases the extra special allowance for the special duties cannot be considered pay to be taken into account when considering the question of pension. The point that causes us difficulty in this case is this: Parliament, I suppose, provides money for the payment of the staff of constables who attend, amongst other places, at the House of Lords, and they provide for so many constables for the whole year and so many during the session, and they provide the funds by which to pay special duty allowances at one shilling per day for six constables

for the whole year, and for nineteen constables for the session only. Now, the present appellant is stated in the case not merely to have in fact served during the whole of the last year before he retired—which I think would not put him on any different footing from that of a man who had served so many weeks—but to have served in this special duty for the whole of the period from 1894 down to his retirement in January, 1899. The difficulty, to my mind, and it is a considerable difficulty, is as to the six constables who are upon a different footing and in a different position from the constables who were employed during the session only, because the case says that the appellant having already served nine years as a police-constable at the Houses of Parliament, was selected by the Commissioner of Police for permanent duty at the House of Lords. I do not suppose the appellant was guaranteed his position there any more than any other constable was guaranteed his position; but he was told apparently that if things went on all right, and if he behaved himself properly, and so on, he would be put on the permanent staff there. The result of that, possibly, may not be to make a legally enforceable contract for the extra shilling a day; but in substance he was *told* he would get an extra shilling a day. Consequently there is very much more difficulty about refusing to say that the appellant's remuneration for his work at the House of Lords was not merely pay because it was a money remuneration for his services, but was also annual pay because he was put in the position that he might expect at any rate to get it all through the year. I think on the whole, although I have great difficulty about it, that it does not make any difference that this sum was paid to the appellant, not as part of his pay—which he must have understood quite well was a separate thing from his allowances—but was paid to him as part of his allowances, notwithstanding that he got it all through the year. On the whole, therefore, although not without considerable doubt, founded solely on that particular statement in the case that he had been selected for permanent duty, I come to the conclusion that this sum of 7s. a week cannot be treated as either "pay" or "annual pay" for the purposes of calculating this pension.

I now come to the remaining point — namely, as to the extra day. As to that, as I have pointed out, the words "annual pay" are not referred to at all in the Act until we come to the schedule. When we get to the schedule, the appellant's pension, the schedule says, is not to exceed two-thirds (and this scale says it is to be two-thirds) of his annual pay. What is his annual pay? It is not a sum contracted to be paid to him by the year. He is not paid so many pounds a year, and consequently it cannot mean that. The police authorities could not say to this constable that he is not paid by the year at all, that his salary is not by the year and that there is no contract to pay him so many pounds a year, and that consequently he has no annual pay. They have not contended that. "Annual pay" does not mean pay under an annual contract for an annual rate—that is to say, for so much per annum. If not, what does it mean? It must mean the sum which the man receives for his services during the year. I do not see my way to saying that it depends upon the number of pay days in the year. Counsel for the appellant has pointed out that if it depended on that there would be some years in which there would be fifty-three pay days. Supposing he retired in the year following such a year, could it be said that therefore his pension should be calculated on the fifty-three weeks' pay, as he was paid fifty-three times during that year? I do not think we could say that, and the consequence is that we must say that he is entitled to the fifty-two weeks and the one day. Those days are all in the year, and as the contract is not an annual contract, the total amount must be the amount which he was entitled to receive annually, and what he receives for his services during the year are fifty-two times thirty-two shillings and the proportionate part for the one day. He is paid in the first week of the next year, and he is paid so many days in one year and so many days in the other, and with regard to the one day which belongs to the previous year, I think that must be added. I do not see my way out of that view of the case, although I can understand how the present practice has grown up. In the result, therefore, my opinion is that this appeal should be allowed to the extent of the necessary alteration of that one day, but not further.

BUCKNILL, J.—With regard to the second point I agree, and I have nothing to add. It is only on the first point that unfortunately we do not hold quite the same opinion. I think I am safe in saying that the object of this Act was to found a new scheme for the pensions of police-constables, because I am quoting the words of the present Lord Chief Justice in the case of *Ruff* v. *Secretary of State for the Home Department*, 60 J. P. 343, in which my brother Channell was counsel. Lord Russell, C.J., there says: "The short effect of the Police Act, 1890, was to found a new general scheme of police pensions which was not intended to be binding upon existing constables . . . who declined in writing to accept its provisions." It is quite clear that that Act of 1890 was the first Act of Parliament which gave to police-constables an absolute right in certain events, to receive a certain pension. In this case the appellant was, and had been for a long time before 1894, chosen by those in authority over him for permanent duty at the House of Lords. I suppose he was probably given the opportunity of refusing, and indeed he must have been, as we find it stated in the case that the 7s. now in question was partly as a reward for his past services, and partly as a solatium for his lost chances of promotion which he might have had if he had not gone there. I think, therefore, we may take it that as between the Commissioner of Police and the appellant it was agreed that he should be permanently appointed to serve thereafter at the House of Lords—that is to say, not only from week to week, but from year to year, should he so long remain in the force. There he went and there he remained for five years, during which time he received in fact no more and no less than that money which was in fact allocated to him, as we see by the Parliamentary letter which has been put in, dated the 31st of December, 1897. In that letter, which was submitted from the Treasury, the clerk says: "I am directed by the Lords Commissioners . . . to ask for funds for the payment of the metropolitan police employed within the precincts of the Houses of Parliament in the same way as police are paid for when employed outside public buildings." Then come the figures. First of all there are certain figures for inspectors and constables, mentioning particularly five constables for the session only, and then comes what is called special duty allowance, and under that heading come six constables, of whom the appellant is one, who would receive for the whole year payment of one shilling a day. I do not think it can be said that, because this one shilling a day is called a special duty allowance, it ceases at the end of the year to be in fact annual pay. I think we must take the words of the Act to mean exactly what they say. I will now look at

another Act of Parliament to which counsel for the appellant has called our attention, the statute 10 Geo. 4, c. 44. That was a Police Act, and in that Act the words particularly were "salaries, wages, and allowances." We find no similar expression in the Police Act of 1890. The only word which is used in the body of that Act, as distinguished from the schedule, is "pay." When we come to the schedule we find the words "annual pay." How are those words "annual pay" to be construed? In the first schedule, Part 3, it is said that: "In estimating any pension, gratuity, or allowance for the purposes of this Act, a pension or gratuity to a constable shall be calculated according to the amount of his annual pay at the date of his retirement." I say at once, that, in my opinion, it cannot be argued against the appellant that those in authority chose to draw up this pay-sheet in the way which they did. It may be that they had good reason for subdividing it into the column of "amount of pay" and the column of "allowances," under which we find "for special duties" this one shilling a day or seven shillings a week. It is certainly an unfortunate circumstance that the constable has for so long signed that sheet, because it would lead one to think that he was looking upon this seven shillings not as his ordinary wage, but as something in addition to it. I think it would be wrong, simply because he has done that and has signed that pay-sheet, submitted to him by his superiors for signature, because those in authority have chosen to form their pay-sheet in that way, to say that the money received by him, thirty-two shillings his ordinary wage and seven shillings his extraordinary wage, do not make up at the end of the year his annual pay. I think they do, and I think it would be wrong to hold otherwise, unless we see that we are doing violence to the language of the Act. I think that if the Act had meant to exclude such payment as this permanent payment of one shilling a day, for permanent services such as were rendered by the appellant in this case, it would probably have taken care to say so. All it says is, that he shall be entitled to his pension, based upon the amount of his annual pay, at the date of his retirement. I have had considerable difficulty in coming to this conclusion, because I have heard what my learned brother's view is, and I cannot, speaking with respect, quite hold the same opinion that he does, because there is in this same Act this special section—section 32—put in for the protection of certain other persons whose rights were created in 1875, and I cannot come to the conclusion that inferentially it was intended by the Act of 1890 to show that a special allowance was not to be deemed part of a man's usual pay. I prefer to go upon my construction of the plain English in the Act that a man's annual pay is that which he receives in the course of the year, and if he receives annually a regular wage for a permanent and regular service, what he receives is in fact his annual pay.

*Appeal dismissed as to the special allowance of 7s. a week, but allowed in respect of the extra day in the year. Leave to appeal.*

Solicitors for the appellant, *Mann & Crimp.*

Solicitors for the respondents, *Wontner & Sons.*

---

## Court of Appeal.

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) — April 30.

ROBERTSON v. MAYOR, &c., OF BRISTOL. (a.)

*Local government—Paving expenses—Street—Alteration of width of carriage-way and footway—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

*An urban authority has no power under section* 150 *of the Public Health Act,* 1875, *when paving and making good a street, to alter the width of the carriage-way and footway.*

Appeal by the plaintiff from the judgment of Grantham, J., at the trial without a jury of an action for an injunction to restrain the defendants from altering the width of the footway and carriage-way of a street called Robertson-road.

The plaintiff was the owner of a piece of land in the parish of St. George, near Bristol, which he laid out for building. He submitted plans to the St. George's Local Board as required by their bye-laws, the plans showing a new street called Robertson-road, along part of which there was a carriageway 30ft. wide, and a footway on each side 7ft. 6in. wide, and along the rest a carriageway 27ft. wide and a footway on each side 6ft. 6in. wide. The plans were approved by the local board, and the road was made and duly certified by the surveyor to the local board.

On the 1st of November, 1897, the parish of St. George was incorporated by the Bristol Corporation Act, 1897, in the city of Bristol, and the St. George's District Urban Council (who were the successors to the St. George's Local Board) were dissolved, and all their powers and duties were transferred to the defendants. At that time houses had been built along Robertson-road, but the road had not been taken over by the local authority.

In May, 1898, the defendants served notice upon the frontagers in Robertson-road, under section 150 of the Public Health Act, 1875, requiring them to pave and make good the road according to plans which showed a footway on each side of the road of a uniform width of six feet. Upon failure to comply with the notices, the defendants commenced the work, when the plaintiff brought this action.

Grantham, J., held that the defendants had power under section 150 to deal with the road as they thought best in the public interest both as regards carriage-way and footway. He accordingly gave judgment for the defendants.

The plaintiff appealed.

*J. A. Foote, Q.C.* (*Duke, Q.C.*, and *F. E. Weatherly*, with him), for the plaintiff.—The defendants have no power under section 150 of the Public Health Act, 1875, to alter the respective widths of the carriage-way and footway of a street. They must pave and make the street as it is dedicated to the public. They cannot alter the dedication. They may, perhaps, after they have taken the street over, alter the width of the carriage-way and footway under section 149, but if they do so they are liable to pay compensation under section 308. The learned judge was therefore wrong.

He referred to *Fisher* v. *Prowse*, 2 B. & S. 770.

*Joseph Walton, Q.C.*, and *Clavell Salter*, for the defendants.—The defendants, as the urban sanitary

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law

authority, have power under section 150 to "pave" the street—that is, they may alter the respective widths of the carriage-way and footway as they think best in the public interest. The only remedy of the owner of the soil is to appeal to the Local Government Board under section 268. The Act gives the local authority power to override the rights of private persons in the interest of the public.

A. L. SMITH, L.J.—In my opinion this appeal must be allowed. The plaintiff was the owner of a piece of land which he laid out as a building estate. He laid out a road through it. He submitted plans to the local authority which were approved by them, and the road was then made. The road had a carriage-way and a footway on each side. In 1897 the *locus in quo* was incorporated in the city of Bristol, and the defendants became the local authority for the district. The defendants thereupon served notices upon the frontages along the road under section 150 of the Public Health Act, 1875, requiring them to pave and make good the road, according to plans, which showed that the footway on each side was to be cut down to a uniform width of six feet, and the space so cut off the footway was to be thrown into the carriage-way. In other words, the defendants proposed to alter that which the plaintiff had dedicated to the use of foot passengers, and to convert part of it into a carriage-way. In my opinion section 150 gives them no such power. There is no power to convert any part of the footway into the carriage-way, or any part of the carriage-way into the footway. They can pave and make good the existing carriage-way and footways, or either of them. Whether they ought to have such a power is not for me to consider. They have not got it. The judgment is therefore wrong, and must be entered for the plaintiff.

VAUGHAN WILLIAMS, L.J.—I agree. In my judgment the corporation have no power under section 150 to do what they claim to be entitled to do in this case. They must deal with the street as they find it, and it is that street which they can pave and make good. But this case is even stronger against the corporation, because their predecessors have approved the plans of the street with the carriage-way and footways of a certain width, and the street has been made in accordance with those plans. In these circumstances it is the street so approved and made that the corporation can pave and make good under section 150.

ROMER, L.J., concurred.

*Appeal allowed.*

Solicitors for the plaintiff, *Ford & Ford*, for *Wansbrough, Dickenson, Robinson, & Tayler*, Bristol.

Solicitors for the defendants, *Robins, Hay, Waters, & Hay*, for *D. Travers Burges*, Bristol.

---

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — April 24, 25.

NATIONAL COMPANY FOR THE DISTRIBUTION OF ELECTRICITY BY SECONDARY GENERATORS (LIMITED) *v.* GIBBS. (*a.*)

*Patent—Grant to two patentees—Agreement for sale—Covenants for validity—Death of one grantee—Joint and several covenants.*

*A provision in an agreement for the sale of letters patent granted to two persons that an assignment should be executed and should contain a covenant by the vendors that the letters patent is valid, is enforceable against the representatives of one of the vendors who has died after the agreement and before assignment, and such representatives are liable for damages for breach of the agreement in this respect.*

*Decision of* Cozens-Hardy, J. (47 *W. R.* 518, [1899] 2 *Ch.* 289), *reversed.*

This was an appeal from a decision of Cozens-Hardy, J. (reported 47 W. R. 518, [1899] 2 Ch. 289).

It raised a question as to the construction of an agreement to assign a patent granted by two patentees. By an agreement under seal dated the 25th of May, 1883, and made between Lucien Gaulard and John Dixon Gibbs (thereinafter called "the vendors") of the one part and the plaintiff company of the other part, after reciting that the vendors were the inventors of certain inventions in connection with the manufacture and construction of secondary generators for the distribution of electricity and other apparatus connected with electrical lighting for which they had obtained her Majesty's letters patent and of which they had filed specifications and that the vendors had also obtained certain foreign patents, it was agreed that (1) the vendors should sell and the company should purchase the exclusive privilege of using, exercising, and vending all the inventions within the United Kingdom and the other countries named, with the full benefit of all extensions, &c.; (2) that "the vendors and each of them" should from time to time and at the request and cost of the company do all such acts and things as by the company might be considered necessary or expedient for procuring confirmation of any of the patents, and for obtaining extensions and prolongations, and that the vendors would communicate all improvements and other inventions and at the request and cost of the company patent the same and execute assurances for vesting the new patents in the company; (3) that in the event of infringement the company should "be at liberty to commence, carry on and prosecute in their own name, or in the name of the patentees or any of them or the executors, or administrators of any of them or otherwise, all such actions and proceedings" as the company might think fit; (4) that "the vendors and each of them" should at all times thereafter give the company advice as to the use of the inventions. Clause 5 stated the consideration payable, and clauses 6 and 7 were as follows: "(6) The vendors shall without delay, at the expense of the said company and to the satisfaction of the solicitors of the said company, establish a title to all the said inventions and letters patent and privileges hereby agreed to be sold, and assign and transfer the same to, and cause the same to be legally vested in, the said company or such person or persons as the said company shall appoint for the purpose. (7) The assignment and transfer of the said letters patent and and other premises sold shall be prepared by and at the expense of the said company and shall be expressed to be made in pursuance of this agreement and in consideration of the payment of the said sum of £220,000, to be paid in fully paid-up shares and cash as before mentioned, and the said vendors and all other necessary parties, if any, shall at the cost of the said company execute such assignments to the said company or as they shall direct, and such assignments respectively shall contain a covenant by the said vendors that all the letters patent thereby assigned or any letters patent which may thus have been obtained in substitution for the same or in respect of such invention as is protected thereby are valid and in nowise void or voidable, and also such other covenants and provisions as may be reasonably required by the

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

said company for giving effect to the sale hereby agreed to be made. Provided that the consideration money may be apportioned among two or more assignments as the said company shall think fit." All the patents referred to in the agreement were granted to Gaulard and Gibbs and not to either of them separately. Amongst others was an English patent of the 13th of September, 1882 (4,362 of 1882), which was in the usual form of a grant to two patentees. After reciting that Gaulard and Gibbs had presented their petition to the Crown, and that the petitioners had prayed for a grant "unto them, their executors, administrators, and assigns" of letters patent for the sole use, benefit, and advantage of the said invention within the United Kingdom for fourteen years, it proceeded as follows: "Know, therefore, that we . . . by these presents for us, our heirs and successors, do give and grant unto the said Lucien Gaulard and John Dixon Gibbs, their executors, administrators, and assigns, our special licence, full power, sole privilege, and authority that they, the said" Gaulard and Gibbs, "their executors, administrators, and assigns, and every of them by themselves or by their deputy, or deputies, servants, or agents, or such others as they, the said" Gaulard and Gibbs, "their executors, administrators, and assigns shall at any time agree with and no others and from time to time and at all times hereafter during the term of years expressed, shall and lawfully may make, use, exercise, and vend their said invention" within the United Kingdom "in such a manner as to them the said" Gaulard and Gibbs, "their executors, administrators, and assigns or any of them shall in their discretion seem meet, and that the said" Gaulard and Gibbs, "their executors, administrators, and assigns shall and lawfully may have and enjoy the whole profit, and benefit," &c., coming by reason of the invention for the period therein mentioned, "To have, hold, exercise, and enjoy the said licences, powers, privileges, and advantages . . . unto the said" Gaulard and Gibbs, "their executors, administrators, and assigns" for the term of fourteen years; "and to the end that they the said" Gaulard and Gibbs, "their executors, administrators, and assigns, and every of them, may have and enjoy the full benefit and sole use and exercise of the said invention." Gaulard died in 1888, and Mme. Henriette Unesime Ruelle, one of the defendants, was his administratrix.

In the present action, which was brought against Gibbs and Mme. Ruelle, the company alleged that the consideration for the sale of the patents had been paid, that the patents had not been assigned to the company, and were entirely or in part void or voidable, that in some countries the patents had been declared void, and that the company had suffered damage by having to pay costs and by the value of the patents having been reduced. The company, accordingly, claimed (1) that the defendants might be ordered to assign the patents; (2) damages for breaches of agreement and warrants; and (3) repayment of a portion of the purchase-money. As against Gibbs the action was compromised. The defendant Mme. Ruelle alleged by her defence that the plaintiff company had taken proceedings in France against her and others to enforce the agreement of the 25th of May, 1883, and that by an order of the Paris Court of Appeal of the 2nd of June, 1897, the plaintiff company were ordered to pay to her under the agreement the sum of £2,581 3s. with interest, and that this sum still remained unpaid, and she counterclaimed for payment of that amount with interest. At the trial of the action it was objected that the grant of letters patent was to Gaulard and Gibbs jointly, and that on the death of Gaulard the joint interest passed to Gibbs by survivorship, and further, that the obligation created by clause 7 of the agreement was merely a joint covenant, and that the survivor Gibbs was the only person who could be sued upon it.

Cozens-Hardy, J., upheld these objections and came to the conclusion that the plaintiffs were not entitled to any relief against Mme. Ruelle, and he dismissed both the action and the counterclaim. Mme. Ruelle appealed from this decision, so far as it related to the counterclaim, and the plaintiffs served a cross-notice of appeal on Mme. Ruelle, so far as the judgment related to the action.

*Eve, Q.C.*, and *Rowden, Q.C.*, for Mme. Ruelle.—Mme. Ruelle is entitled to judgment on the counterclaim. This is a case in which the courts here will enforce the judgment of a foreign court: *Rousillon* v. *Rousillon*, 28 W. R. 623, 14 Ch. D. 351; *Schibsby* v. *Westenholz*, 19 W. R. 587, L. R. 6 Q. B. 155.

*Gore Browne* (*Moulton, Q.C.*, with him), for the plaintiffs.—As to the appeal, an agreement to pay money for property cannot been forced unless the property is transferred. As to our cross-appeal, the agreement is executory, and the courts will enforce it on the footing that what ought to have done has been done. If these patents had been assigned, the proper covenants to insert in the assignment would have been joint and several covenants by the vendors: Conveyancing Act, 1881, s. 7; Davidson's Precedents (4th ed.), vol. 2, part 1, p. 359; Key and Elphinstone (5th ed.), vol. 1, p. 409.

*Eve, Q.C.*, in reply.—The question is not what covenants might properly be inserted in the assignment, but whether the purchaser would be entitled to joint and several covenants if the vendors refused to give more than a joint covenant: *White* v. *Tyndall*, 13 App. Cas. 263, 36 W. R. Dig. 113.

LINDLEY, M.R.—In this case I am unable after consideration to agree with the view adopted by the learned judge, but I doubt very much whether the practical result of the view which we have adopted will be more beneficial to the parties than the view which he has adopted.

The question arises in this way. There were two patentees, Gaulard and Gibbs, who were entitled to various patents, and amongst others to a patent for England for the distribution of electricity. It is quite obvious from what we learned yesterday that they were not merely co-owners of that patent, but they took out the patent in order to make money by selling it and sharing any profits which they might get out of it; and they agreed to sell it to the plaintiff company by an agreement dated May, 1883, which was afterwards modified by an agreement dated October, 1883. It was in substance an agreement to sell the patents mentioned in the schedule for a very considerable sum of money. It is unnecessary to go into the details of the consideration. The agreement is important in one of its clauses, because the learned judge has taken what appears to me to be rather a short cut in dealing with the rights of the parties under the agreement. After agreeing for the sale and settling the price, we come to clauses 6 and 7, which relate to the method of carrying out the agreement by the vendors Gaulard and Gibbs. They were to assign the patents to the company as the company should direct, and then comes clause 7, which is very important, and which is in effect that "the assignment and transfer of the said letters patent shall be prepared by and at the costs of the company, and shall be expressed to be made in pursuance of the agreement and in consideration of the payment of the consideration money. The vendors and all other

other necessary parties hereto shall at the cost of the company execute such assignments to the company as they shall direct, and such assignments respectively shall contain a covenant by the vendors that all the letters patent hereby assigned or any substituted for them are valid and in no wise void or voidable; and also such other covenants and provisions as may be reasonably required by the company for giving effect to the sale hereby agreed to be made." Then there is a proviso which does not appear to be important, that the consideration may be apportioned amongst two or more assignments as the company shall think fit. That, I suppose, has reference to the convenience of drafting if they wanted separate assignments of the separate patents.

This seventh clause, which I have read, to my mind, distinguishes this case in principle from the decision of the House of Lords in *White* v. *Tyndall*, upon which, mainly, the learned judge proceeded. He treated this agreement as neither more nor less than a joint covenant by Gaulard and Gibbs to assign these patents and covenant for their validity.

I cannot think that that is a true construction, and the learned judge himself, I think, almost admitted it, because he said it might be that in a proper assignment the covenants of title would be joint and several. I have not the slightest doubt that they would and ought to be joint and several, and that the learned judge has gone too far in deciding the case upon the short ground that the covenants being joint and Gaulard being dead, there was no remedy against his legal personal representative Mme. Ruelle, and that the claim by the company against her failed, and the company could only look to Gibbs, the survivor. It followed from that view that certain rights which Mme. Ruelle set up in her counterclaim, and which proceeded upon the theory that the covenant was a joint and several one, and that she had separate rights against the company, also failed.

By taking that short cut the learned judge dismissed the action and the counterclaim. I cannot think that that view is correct, and what I propose to do—and what my brothers agree with me in thinking ought to be done—is this: we ought to reverse the judgment and declare that upon the true construction of the agreement of the 25th of May, 1883, the right of the plaintiff company against Mme. Ruelle is to be ascertained upon the footing that Gaulard and Gibbs had jointly covenanted to assign the patents mentioned in the agreement to the plaintiff company, and that such assignments should contain joint and several covenants by Gaulard and Gibbs with the company that such patents were valid and in no wise void or voidable. Then declare that the amount due from the company to Mme. Ruelle on her counterclaim is to be ascertained upon the footing of the order of the 25th of March, 1898, which refers to the French proceedings and so on. With those declarations remit the action and the counterclaim for trial.

Then as regards the costs. Each cross-notice succeeds, and what we propose to do is this—to reserve the costs of the action and of the counterclaim and of this appeal, including the costs of the plaintiff company's cross-notice, to be dealt with by the judge at the trial. When the whole case is before him the proper mode of dealing with these costs will be easily arrived at.

I wish to say one word upon the matter discussed yesterday, and that is about the plaintiffs' cross-notice. If the learned judge had not so linked the action and the counterclaim together as he did, and if the counsel in the court below had not more or less acquiesced in that view, I should have thought, and I think my brothers agree, that the plaintiffs would have been wrong in giving their cross-notice of appeal as distinguished from bringing a cross-appeal, inasmuch as that cross-notice was addressed to not merely the counterclaim to which the appeal was confined, but to the totally different matter of their right to relief upon their action, which is a separate and distinct matter altogether. But having regard to the mode in which the two were linked together, we think that in the circumstances of this case that cross-notice ought to be treated—and we did treat it yesterday—as if it were a distinct notice of appeal. It turns on the true construction of the rule which was drawn to our attention yesterday, and the appeal there referred to was the appeal by the defendants on their counterclaim, and looked at strictly and properly, that cross-notice could only be made available as an answer to an appeal on the order from the counterclaim, and ought not to be extended to the totally distinct matter—that is to say, the relief sought by the plaintiffs on their claim. But, as I have said before, and I am prepared to adhere to it, the circumstances of this case were so special by reason of the course taken to which I have alluded, that we think it only just to treat the cross-notice as a cross-appeal, and we do so accordingly.

I wish to be quite clear about this. This declaration is not to exclude any defence which anybody can take to anything. The rights are to be ascertained upon this footing, reserving all defences to anybody. I think the declaration is plain.

RIGBY, L.J.—I agree.

COLLINS, L.J.—I also agree.

Solicitors, *Edward Betteley; Campbell, Reeves, & Hooper.*

---

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 16, 19; April 2.

DIDISHEIM *v.* LONDON AND WESTMINSTER BANK. (*a.*)

*Lunacy—Person of unsound mind—Foreign domicil—English property of foreign lunatic—Foreign receiver—Next friend, action by—Lunacy Act,* 1890 (53 & 54 *Vict. c.* 5), *s.* 134.

*An action can be brought in the name of a lunatic not so found by inquisition without the sanction of the Crown.*

*The* administrateur provisoire, *with power to collect the personal estate of a lunatic domiciled abroad, can bring an action in England in his own name and in the name of the lunatic, and as her next friend, for the delivery to him of her property in England.*

This was an appeal from a decision of North, J.

The action was in the nature of a common law action for detinue, and raised questions as to the right of a person who had been appointed by a Belgian court *administrateur provisoire* in lunacy, to have handed over to him securities deposited with the London and Westminster Bank amounting in value to between £300,000 and £400,000.

The action related to property which, by the terms of a marriage contract between the late Benedict Leopold Goldschmidt and his wife, whose maiden name was Marie Woog, was held by husband and wife under the Swiss system of legal community. The documents held by the bank comprised certificates of shares and securities and bonds and scrip to bearer,

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

representing investments in English, colonial, American, and foreign companies and Government securities which had been lodged by M. Goldschmidt in his lifetime. The income was collected by the bank and placed to the credit of a current account M. Goldschmidt kept at the bank.

M. and Mme. Goldschmidt were married at Geneva in 1866, M. Goldschmidt being at the time a German merchant resident at Mayence, his wife being Swiss.

Subsequently to the marriage they went to Brussels and resided there for some twenty-five years, down to the death of M. Goldschmidt in 1892.

He made a will bequeathing one-fourth of the half of the common property to which he was entitled to his wife and giving her a life interest in another quarter. The other parts became distributable among their four children. Mme. Goldschmidt was appointed administrator of her husband's personal estate in England. She satisfied the shares of her three elder children, but the share of the youngest had not been handed over to him because he was under age. The bulk of the property in the custody of the bank was either left or redeposited with them.

Mme. Goldschmidt became of unsound mind and was placed under the care of a Dr. Hertz at Bonn, in Germany, where she still resided.

Under the Belgian law two proceedings can be adopted in the case of a person of unsound mind, by "interdiction" or "administration." The former, it appears, is analogous to a formal finding by a jury in this country, of lunacy, which results in the appointment of a committee of the estate of a lunatic; the latter a proceeding in which a mere receiver in lunacy is appointed. The family adopted the latter procedure, and M. Didisheim was appointed *administrateur provisoire* accordingly, his position being apparently similar to that of a receiver in lunacy in England. The letters of administration of the estate of her husband, which had been granted to Mme. Goldschmidt, were impounded, and administration *de bonis non* granted to M. Didisheim. The bank considered that M. Didisheim could not give them a valid discharge and refused to part with the securities.

This action was brought by M. Didisheim and by Mme. Goldschmidt, suing by him as her next friend. The youngest son—Robert, now of age—of Mme. Goldschmidt, who had not received his share of his father's estate, was made a defendant.

North, J., held, upon the authority of *In re Barlow*, 35 W. R. 737, 36 Ch. D. 287, and *In re Brown*, 44 W. R. 17, [1895] 2 Ch. 666, that, as the lady had not been found lunatic by a foreign court of competent jurisdiction, M. Didisheim could not compel the bank to hand him over the securities in this country. He therefore dismissed the action.

The plaintiffs appealed.

*Haldane, Q.C.*, and *Henry Fellows*, for the appellants.—If judgment be given against us, the result will be a deadlock; the moneys will remain in the bank indefinitely. It is said that Didisheim is not the legal owner of the *chose in action*; even if that is true, the equitable assignee of a *chose in action* can sue if the legal owner is present before the court. That is the case here: *Alivion* v. *Furnival*, 1 Cr. M. & R. 277.

They referred to *In re Princess Soltykoff*, [1898] W. N. 77; *Thiery* v. *Chalmers, Guthrie, & Co.*, *ante*, p. 148, [1900] 1 Ch. 80.

*Terrell, Q.C.*, and *McSwinney*, for the respondent.—The first question is whether the plaintiff is entitled to maintain an action for detinue under any order of the Belgian court or otherwise. We submit that no court except a Court in Lunacy can make any order as to dealing with the lunatic's property. The Court of Chancery may make an order to protect it, but not to hand it over. Here it is on the face of the record that the plaintiff is a lunatic. In other cases it was not on the face of the record: *In re Barlow*. The custody of a lunatic's property is vested in the Crown; and the jurisdiction of the court arises under Statute of *De Prærogativa Regis*: *In re Knight*, 46 W. R. 289, [1898] 1 Ch. 257; *In re Sottomaior*, L. R. 9 Ch. App. 677. Domicil in this country is not necessary to found jurisdiction over a lunatic. Sections 96, 131 (3) of the Lunacy Act, 1890, would be useless if the plaintiff's contention were correct. A foreign lunatic ought not to be in a better position than an English lunatic not so found by inquisition. The cases cited are special cases, where it was a question of preventing a lunatic from starving and such like: *Beall* v. *Smith*, 22 W. R. 121, L. R. 9 Ch. App. 85. The court will not interfere where it is not necessary: *Halfhide* v. *Robinson*, 22 W. R. 448, L. R. 9 Ch. App. 373.

The referred to *Jones* v. *Lloyd*, 22 W. R. 785, L. R. 18 Eq. 265; *Porter* v. *Porter*, 36 W. R. 580, 37 Ch. D. 420; *Howell* v. *Lewis*, 40 W. R. 88, 61 L. J. Ch. 89; *Waterhouse* v. *Worsnop*, 59 L. T. Rep. 140, 37 W. R. Dig. 142.

*Haldane, Q.C.*, replied.

*A. Fellows*, for the defendant R. Goldschmidt.

THE COURT (LINDLEY, M.R., RIGBY and VAUGHAN WILLIAMS, L.JJ.) allowed the appeal.

LINDLEY, M.R., delivered the considered judgment of the court. He said: In consequence of the arguments addressed to us we will make a few prefatory observations on actions at law and suits in Chancery by persons of unsound mind not so found by inquisition. If before the Judicature Acts an action at law had been brought in the name of such a person to enforce a purely legal demand—say an action on a covenant or an action of assumpsit or of debt, detinue, or trover, there would have been no defence to the action on the ground that the plaintiff on the record was of unsound mind. No plea in bar or in abatement applicable to such a case is to be found in the books. Such an action might, perhaps, have been stayed on an application showing that the action was an abuse of the process of the court—*i.e.*, was brought in the plaintiff's name without his authority: see *Waterhouse* v. *Worsnop*, which, however, was since the Judicature Act. Such an action could certainly have been stayed by proceedings in lunacy and the appointment of a committee. Unless the action were stayed it would proceed to trial in the ordinary way, and on proof of the plaintiff's case judgment would have been entered for the plaintiff on the record and execution issued accordingly: see *Dennis* v. *Dennis*, 2 Wms. Saund. 729. If the plaintiff had sued by attorney payment or delivery to him would have discharged the defendant or sheriff. If the plaintiff had sued in person a difficulty would obviously have arisen. An application to stay execution on payment into court might, we apprehend, have been successfully made, or the court could, as in *Gleddon* v. *Trebble*, 9 C. B. N. S. 367, 9 W. R. C. L. Dig. 70, have ordered payment to his next friend, and so the necessity of instituting proceedings in lunacy would be avoided: see generally 1 Coll. Lunacy, 339, &c. In Chancery it had long been the settled practice to institute suits in the names of lunatics not so found by inquisition by a next friend. Applications to stay such suits were also frequently made with success: see generally on such suits *Jones* v. *Lloyd*; *Beall* v. *Smith*; *Farnham* v. *Milward*, 44 W. R. 135, [1895] 2 Ch. 730; *In re George*

*Armstrong & Sons*, 44 W. R. 281, [1896] 1 Ch. 536. The alleged lunatic could make such application himself if he asserted his sanity, and any one willing to act as next friend could make it in the alleged lunatic's name, as in *Howell* v. *Lewis*. Even the defendant might apply: see *Wartnaby* v. *Wartnaby*, Jac. 377, and *Porter* v. *Porter*, per Cotton, L.J. When a lunatic was so found by inquisition the Court of Chancery would stay a suit instituted in his name until the appointment of a committee: see *Hartley* v. *Gilbert*, 13 Sim. 596. We are not aware of any case in which a foreign curator has been held to be an improper next friend of the person whose curator he is. Security for costs from such a next friend might be required if he was resident abroad; but no suit could be stayed simply because the next friend filled an official position in a foreign country. The notion that either at law or in equity an action or suit cannot be successfully maintained, if brought in the name of a lunatic not so found by inquisition without the sanction of the Crown, is not supported by authority or sound principle. If this notion were true, the orders for payment made in *In re Barlow* and other cases which will be referred to presently, would have been clearly wrong. Such orders were not made in lunacy, but by the Court of Chancery, which had no lunacy jurisdiction. It is well settled that until the Crown interferes, or at all events until its interference is invoked by a petition for an inquisition or by an application for the appointment of a receiver, the prerogative of the Crown has no practical legal effect. In other words, no person can avail himself of that prerogative without taking the proper steps to induce the Crown to exercise it. This point was examined by this court last summer, when *Seager Hunt's case* was before it. In the present case no lunacy proceedings have been taken in this country; nor was any attempt made to stay the action. Having made these preliminary remarks we pass to the question more immediately before the court.

This action is by M. Didisheim and by Mme. Goldschmidt, by him as her next friend. The object is to obtain a large sum of cash and also share, stock, and debenture certificates of great value from the defendants. The defendants are quite ready to pay and deliver them up provided they can safely do so. The bulk of the property sought to be recovered formed part of the assets of M. Goldschmidt, a deceased gentleman, domiciled and resident in Belgium. He died some time ago, and his widow, the plaintiff, Mme. Goldschmidt, obtained letters of administration with his will annexed. By her directions most of the property in the hands of the defendants has been placed in their books in her name. She is domiciled in Belgium and is resident abroad. She has become insane and is in a foreign lunatic asylum. M. Didisheim has been duly appointed her *administrateur provisoire*, with power to collect and get in all her personal estate. He is also now the legal personal representative of M. Goldschmidt, having obtained letters of administration to his personal assets left unadministered by Mme. Goldschmidt. He and she together, therefore, are clearly entitled to all the property sought to be obtained from the defendants. They do not deny M. Didisheim's right as administrator to such assets of the deceased as have not become Mme. Goldschmidt's property; but they say that owing to what she did when sane, all the deceased's assets in their hands became hers, and they are now accountable to her alone for them. As to the cash and certificates, which are the property of Mme. Goldschmidt, the defendants say they cannot safely hand them over to M. Didisheim, as the ownership of them is still vested in her and has not been legally vested in M. Didisheim. North, J., has held that unless an order is made in lunacy requiring or authorizing the defendants to deliver the property of Mme. Goldschmidt to M. Didisheim they cannot safely deliver such property to him. The relations and friends of Mme. Goldschmidt are particularly desirous of avoiding any formal adjudication of lunacy, and this appeal has been brought on purpose to avoid the necessity of such an adjudication.

The demand of the plaintiffs, it will be observed, is a purely legal title; there is no trust in the case. Under the old practice one action could not have been maintained to enforce a claim by M. Didisheim as administrator and also a claim by Mme. Goldschmidt to recover her own property. Two separate actions of detinue or trover would have been necessary. Our modern practice, however, is less rigid, and the defendants have raised no objection to the two claims being joined in one action. The court, therefore, can properly entertain the action and decide the real question raised by the defendants, which is whether in an action brought by M. Didisheim in his own name and in the name of Mme Goldschmidt and as her next friend the High Court ought to make an order for the delivery to him of her property. The question may be put in another way, whether he is entitled in an action so framed to demand delivery of her property to him. We are of opinion that he is. In *Scott* v. *Bentley*, 3 W. R. 280, 1 K. & J. 281, a person resident in Scotland was entitled to an annuity charged on land in England and secured by a covenant entered into with himself. The annuitant became lunatic, and a *curator bonis* was appointed according to Scotch law. Whether he was judicially declared a lunatic does not distinctly appear. Nor does it appear that the ownership of his personal property was by Scotch law divested from him and vested in his curator. We rather infer that the curator merely had power to collect it and get it in. The annuity being in arrear the curator brought a suit in Chancery in his own name against the executrix and devisee in trust of the grantor of the annuity for payment of the arrears and for payment of the annuity in future. It is to be observed that the demand of the plaintiff was a purely legal demand. He sought to enforce the legal right of the annuitant under the covenant and grant. But the arrears seems to have been set apart as a trust fund, and this was held enough to give the Court of Chancery jurisdiction to entertain the suit. Vice-Chancellor Wood made an order as prayed by the bill. This decision has been much questioned; but unless it be that the suit ought in strictness to have been in the name of the lunatic by his curator as next friend we see no ground for doubting the correctness of the decision. *Scott* v. *Bentley* has been questioned mainly because it proceeded to some extent on the supposed authority of a decision in the House of Lords on an appeal from Scotland: *In re Morison's Lunacy*. This case appears to have been to some extent misunderstood. The Vice-Chancellor refers to it as an unreported case cited in *Johnstone* v. *Beattie*, 10 Cl. & Fin. 42, and in *Sill* v. *Worswick*, 1 H. Bl. 677-8. In *Johnstone* v. *Beattie* (see 10 Cl. & Fin., p. 97) Lord Brougham refers to *Morison's case* as cited in the note to *Sill* v. *Worswick*, as an authority for the proposition that the legally appointed curator in one country was held entitled to act in another. This it is plain was also Vice-Chancellor Wood's view of *Morison's case*, as is apparent from his remark on p. 285 that in *Morison's case* the curator sued alone. But the reports of that case to which we have referred in 1 Paton, 454, and Mor. 4595, show that the decision of the House of Lords in *Morison's case* did not go that length, and Lord Campbell was not satisfied that it did: see 10 Cl. & Fin. 133. We under-

stand the decision as showing that a committee appointed in England of a Scotchman resident in England could not sue in Scotland simply in his own name and as committee for the recovery of the lunatic's personal estate; but that such committee could sue there in the name of the lunatic for the recovery of the lunatic's personal estate. *Morison's case*, therefore, did not go so far as Vice-Chancellor Wood thought, but it goes a long way to show that the proceedings in this action are properly framed; for this action is brought, not only by M. Didisheim in his double capacity of administrator of Mme. Goldschmidt and curator of Mme. Goldschmidt, but also by her in her own name suing by M. Didisheim as her next friend. In *Scott* v. *Bentley* Vice-Chancellor Wood did not by any means base his judgment only on the supposed decision in *In re Morison*, and after making every allowance for his misapprehension of that case, *Scott* v. *Bentley* was, in our opinion, well decided, although we cannot help thinking that if Vice-Chancellor Wood had known the form of the order made in *Morison's case* he would have directed the bill to be amended by making it in form a bill by the lunatic by his curator and next friend. In *Alivon* v. *Furnival*, 1 Cr. M. & R., 277, Baron Parke (p. 296) expressed a clear opinion to the effect that a foreign curator could sue here in his own name for goods and chattels of a person of unsound mind. *Scott* v. *Bentley* is consistent with and is really supported by several other cases cited by Mr. Haldane, and of which *In re Tarratt*, 32 W. R. 909, 51 L. T. Rep. 310; *In re de Linden*, 45 W. R. 342, [1897] 1 Ch. 453; and *Thiery* v. *Chalmers, Guthrie, & Co*, are the most recent and important. In *In re de Linden* an application was made on behalf of a Bavarian lunatic lady for payment out to two foreign gentlemen of some money in court belonging to her. The application was by her in her own mean by her next friend, who was a Bavarian judge and one of two persons appointed by a Bavarian court to take charge of her and her property. The order was made as asked — *i.e.*, for payment, not to her, but to the two persons appointed as above mentioned. The lady had been judicially declared lunatic, but there was no judicial vesting of her property in the curators. *Thiery* v. *Chalmers, Guthrie, & Co.* was a similar case. The lunatic there was a French subject declared lunatic in France and whose property was placed under the care of a duly-appointed tuteur. An action was brought in this country by the lunatic by a next friend and by the tuteur as a co-plaintiff to recover money and securities in the hands of the lunatic's bankers. An order was made for the delivery of them to the tuteur. Kekewich, J., thought that the tuteur might have sued alone in his own name. He regarded the decision in *In re Brown* as an authority for so holding, inasmuch as both in *In re Brown* and in *Thiery* v. *Chalmers, Guthrie, & Co.* the lunatic had been formally so declared by the foreign court. But *In re Brown* was not an action; it was an application to the Court in Lunacy under section 134 of the Lunacy Act, and we doubt whether the action of *Thiery* v. *Chalmers, Guthrie, & Co.* would have been rightly framed if brought by the tuteur as sole plaintiff. An alteration in the *status* of a lunatic appears to be necessary in order to enable the Court in Lunacy to exercise the jurisdiction conferred upon it by section 134 of the Lunacy Regulation Act; but it by no means follows that persons, whose *status* has not been altered by their being judicially declared lunatic, cannot sue by themselves by a next friend for the recovery of their own property. *In re Knight* turned on the discretion which the court had under section 134 of the Lunacy Regulation Act, and throws no real light on this case. The only difficulty in the way of the plaintiffs is occasioned by *In re Barlow*. In that case a colonial statute vested in a master in Lunacy the care and custody of the property of lunatic patients—*i.e.*, of persons confined in lunatic asylums but not judicially declared lunatic. A colonial lady, confined in a lunatic asylum in the colony, was entitled to some funds in the hands of trustees in this country, and the colonial master in Lunacy claimed these funds. The trustees paid them into court under the Trustee Relief Act. The colonial master and the lady by her next friend presented a petition for the transfer of the funds in court to the colonial master in Lunacy. The court made an order for the payment out of capital of some past maintenance and for the payment of the income to the master whilst the lady continued in an asylum. But the court would not order the rest of the *corpus* to be paid over to the master. It is to be observed that the general statutory authority given by the colonial Act to the master as an officer of the colonial court was not supplemented by any order giving the master any express authority as the lunatic's attorney to get in any property not locally within the jurisdiction of the court; and, as we understand Cotton, L.J.'s, judgment, he was much influenced by the omission of any such order. If the master's authority derived from the colonial statute was unsatisfactory, it is obvious that such authority was not improved by his assumption of the right to use the lunatic's name. In that view of the case the fact that the lunatic petitioned in her own name by her next friend did not remove the difficulty. Having decided that the master was not entitled as a matter of right to demand payment to himself, it became necessary for the court, acting as trustees, to consider what it was the duty of trustees to do in such a case as that before them, and they considered that in such a case the trustees ought not to part with the trust fund without seeing to its application, and ought not to part with the fund to the master further than they were satisfied that the interests of the lunatic rendered it necessary to do so. This was the view taken in *In re Garnier*, 20 W. R. 288, L. R. 13 Eq. 532, where, however, the lunatic was a domiciled Englishman, and we see no reason to dissent from it where the authority of the foreign curator to get in the trust property is regarded by the court as unsatisfactory. But where it is not, the considerations which weighed with the court in *In re Barlow* do not arise. A person absolutely entitled to trust money is entitled to have it paid to him or to anyone duly appointed by him to receive it, and the trustees or the court acting for them have no discretion to refuse payment. The same principle is, in our opinion, applicable to the case in which trust money belongs to a lunatic, and a person is duly appointed by a competent authority to get in such money for the lunatic. If the title of the lunatic is clear, and the authority to act for him is equally clear, we fail to see what discretion the court, acting for the trustees, has in the matter. The trustees may properly say that they cannot safely act without the sanction of the court, but we fail to see what other discretion there is. Where the lunacy jurisdiction is being exercised, as it was in *In re Stark*, 2 Mac. & G. 174, other considerations at once arise. If, as in *In re Garnier*, the lunatic were an Englishman temporarily abroad, we should feel considerable difficulty in holding that the courts of this country were bound to recognize the title of a foreign curator to sue in this country. But here we are dealing with an alien domiciled abroad, and over whom the courts of this country have no jurisdiction, except such as is conferred by the fact that she has property here. All that the court here has to do is to see that the person claiming it is entitled to have

it. In this case the order of the Belgian court of the 5th of November, 1899, removes all doubt as to M. Didisheim's authority to take these proceedings and obtain and give a good discharge for the property which he seeks to recover. On general principles of private international law, the courts of this country are bound to recognize the authority conferred on him by the Belgian courts, unless lunacy proceedings in this country prevent them from doing so. What ought to be done in lunacy has not to be considered, and we say nothing on that subject. In our opinion, the appeal should be allowed, and an order be made as asked by the claim. But the plaintiffs must pay all the costs; for the bank was perfectly justified in not complying with M. Didisheim's demands without an order of the High Court—*i.e.*, without proving his title in such a way as to make it unreasonable for the bank to refuse to recognize it. Under the old practice an action of detinue or trover might have failed; for under the general issue the defendants could have given in evidence facts excusing delivery to a person rightfully entitled, but whose title was not such as the defendants could safely recognize: see per Blackburn, J., in *Hollins* v. *Fowler*, L. R. 7 H. L. 757 at p. 766, 23 W. R. Dig. 238, and the cases there cited. But in practice if in such a case the plaintiff proved his title to the satisfaction of the court and paid the defendant's costs, the plaintiff always obtained delivery. Under the modern practice, if this case had been tried by a jury there would be no difficulty, we apprehend, in ordering delivery to M. Didisheim, and in a proper case like this giving the defendants the costs of the action—*i.e.*, there would be good cause for making the plaintiffs pay the costs, although they succeeded in establishing their title: see *Gleddon* v. *Trebble*. If the action were tried without a jury, whether in the Chancery Division, as this was, or in the Queen's Bench Division, the costs would be in the discretion of the judge, and there would be no difficulty in ordering them to pay the costs. However tried, any other result would be very unjust. Mr. Terrell suggested that the order of the court would not protect the bank if the lunatic were to recover and were to sue the bank for her money and property after the bank had paid and delivered it to M. Didisheim. We do not entertain any misgiving on this point. The High Court clearly had jurisdiction to entertain the action and to decide the questions raised in it, and to make the order which this court now declares it ought to have made; and this court clearly has jurisdiction to entertain this appeal. This being clear, and the Belgian court having had jurisdiction to make the order which it made, the bank would unquestionably have a perfectly good defence to any action which the lunatic could bring against it, either by another next friend or by another official curator, or by herself if she should recover.

*Appeal allowed.*

Solicitors, *Stibbard, Gibson, & Co.*; *Travers-Smith, Braithwaite, & Robinson.*

---

From Chan. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — Feb. 28.

LUDINGTON CIGARETTE MACHINE CO. v. BARON CIGARETTE MACHINE CO. (*a.*)

*Patent—Action for infringement—Petition for revocation—Amendment by disclaimer—Conditions to be imposed—Patents, Designs, and Trade-Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20.

Deeley v. Perkes, [1896] *A. C.* 496, *does not lay down any general rule as to the conditions to be imposed on a patentee, who, after the commencement of an action, desires leave to amend the specification of his patent by way of disclaimer, but the conditions to be imposed will depend on the circumstances of each case.*

This was an appeal from a decision of Kekewich, J.

The plaintiffs were assignees of a patent granted on the 26th of June, 1896, to S. Pitt for "Improvements in Cigarette Machines," and the action was brought by them on the ground of infringement of the patent.

By their defence the defendants denied infringement and alleged that the patent was invalid.

On the 22nd of September, 1899, the defendants, with the sanction of the Attorney-General, presented a petition for the revocation of the patent on the grounds that Pitt was not the true and first inventor, and that the alleged invention was not new or useful, or the proper subject-matter for a patent.

On the 8th of November, 1899, the plaintiffs issued a summons by which they asked for liberty to apply at the Patent Office for leave to amend the specification by way of disclaimer, and for liberty after that amendment had been made to amend their statement of claim so as to limit the action to the amended specification.

Kekewich, J., gave the liberty required, but he held that *Deeley* v. *Perkes*, [1896] A. C. 496, applied, and that the House of Lords had there laid down the general practice as to the conditions which should be imposed in giving liberty in such cases to apply for leave to amend a specification. He therefore ordered that the plaintiffs should not threaten any persons with legal proceedings under the patent until after the amendment should have been made; that the plaintiffs should not bring or maintain any action for the infringement of the patent in respect of any machines or part of machines made prior to the date of the order; and that the defendants' costs of the action and of the petition, including the costs of the present applications, save so far as the same could be utilized for the purposes of the action and petition respectively, after the amendment of the specification, should be borne by the plaintiffs in any event.

The plaintiffs appealed.

The original specification contained twenty-two claims, and of these it was proposed to disclaim twenty. From some further affidavits, which were admitted on the hearing of the appeal, it appeared that the defendants had, since 1896, manufactured and sold a number of machines which were being worked by the purchasers thereof; that the total cost of these machines was from £1,100 to £1,500, but that that part of the whole machine which was covered by two of the claims contained in the plaintiffs' specification which they proposed to retain would not cost more than £2 to make for each machine. The defendants also proved that some of

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

their customers who had purchased or hired machines from the defendants had declined to pay the instalments of purchase-money or rent due because of the action taken by the plaintiffs.

The court also held it proved that the plaintiffs had never made any use of their patent in England.

*Bousfield, Q.C., Lewis Edmunds, Q.C.*, and *J. C. Graham*, for the plaintiffs.—*Deeley* v. *Perkes*, does not lay down any general rule. The circumstances of that case were very peculiar. There is nothing in the circumstances of this case which makes it proper to impose such a condition.

They referred to *Bray* v. *Gardner*, 35 W. R. 341, 4 Rep. Pat. Cas. 40; *Hopkinson* v. *St. James's and Pall Mall Electric Light Co.*, 10 Rep. Pat. Cas. 46; *Re Chatwood's Patent*, 16 Rep. Pat. Cas. 370.

*T. Terrell, Q.C.*, and *A. J. Walter*.—Section 20 of the Patents Act, 1883, gives the minimum condition which may be imposed in cases of amendment. Section 19 gives a discretion to the court to impose further conditions. Even if the rule in *Deeley* v. *Perkes* be not a general one, the conditions ought to be imposed in the present case.

*Bousfield, Q.C.*, replied.

LINDLEY, M.R.—I do not think there is any real difficulty in this case, although it is of an unusual kind. So far as the appeal raises any question of general practice, I propose to say nothing. It appears to me that each case must depend entirely upon its own circumstances. I am certainly not prepared to take the view that the form of order which the House of Lords adopted in *Deeley* v. *Perkes* is to be adopted as a common form. I do not understand the House of Lords to have intimated anything of that kind. There were very special circumstances in that case which, in the view of the House (and I think this must be the view of every one who looks at the facts dispassionately), made it proper to impose the terms which they did impose. It does not at all follow that it would be proper to impose those terms in other cases simply because liberty is asked to apply for leave to amend a specification by way of disclaimer or otherwise.

On the construction of the statute I do not think there is much difficulty. I have no doubt that section 20 applies to all cases in which an amendment has been allowed, whether the application for leave to amend has been made before litigation under section 18, or after litigation under section 19. And section 20 is valuable as showing what the Legislature has thought right to impose as a condition when an amendment has been allowed. Whether that is a minimum condition or not, it is a circumstance to be taken into consideration, and when either the comptroller, under section 18, or the court, under section 19, has to decide what terms ought to be imposed before leave to amend or to apply for leave to amend is given, it becomes important to consider what reason there is for imposing any terms, having regard to what must follow under section 20, if an amendment is allowed. I approach the present case from that point of view, which I think is as favourable to the appellants as possible. In my opinion, the very peculiar circumstances of this case render it just and proper that the condition imposed by the learned judge should stand unaltered. The patent is eight years old, and it has never been worked in this country. The specification makes twenty-two claims (I have not had an opportunity of criticizing it), and eight years after its date this action is brought for infringement. The action is met with the ordinary defences to such an action, and also by a petition to revoke the patent. What do the patentees do? They seek to get rid of twenty out of their twenty-two claims, and to cut down their patent from a large and roaming, and, as we are now entitled to say, an extravagant, claim to a minimum which they hope will hold water. What has been done in the meantime? The defendants have been making machines which the plaintiffs say were made in accordance with their patent before amendment, infringing, I suppose, more than the two claims which they propose to retain. These machines are very costly, and the defendants sold them in the ordinary course of their trade, not supposing until recently that they were doing anything wrong or infringing anyone's rights.

Are we to confiscate these machines, or to tell the defendants that, if the plaintiffs succeed in patching up their patent and obtaining a valid patent by means of the disclaimer which they seek to make, they are to be liable to an action by the plaintiffs which will deprive them of the benefit of what they have done, and, as the law stands, done properly? I do not think that would be at all fair. I think it would be eminently unjust to do that which would in substance amount to confiscating the machines which are in the defendants' hands, and would render it impossible for them to obtain the price of those which they have sold, so far as it has not yet been paid. In my opinion, the age of the patent and its apparent worthlessness until a very recent date are circumstances which render it unjust, inequitable, and unfair to alter the conditions which the learned judge has imposed. I think, therefore, that the appeal must be dismissed with costs. But I protest against the notion that the order adopted in *Deeley* v. *Perkes* ought to be regarded as a settled form applicable to all cases.

RIGBY, L.J.—I agree with what the Master of the Rolls has said, and I do not wish to add anything except upon one point. It has been suggested that the comptroller, following a decision of the law officers, will not now impose any conditions which are not contained in section 20. I daresay it may come to that in many cases, but to lay that down as a matter of law would, I think, be a direct contradiction of the provision of section 18, that "The law officer shall, if required . . . determine whether and subject to what conditions, if any, the amendment ought to be allowed." That must, of course, mean conditions in addition to those mentioned in section 20, and it cannot have become the practice of the Patent Office or of the law officers to say that, considering section 20 to be a very good one, they will not enter into the question whether any other conditions shall be imposed.

VAUGHAN WILLIAMS, L.J.—I entirely agree. If the only special circumstance upon which the defendants could rely had been that they had not only manufactured but sold machines, and the purchasers were refusing to pay for them, I am not sure that I should have thought the conditions imposed by Kekewich, J., fair conditions. But having regard to the other special circumstances, the age of the patent, what has been done under it, and the very large proportion of the claims which have been thrown overboard, I agree with the Master of the Rolls that it would be most unjust and unfair not to impose the conditions which have been imposed.

Solicitors, *Wilson, Bristows, & Carpmael; Beyfus & Beyfus.*

## High Court of Justice.

Chan. Div.
Kekewich, J. } May 16.

*In re* HOFFE'S ESTATE ACT, 1855. (*a.*)

*Practice—Payment out—Petition—Distribution of fund in court—Assignment of share—Rectification of deed—Jurisdiction—Defective title—Subsequent acquisition of good title.*

*Where a person purports to convey one-sixth of a fund in court representing real estate, though only entitled to one-ninth share, and afterwards becomes entitled to one-sixth, the court will make the good title subsequently acquired available to make the assignment effectual.*

Noel *v.* Bewley, 3 *Sim.* 103, *followed.**

*The jurisdiction of the court with regard to rectification of deeds on petition considered.*

In re Bird's Trusts, 3 *Ch. D.* 214, 25 *W. R. Dig.* 97, *and* Lewis *v.* Hillman, 3 *H. L. Cas.* 607, *considered.*

This was a petition for distribution of a fund in court.

By a marriage settlement made in 1845 certain lands were settled upon the husband for life, with remainder to his wife for life, with remainder to the children of the marriage as the husband should appoint, and in default of appointment in equal shares as tenants in common. The lands subject to the trusts of the settlement were sold, and the purchase-money was paid into court under a private Act of Parliament, which contained a proviso that for the purposes of title the purchase-money should be deemed to be real estate. The husband died in 1869 intestate, and without having exercised his power of appointment. The wife died in February, 1900. There were nine children of the marriage—namely, the petitioners, and three others who died in infancy.

In 1884 Philip Rideout Hoffe, one of the younger sons of the marriage, believing that he was entitled to a one-sixth share, though in fact entitled only to one-ninth of the fund in court, purported to assign one-sixth share to one Upcraft.

In 1896, J. L. Hoffe, the eldest son of the marriage, having become entitled to the shares of three deceased children as heir-at-law of his father, divided these shares between himself and his brothers and sisters, the result being that the petitioner P. R. Hoffe became entitled to a one-sixth share.

The petitioners asked that the fund might be distributed on the footing that one-ninth only of the fund in court passed under the assignment of 1884 to the respondent Upcraft. The respondent Upcraft and his mortgagee claimed the whole one-sixth share.

*Fawcus*, for the petitioners, referred to *In re Bird's Trusts*, 3 Ch. D. 214, 25 W. R. Dig. 97, and *Lewis* v. *Hillman*, 3 H. L. Cas. 607.

*P. F. Wheeler*, for the respondents.

KEKEWICH, J., said: The question here depends upon the effect of the deed of the 24th of May, 1884, which purports to assign one-sixth share of the petitioner, Philip Rideout Hoffe, though he was only entitled to one-ninth. It might be said that in order to determine this question the court must decide that the deed ought to be rectified or set aside. This gives rise to an argument whether a complete distribution of the fund can be made on petition. Reference was made to *In re Bird's Trusts* and *Lewis* v. *Hillman* in each of which cases the court saw its way to determine on petition dealing with a fund in court questions which are generally raised in an action. In each of those cases the petition was presented under the Trustee Relief Act, and in *Lewis* v. *Hillman* the Lord Chancellor took care to point out that the express provisions of that Act made it unnecessary to file a bill unless there was urgent reason for such procedure. Here the money was paid in under a private Act, and the considerations which prevailed in *Lewis* v. *Hillman* are not directly applicable. Nevertheless, the court should be shrewd to overcome objections to deciding on petition any questions concerning the distribution of a fund in court however it may have been paid in; and even if there were more difficulty here than really exists I should be extremely unwilling to put the parties to the expense and delay of an action. On reflection I think that a conclusion as to the rights of the parties is possible on consideration of the deed of assignment and the subsequent deeds without inquiry whether any case is made for rectification or for restoring the parties to their original position. I may, however, add that rectification and restoration seem to me alike impossible. Under the settlement of the 17th of June, 1845, Philip Rideout Hoffe, the assignor, was, at the date of the assignment, entitled to one-ninth. That the assignment passed this one-ninth, which the assignor actually had, is beyond question, as is also the intention to sell and purchase one-sixth. The property comprised in the settlement was real estate, and this character was preserved on conversion by the private Act. Therefore the three shares which had vested in the deceased infants devolved on the eldest son, who executed a deed of the 4th of April, 1896, under which each of the surviving children became entitled to one-sixth of the fund. The respondent Upcraft, the assignee under the deed of the 24th of May, 1884, and his mortgagee claim the entire one-sixth of the fund, and in my judgment their claim is well founded. P. R. Hoffe assigned as beneficial owner and the covenants implied in such an assignment by the Conveyancing Act, 1881, are therefore imported into the deed. Probably the claim of the assignee might be rested on that ground; but I prefer, as Shadwell, V.C., did in *Noel* v. *Bewley*, 3 Sim. 103, to take the broader ground, and to hold that though the assignment was of a defective title, yet as the assignor afterwards acquired a good title to one-sixth, this court will make that good title available to make the assignment effectual. My conclusion, therefore, is that the one-sixth belongs to the assignee and his mortgagee.

Solicitors, *Lewis & Sons; William Sharp.*

---

Chan. Div.
Kekewich, J. } April 27.

ZUMBECK *v.* BIGGS. (*a.*)

*Practice—Evidence—Production of books—Partnership—Order upon person not a party—*Ex parte *application—Form of order—R. S. C., ord.* 37, *r.* 7.

*An order may be made* ex parte *against a person not a party to the action to attend before an examiner for the purpose of producing documents.*

This was a motion by the plaintiff that the defendant and one Lister, who was his partner, but not a party to the action, should produce before an examiner appointed in the action at such times and

* See also *Smith* v. *Osborne*, 6 W. R. 21, 6 H. L. Cas. 375.

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

place as the examiner might appoint for the cross-examination of the defendant (*inter alia*), the journals, ledgers, account, order, and delivery books kept by Messrs. Lister & Biggs containing all entries made between certain specified dates. The action was for a declaration that the defendant Biggs was a trustee for the plaintiff of a certain business mortgaged to the defendant, and for an account of all moneys realized or which but for the defendant's default might have been realized from the business, and of all profits made by the defendant or his firm by means thereof, and of all his dealings and transactions as mortgagee of the said business. Lister was not a party to the action. Judgment had been given in the action declaring the defendant a trustee for the plaintiff of all moneys realized from the premises comprised in the mortgage, and for an account of all moneys received by the defendant, and which but for his wilful default he might have received in respect of the mortgaged premises or the carrying on of the business. A subsequent order was obtained giving liberty to the plaintiff to cross-examine the defendant before one of the examiners of the court on the account carried in by him and on his affidavits.

Before the examiner the defendant, by his counsel, declined to produce the books of Messrs. Lister & Biggs, on the ground that he could not do so without the consent of his partner Lister, who objected to any of the books being shown to a stranger.

The question was whether the order asked for on the motion could be made as against one who was not a party to the action.

Ord. 37, r. 7, provides that "the court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the court or judge may think fit to be produced; provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produced at the hearing or trial."

*T. R. Warrington, Q.C.*, and *G. F. Hart*, for the motion, referred to *In re Smith, Williams* v. *Frere*, [1891] 1 Ch. 323, 39 W. R. Dig. 170; *Hadley* v. *McDougal*, 20 W. R. 393, L. R. 7 Ch. App. 312.

*W. M. Cann*, for the defendant, argued that there was no jurisdiction to make any such order, and referred to *Taylor* v. *Rundell*, Cr. & P. 104; *Murray* v. *Walter*, Cr. &. P. 114; *Kearsley* v. *Phillips*, 31 W. R. 467, 10 Q. B. D. 465.

KEKEWICH, J., said it would be a matter for regret if in a case of this sort production could not be enforced by some summary process. Defendant had used the books for the purpose of preparing the account which he had carried in and which it was impossible to check without the books. Justice demanded that the books should be produced. The defendant objected that he could not produce them because he was only joint owner, and his partner would not consent to their production. Ord. 37, r. 7, however, seems to meet the precise case. In *In re Smith, Williams* v. *Frere* a similar order was made *ex parte*, and North, J., refused to discharge it on that ground. In the present case I must exercise my discretion, and this is a case in which it appears to me that an order ought to be made *ex parte*. I do not see how the defendant's partner could have been made a party to the action. An order made under this rule is like a *subpœna duces tecum* and may be made *ex parte*. Any objection to production of the books can be raised before the examiner, and can, if necessary, be brought here. The order will be that the defendant and his partner do attend before the examiner at such time and place as the examiner shall appoint for the purpose of producing the books, and that they or one of them do produce the books kept by Lister & Biggs.

Solicitors, *Watson & Watson; George Terrell.*

---

Chan. Div.
Byrne, J. } May 1, 2.

*In re* MARSHALL AND SALT'S CONTRACT. (a.)

*Vendor and purchaser—Assignment of leasehold public-house—Covenant by lessee not to assign without lessor's consent—Consent unreasonably withheld—Forcing title on purchaser—Specific performance—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict.* c. 78).

*The lessee of a public-house contracted to sell the lease to a brewery company. The lease contained a covenant that the lessee would not assign, underlet, or otherwise part with the demised premises without the written consent of the lessor, but that such consent should not be unreasonably withheld. The lessor refused to consent chiefly on the ground that he wished to retain the house as a "free house."*

*Held, that the vendor had not made out a sufficient title which could be forced on the purchaser.*

Adjourned summons.

This was a summons taken out under the Vendor and Purchaser Act, 1874, asking for a declaration that a good title had not been shown to certain leasehold premises contracted to be sold.

The subject-matter of the sale was a leasehold public-house held under a lease dated in 1896 in which was a covenant by the lessee "that he, the lessee, his executors or administrators, shall not assign or underlet or otherwise part with the possession of the said messuage and premises hereby demised or any part thereof without the written consent of the lessor, his heirs or assigns, first had and obtained, but such consent shall not be unreasonably withheld in the case of a respectable and responsible tenant." There was also a clause providing for re-entry in case of default in the observance and performance of any of the covenants in the lease.

The contract which was entered into between the parties was as follows: "I hereby agree to sell to Thomas Salt & Co. (Limited) the lease of the Emscote Tavern, Emscote-road, Warwick (having eighteen years to run), from the 25th day of March last at or for the sum of £850, subject to the said lease being approved by the purchasers' and vendor's solicitors."

The vendor applied to the lessor for his consent to the assignment, but the lessor replied, "I regret that I cannot comply with your request. I object to the lease being transferred to a brewery, being desirous of retaining it as a free house."

The purchasers' solicitors also wrote to the lessor asking him to state the ground of his refusal, and his reply was, "My chief reason for objecting to the assignment of the lease to your clients is that I wish to keep the house as a free house."

The purchasers thereupon refused to complete, but the vendor insisted that the reasons given by the lessor for withholding his consent to the assignment were so unreasonable that the purchasers ought to be compelled to complete.

The purchasers offered to complete if the vendor would enter into a covenant to indemnify them from

(a.) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

all actions, claims, and damages resulting from the absence of the consent of the lessor to the assignment. This the vendor refused, and thereupon the purchasers took out the present summons.

*Dibdin*, for the purchasers.—The vendor has not shown a good marketable title such as was required by the contract, which is an open contract. If the purchasers were to complete they would, in effect, be buying a lawsuit. The court will not compel a purchaser to buy a lawsuit. If the vendor thought the lessor's objections so unreasonable, why did he refuse to covenant to indemnify? *Sear* v. *House Property and Investment Society*, 29 W. R. 192, 16 Ch. D. 387; *Day* v. *Singleton*, *ante*, p. 18, [1899] 2 Ch. 320; *In re The Trustees of Hollis Hospital and Hague's Contract*, 47 W. R. 691, [1899] 2 Ch. 555; *Mason* v. *Corder*, 7 Taunton 9.

*T. Willes Chitty*, for the vendor.—The covenant against assignment is qualified. Therefore, unless the lessor can show a substantial reason for withholding consent, the assignment without his consent can be forced on the purchaser. The lessor has failed to show a substantial reason. If the purchaser is bound to take the assignment the vendor is not bound to covenant to indemnify him. The assignment to the brewery company will not "tie" the house, because the purchasers will still be bound not to assign or underlet without the lessor's consent. There is no reasonable chance that the purchasers will be involved in litigation over this matter: *Treloar* v. *Bigge*, 22 W. R. 843, L. R. 9 Ex. 151; *Hyde* v. *Warden*, 26 W. R. 201, 3 Ex. D. 72; *Bates* v. *Donaldson*, 44 W. R. 659, [1896] 2 Q. B. 241.

*Spencer* v. *Topham*, 22 Beav. 573, 5 W. R. Ch. Dig. 23; and *In re Thackeray and Young's Contract*, 37 W. R. 34, 40 Ch. D. 34, were also referred to during the argument.

BYRNE, J., stated the facts, and continued: The real question between the parties is whether such a title as has been shown ought to be forced upon the purchasers. The vendor says that this is a title which would in an action for specific performance be enforced, or ought to be, upon the purchaser. The purchaser says: "In the face of the objection taken by the lessor I am not bound to complete in the absence of the lessor's consent to the assignment." The vendor says that this ground taken by the lessor is so unreasonable that it entitles the vendor, the lessee, to assign the lease without regard to that term of his covenant which involved obtaining the consent of his lessor. The real question is, Is the objection taken by the lessor against assignment so unreasonable upon the face of it that I can say (to use the words of Baron Alderson) "there is not a reasonably decent probability of litigation" incurred by the purchaser should he complete under present circumstances.

There is much force in the argument which has been addressed to me that the objection originally alleged by the lessor—viz., that he wished to keep the house a free house, was unreasonable because the "tie" is not created by the assignment to the purchaser, but it could only be created by something done subsequently by the purchaser, and that there being this covenant in the lease in the event of an attempted assignment for the purpose of "tying" the house, the landlord could then raise the question and say, "The purchaser has taken with notice of this covenant contained in the lease and knows that he will take subject to it." But this is not quite all. The form of the objection is that he wishes to keep it as a free house. That is the main objection. I do not read the landlord as saying finally "I have no *other* reason."

It is urged that, suppose litigation were to ensue, it would be at least extremely difficult for him to allege any other reason than what he has already alleged, but I am not prepared to say, in his absence, that he would be estopped from alleging other reasons in addition to that which he has already given. And then there is this. If he has a genuine opinion that it would not be advisable that the house should be other than a free house, he suspects, as anybody would suspect in the case of a sale of a public-house to a brewery company, that the brewery company intend, either by means of some fresh subletting or by means of some manager of their own, to make the house other than a free house, in this sense, that the person carrying on the business there, whoever he was, would obtain his beer from one source only and not be at liberty, or (if it were a brewery company carrying it on themselves) would not be in the least degree likely, to exercise any judgment as to the person from whom they should get such beer.

When I get to the root of the whole question it is this: Am I satisfied, on the mixed question of law and fact which might be raised by the lessor should he, after completion, bring an action of ejectment against the purchaser, that it is so certain that he could not succeed as to make this objection one which ought not to be had regard to? I may observe that it is not without materiality in the matter to know that the vendor was not prepared to give an indemnity against any possible litigation. It is perfectly true that the vendor is not bound to give any such covenant, but I cannot help thinking that, in a case of this kind, his willingness or unwillingness to give such a covenant has some bearing upon the question whether the objection taken is an untenable one under the circumstances.

Upon a whole review of the circumstances, and having regard to the authorities and that this is, in effect, asking whether specific performance ought to be granted, I do not think that I ought, in the circumstances, to say that a good title has been made out upon that footing. I therefore think that the proper order will be in accordance with that given in *Hargreaves* v. *Thompson*, 34 W. R. 708, 32 Ch. D. 454, at p. 457, which I think extends to the reasonable costs of investigating.

Solicitors, *Bridges, Sawtell, & Co.*, for *Lowe & Auden*, Burton-on-Trent; *Kingsford, Dorman, & Co.*, for *Handley, Brown, & Ledbrook*, Warwick.

---

## Court of Appeal.

From Prob. Div. & Adm. Div. (Lindley, M.R., and Rigby and Vaughan Williams, L.JJ.) — March 29, 30; April 30.

*In re* MARTIN (OTHERWISE GUILLARD). LOUSTALAN *v.* LOUSTALAN. (*a.*)

*Will—Pre-nuptial will—Subsequent marriage of testator—Revocation—Domicil—Adoption of foreign matrimonial* régime *by express or inferred agreement—Wills Act*, 1837, *s.* 18.

*The validity of a pre-nuptial will, so far as it affects movable property, depends not only on the law of the domicil of the testator at the time of his death, but also on the law of his domicil at the time of his making his will and at the time of his subsequent marriage; but the domicil of the testator on each of these occasions must be*

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

*determined by the English Court of Probate in the English sense*—i.e., *according to those legal principles which are recognized in this country and are part of its law.*

*To acquire an English domicil in the English sense, not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently or for an indefinite period.*

*According to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends* primâ facie *on the domicil of the husband in the English sense at the time of the marriage; and, even assuming that it is possible for the parties to accept in this respect by express agreement* (e.g., *by marriage settlement*) *a matrimonial* régime *different from that of the country of the husband's domicil at the time of the marriage, yet no such intention ought to be circumstantially inferred in the absence of such express agreement.*

Per Vaughan Williams, L.J.—*The rule that a prenuptial will is revoked by the subsequent marriage of the testator is part of the matrimonial* régime *of England.*

*Decision of* Jeune, P. (68 *L. J. P.* 106), *reversed.*

Appeal from a decision of Jeune, P. (68 L. J. Prob. 106), given on the 5th of August, 1899, revoking a grant of letters of administration to the estate of Catherine Euphrasie Guillard, which had been made to her brother, Jean Loustalan, and establishing a will of the deceased woman dated 1870.

Catherine Euphrasie Loustalan, a Frenchwoman by birth and education, came to England prior to the year 1870, in order to earn her living by laundry work.

In 1870, whilst working in a situation near Huddersfield, she wrote for and obtained from her sister in France certain French stamped official paper, on which she executed a holograph will appointing her sister Marie Loustalan her universal legatee. This will was validly executed according to the law of France, but insufficiently attested according to the law of England. When executed it was deposited for safety in the custody of a notary at Pau.

In 1876 the testatrix married in London a Frenchman named Louis Guillard, who had adopted the name of Martin, and was at the time unable to return to France for a number of years under penalty of incurring imprisonment owing to a certain offence committed by him against French criminal law. There was no marriage settlement. Subsequently to the marriage husband and wife carried on the business of a laundry at certain premises in the Edgware-road, but in 1890, the period of his proscription having then expired for some years, the husband deserted his wife and returned to France. The latter, however, continued to carry on the laundry business in London till the night of the 2nd of January, 1895, when she was burnt to death, with a number of her assistants, in a fire which destroyed the premises in the Edgware-road. The existence of the will of 1870 being for the time forgotten, a grant of letters of administration to her estate was sought for and obtained by her brother Jean Loustalan. In the present action her sister, Marie Loustalan, now asked for a revocation of this grant, and for a fresh grant of administration to her sister's estate with the will of 1870 annexed.

Jeune, P., delivered judgment to the following effect on the 5th of August, 1899: (1) In his opinion, the domicil of the husband, which was also that of the wife, was, at the time of her death, French, according to both French and English law. (2) It was said, however, that the parties married, and intended to marry, according to the matrimonial *régime* of England and not according to the matrimonial *régime* of France. It was further said that if that were the case the effect would be to import into their matrimonial relations the revocation of a will previously made by the wife. There were, in fact, two points to be considered: (*a*) First, was it shown that these people married according to the English matrimonial *régime*, or did they marry according to the French law of *communauté*, according to which, in the absence of any information to the contrary, they must be considered to have married? The evidence on this point was scanty, but on the whole he had arrived at the conclusion, though not without hesitation, that they intended to marry according to English law. (*b*) But then there arose the difficult question—was the rule as to the revocation of a will by marriage a part of the English matrimonial or of the English testamentary law? The provision of the English law by which a will was revoked by marriage was very peculiar. It was now embodied in the Wills Act, 1837. That was to say, the Act recognized it as a way in which a will might be considered to be revoked. The law was far older than the Act, and he was unable to say what was its real origin. It was, however, a very peculiar law, and he did not know that it was a very reasonable one. But it was none the less the law of England. As the law of England formerly stood, the wife's property went entirely to her husband, and therefore her previous will would naturally be revoked by her marriage; and had the law been that the wife's will only, and not that of the husband, was revoked by marriage, its origin would have been clear; and he thought that it would then have been possible to have found that it was part of the English matrimonial *régime*. But that was not the law. The wills of both spouses were equally revoked by their marriage, and therefore he had great difficulty in attaching it to the matrimonial *régime* at all. On the whole, therefore, he arrived at the conclusion that this provision was in reality part of the testamentary law of England, arising, it might be, from the presumed intention of the parties, or it might be a provision of law having regard to the possibility of children and the desirability of impressing on the parties to a marriage contract, the necessity of making wills for the welfare of such children. Whether these parties married according to the French or English *régime* he could not suppose that they intended this provision should affect their testamentary powers. The will of 1870 was therefore perfectly good; the existing grant of letters of administration must be revoked; and there would be a grant of administration with the will annexed made to the defendant, as the natural and lawful brother of the deceased.

From this decision the defendant now appealed.

*Inderwick, Q.C.*, and *H. D. Grazebrook*, for the appellant, cited *Marston* v. *Roe*, 8 A. & E. 14; Dalloz' Jurisprudence Générale Recueil Periodique (1854) Part II., 161, (1865) Part I., 418, (1886) Part II., 181; Dicey's Conflict of Laws, 648. [VAUGHAN WILLIAMS, L.J., referred to *Doe d. Hodsden* v. *Staple*, 2 T. R. 684.]

*H. J. H. Mackay*, for the respondent, cited *Bremer* v. *Freeman*, 5 W. R. 618, 10 Moo. P. C. 306; *Forse and Hembling's cass*, 4 Coke's Rep. 61*a*; *In re Aganoors' Trusts*, 64 L. J. Ch. 521; *Jopp* v. *Wood*, [illegible] W. R. 481; *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307; *Udney* v. *Udney*, L. R. 1 H. L. Sc. 441; *Croker* v. *Hertford* (*Marquis*), 4 Moo. P. C. 339; *Abdul Messih* v. *Farra*, 13 App. Cas. 431, at pp. 439, 441, 44[illegible]

*Mayor of Canterbury* v. *Wyburn*, 43 W. R. 430, [1895] A. C. 89; *In re Price, Tomlin* v. *Latter, ante*, p. 373.

*Cur. adv. vult.*

April 30.—LINDLEY, M.R.—The will which is in question in this case was made in this country by a Frenchwoman before her marriage, and was not attested as required by English law. By English law, by which I mean English law irrespective of all foreign law, the will is therefore clearly invalid. But foreign law must be taken into account. Those principles of private international law which are recognized in this country are part of the law of England, and on those principles the validity of the will, so far as it affects movable property, depends on the law of the domicil of the testatrix when she died. The domicil of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicil which are recognized in this country and are part of its law. Until the question of the domicil of the testatrix at the time of her death is determined the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a Frenchwoman, but it would be contrary to sound principle to determine her domicil at her death by the evidence of French legal experts. The preliminary question, by what law is the will to be governed, must depend in an English court on the view that court takes of the domicil of the testatrix when she died. If authority for these statements is wanted, it will be found in *Bremer* v. *Freeman*, 5 W. R. 618, 10 Moo. P. C. 306, see pp. 359, &c.; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301, 15 W. R. H. L. Dig. 8; and *In re Trufort. Trafford* v. *Blanc*, 36 W. R. 163, 36 Ch. D. 600. In each of the last two cases a foreign court had determined the domicil: and the English court had also to determine it, and did determine it to be the same as that determined by the foreign court. But, as I understand those cases, the English court satisfied itself as to the domicil in the English sense of the term, and did not simply adopt the foreign decisions. The course universally followed when domicil has to be decided by the courts of this country proceeds upon the principles to which I have alluded.

But, further, the validity of a will of movables made by a person domiciled in a foreign country at the time of such person's death not only may, but must, depend on the view its courts take of the validity of the will when made and on its subsequent revocation if that question arises. These questions may or may not turn in any particular country on the domicil of the testator. For example, in this case it is agreed on all hands that by the law of France the will in question, being a holograph will made by a French subject, was valid when made, whatever her domicil may have been when she made it. It is also agreed on all hands that by French law marriage does not revoke the prior wills of the spouses. But the testatrix married a Frenchman in this country after she made her will, and the question whether her will was thereby revoked as to her movables is the real question on which this case turns. By whatever court this question is to be decided, the English law of marriage, which in such a case involves and, indeed, turns on English views of domicil, must be considered. If this view be ignored, the effect of the marriage will be inadequately, and, indeed, erroneously ascertained. If the domicil of the testatrix is to be treated as English when she became a married woman, her will was revoked by her marriage; for such is the law of England whatever the intentions of the parties may be (1 Jarm. on Wills, c. 7); but if her domicil was French her will would not be revoked by English law, and still less by French law. Both laws are alike in regarding her domicil as that of her husband as soon as she married him. The effect of her marriage must therefore depend on the English view of his domicil. It would be useless and entirely misleading to ask a French expert what effect the French law would give to an English marriage without explaining the English law to him, and no explanation of that law would be adequate or correct if it excluded the English view of the domicil of the parties.

Having thus stated the principles which, in my opinion, ought to be applied to the case, I proceed to consider the facts and the evidence of the experts called at the trial.

The learned President decided, and, in my opinion, rightly decided, that the domicil of the testatrix in the English sense was French when she died. It became necessary, therefore, to determine whether by the law of France her will was valid when she died. Experts were called and examined and cross-examined at great length on a number of points, many of which are not now, at all events, material or in controversy. The experts all agree that the will was valid when made. They also all agreed that according to French law the testatrix was domiciled (in the French sense) in England when she made her will and when she married. They also all agreed that, according to French law and in the French sense, her husband was domiciled in England when he married. Treating the husband and wife as domiciled in England when they married they differed as to the consequences. MM. Guastalla, Gorostarzee, and Mesnil think that the marriage revoked the will. M. Mesnil is quite clear upon the point; the others are less so, but they, I think, take the same view. M. Astone when first called, stated that the marriage did not revoke the will—that it depended on nationality, not domicil, in the French sense. When recalled he apparently adhered to his opinion, but considered that the revocation might depend on the intention of the parties and on the adoption of the matrimonial *régime* by the spouses. All these experts based their opinion on their view that at the time of the marriage the parties were domiciled in England and they applied the English law of marriage to that state of things. But, as I have already pointed out, the English law of marriage, when considered with reference to its effect on property involves, and in a case like this cannot be severed from, English views of domicil. The learned President came to the conclusion that the domicil of the husband at the time of the marriage was in France, not in England. But he also came to the conclusion that both husband and wife intended to marry according to English law and that the English matrimonial law should and would govern their future property. He further considered that the law by which wills are revoked by marriage was not part of the English matrimonial law but part of the English testamentary law, and that this law did not apply to the case. I confess I have great difficulty in adopting this view of the case. If, as the President considered, the parties were (according to English views) domiciled in France when they married, their marriage would not revoke their previous wills; and French experts should have been told so and should have been directed that their assumption of an English domicil was inadmissible. It is plain from their evidence that, according to French law, the domicil in the French sense of both husband and wife was in England and not in France both when the marriage took place and when the testatrix died. I have no doubt that this conclusion was quite correct,

but for the reasons I have already given I consider it necessary to examine the effect of the marriage according to English views of domicil. I proceed, therefore, to inquire whether the President was right in his view that the husband was domiciled (in the English sense) in France and not in England when he married. We start with the fact that the husband had a domicil of origin in France. According to English law the burden of proving that he lost that domicil and acquired an English domicil is on those who assert that he did so. Further the domicil to be acquired must be, not domicil in the French sense, but in the English sense. The experts all tell us that he lost his French domicil in the French sense by coming to England and setting himself up as a teacher of languages here. But to acquire an English domicil in the English sense not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently or for an indefinite period: see the authorities collected in Dicey's Conflict of Laws, p. 104 *et seq.* I cannot come to the conclusion that this intention is proved. I see no proof of any intention to abandon France as his domicil in the English sense, and to acquire a domicil in the English sense in this country. I do not say there is no evidence tending to establish a change of domicil in the English sense, but such evidence, in my opinion, falls short of proof, and is in fact, outweighed by evidence on the other side. The circumstances tending to show an abandonment of an intention to return to France are that the husband came over here and taught here; that he married a woman in business here; that he and she described themselves as then *domiciliés à Londres*; that he intended to settle here until he could safely return; that he lived here with his wife for some years, and did so after it was safe to return to France; that he took leases in his own name; and that (whether he knew it or not) he had lost his French domicil in the French sense. Against this must be set the facts that he was a French subject and had a French domicil of origin, that he came here to avoid imprisonment, that he dared not go back to France for many years, but that he could safely do so at the end of twenty years from the time he fled from his own country, that he does go back a few years after it is safe to do so, and that he has ever since been and is now settled in his native country and living with his own relatives. If we look at all the facts as we now know them, they in my opinion, point to a retention of his domicil of origin (in the English sense of the word domicil) rather than to an abandonment of such domicil and a subsequent re-acquisition of it when he went back to France. What has happened since marriage throws a great deal of light on what was obscure at the time of marriage. But if we carry our minds back to the time of marriage and disregard all subsequent events (which I do not think we ought to do) the fact that he was then a criminal fugitive who dared not go back to France for a definite number of years but could safely go back when they had elapsed would prevent me from inferring an abandonment of an intention to return to France when he could safely do so: see Dicey's Conflict of Laws, 142. I should not arrive at the same conclusion if he had fled from his country for life unless pardoned as an English criminal fugitive would have done to escape from the operation of the laws of his own country. The definite period after which he could safely return is, to my mind, all important. As to the declaration made by husband and wife when they married that they were "*domiciliés à Londres*," I have no doubt that *domicilié* was used in the French sense—*i.e.*, in the sense of residence and not in the sense of what we mean by "domiciled," which has a very different signification. Upon the question of domicil (in the English sense) my own conclusions are that the domicil of the testatrix was French when she made her will; French up to the time that she married; French by her marriage; and French when she died. Her domicil was French by and after marriage because, in my opinion, her husband's domicile was French. The domicil of the testatrix being French when she made her will and when she died, it became necessary to ascertain the effect of her will on her movable property according to the French law. The husband being, in my opinion, domiciled in France when she married, it became necessary to ascertain the effect of such marriage by French law upon her will; and if in order to ascertain this it became necessary for the French experts to be told what the English law was, they should have been told that it depended on the view which an English court would take of the domicil in the English sense of the husband; and if I am right in my view of his domicil, the experts should have been told that by English law the marriage in this case did not revoke the wife's will. It was not necessary or, indeed, proper on this occasion to pursue the inquiry further and to see what matrimonial *régime* the parties intended to adopt. It is not necessary to cite authorities to show that it is now settled that according to international law as understood and administered in England the effect of marriage on the movable property of spouses depends (in the absence of any contract) on the domicil of the husband, in the English sense. The authorities will be found collected in Foote's Private International Jurisprudence, edition 2. pp. 315, 321, and Dicey's Conflict of Laws, 648 *et seq.* This being clear, the will was not revoked; and if not revoked, it was clearly valid as regards the wife's movable property. Section 18 of the Wills Act does not apply to the wills of foreigners who die domiciled abroad, and the effect of the marriage was not to vest the wife's property in the husband. French law did not so vest it, neither did international law as understood and administered in this country. The English law applicable to English people, and according to which a woman's personal property formerly vested in her husband on marriage, and according to which her will was revoked by marriage even before the Wills Act, could not on principle apply to French spouses married in England, but (according to English views) domiciled in France when they married. In my opinion the will has been properly admitted to probate, but it will not apply to leasehold property, for that is not regarded as movable property, to which the *lex domicilii* is alone applicable: Dicey's Conflict of Laws, 72.

RIGBY, L.J.—I see no sufficient reason to differ from the President's conclusion that the mutual rights of the spouses as to movables were to be determined by English law. If it is necessary, in order to support this conclusion, to hold that the husband's domicil at the date of the marriage, or, at any rate, the matrimonial domicil, was English, I should not hesitate to hold that it was. The husband had been brought up to be a teacher or professor of French, and at first, and down to the time of the marriage in 1874, had no other means of gaining his livelihood than by teaching French. His departure from France was brought about by his fear of a prosecution for an offence alleged to have been committed by him whilst he was a professor of French and in connection with his exercise of his professorship. Over and above the punishment to be imposed for the offence, if proved, it is obvious that convic-

tion for such an offence would have an extremely prejudicial, and not improbably a prohibitive, effect on his subsequent exercise of his profession in France. As he did not elect to abide his trial in France, his evasion of a trial was almost, if not quite, equivalent to a renunciation for all his life of his profession in France. He went in the first place to Belgium, and was in his absence convicted and sentenced. The precise date of this conviction I cannot find, but it must have been before his coming to England, which was in 1868 or 1869. He might at any time have gone back to France and submitted to trial, but he did not elect so to do. It appears that twenty years after the date of his conviction he would have been safe from punishment, but he would then have been advanced in years, and if it is suggested that he formed from the first the intention of going back after the twenty years and becoming again a professor in France, such an intention would, in my opinion, be so irrational that, in default of the strongest evidence, it ought not to be imputed to him. Nor could he have had the intention of going back without having the means of supporting himself. Evidence of any such intention does not exist. I take it that the proper conclusion is, not that he had the intention of returning to France at the end of an interval however long, but that he had no intention of returning at all. In England he adopted the name Martin, which might pass for an English name, and at any rate would have the effect of keeping in the background the discredited name of Guillard. He was supporting himself as a teacher of French at the time of the marriage in 1874, when a prospect opened of gaining a probably easier living by means of his wife's laundry. He married (being fifty-one years old) with the clearly formed intention of living by the laundry business, whether or not he assisted with money, or his personal exertions, in carrying it on. I consider the reasonable inference to be that he intended to remain in England, and was domiciled there according to English, as he certainly was according to French, law. It is his intention that governs, not that of the wife, in the absence of any marriage settlement; and I conclude that he intended English law to apply, and that law gave him, immediately on the marriage, the exclusive right to all the wife's movables, that is to say, to everything that could pass by the holograph will of 1870. As by the marriage she would become incapable of making another will, the will of 1870 would be revoked. It matters not that she might subsequently, by an alteration in the law, become entitled to personal property which she could dispose of by will. Such a new testamentary power would not in my opinion revive the will which had already been revoked. I have considered the question of the husband's domicil exclusively with reference to the facts as they existed previously to, and at the date of the marriage. The subsequent events do not in my judgment throw any light upon the question adverse to the conclusion which I have arrived at. The taking of leases for terms of years of various lengths would tend rather to show that his connection with England was permanent than otherwise, though probably it is not of much importance. True it is that at length, not before 1890, when he was already about sixty-seven years old, he returns to France; but in the circumstances that does not give any ground for supposing that he always, from the time when he left France, had the *animus revertendi*. One of the reasons for returning was the state of his health; another, probably, the unsatisfactory state of his relations with his wife. But probably the most important thing to notice is that his residence in France was rendered possible by his having acquired a considerable fortune from his wife's property, which he had no reason to count upon before the marriage. True it is that the twenty years, the expiration of which brought immunity from punishment for the offence for which he had been condemned, had run; but it was not on the expiration of that period, but at least several years later, that he returned. I am not disposed to hold this evidence of an intention throughout to return which would prevent his acquiring an English domicil. The fact that he took steps for vesting in his wife all his interest in the laundry business would be strong evidence of his intention to remain out of England; and I agree with the Master of the Rolls that in 1895 he, and therefore his wife at her death, had a French domicil.

VAUGHAN WILLIAMS, L.J.—I agree in the conclusion of Jeune, P., that the husband and wife intended to keep up "an establishment in England," and that they intended to marry under English law and to adopt it as their matrimonial law; but I base this conclusion on the fact, which Jeune, P., does not accept, that at the date of the marriage the husband had an English domicil, for I find no evidence of an agreement embodying that intention, unless it be as an inference from the actual domicil at the date of the marriage. At the time of the marriage the laundry business in the Edgware-road was already a going concern. It had been established by the wife while she was yet a spinster, and it seems to me to have been arranged before the marriage that the husband should bring some money into the business, and that he did so. The husband and wife carried on this business from 1874—when they were married in London according to the prescribed requirements of the English law—until 1890, when the husband returned to France. During all this time both husband and wife had clearly, according to French law, an English domicil. Jeune, P., has held, however, that, according to English law, the wife had a French domicil, and that on the marriage she acquired the domicil of her husband. He has held, also, that the latter—his domicil of origin being admittedly French — had done nothing at the time of his marriage to acquire any other. I certainly should have drawn the conclusion myself that, as far as the wife was concerned, there was ample evidence of the *animus manendi*; and that she had acquired an English domicil at the date of her marriage according to French and English law alike. This, of course, is not enough, because on marriage she would immediately acquire the domicil of her husband. But even in the case of the husband I should myself draw the inference that he abandoned his French domicil of origin, and intended to adopt, and thus in fact actually acquired, a new (*i.e.*, an English) domicil. He was, and had been for some time, living in this country. He intended to carry on the laundry business in the Edgware-road, and to have his matrimonial home there. He invested money in this business and bought land for the purpose of enlarging it. The evidence seems to me to show that during all this time the husband and wife did not apply the French principle of community of goods to their respective property, but treated everything as belonging to the husband. It is certain that the latter, at the time of his marriage, did not intend to return to France for a period of at least twenty years. All this is evidence of an *animus manendi*; and although, as a matter of fact, he did return to France at the end of twenty years, I still see no evidence that his stay in England was always intended to be thus limited, whilst there is considerable rea[illegible]

believing the occasion and cause of his ultimate return were quarrels with his wife. He may have contemplated the possibility of returning to France after the lapse of time should have rendered it safe for him to do so, but I do not think that this fact prevents his permanent residence in England being cogent evidence of an intention to acquire a new domicil. I suppose the possibility of returning to one's domicil of origin, if circumstances should change, is never excluded from a man's mind, however much he may choose a country other than that of his domicil of origin as his permanent residence; but I cannot doubt that if the husband had died within the twenty years without returning to France, his domicil would have been held, under the circumstances, to be English; and I do not think that one should refuse so to hold because he happened to return to France. This, in my judgment, is sufficient to show that his actual domicil at the time of the marriage was English, according to the law both of England and of France. I gather, however, from the judgment of Jeune, P., that his view is that England became the matrimonial domicil by the agreement of the husband and wife at the time of the marriage; but I do not quite understand where he finds such an agreement, unless it is to be inferred from a change of the husband's domicil. There is no express agreement, and I know of no English decision in which such an agreement has been inferred inconsistently with the fact of domicil. Husband and wife cannot by mere tacit agreement choose a matrimonial domicil. Mr. Westlake (Private International Law (3rd ed.), p. 68) says: "By the matrimonial domicil is to be understood that of the husband at the date of the marriage, with a possible exception in favour of any other which may have been acquired immediately after the marriage in pursuance of an agreement to that effect made before it." If this exception can be supported, for which there is no English authority, no doubt there is evidence from which one may infer that the actual English domicil after marriage was in pursuance of an ante-nuptial agreement. I doubt, however, if domicil can be directly affected by the marriage contract. Such an agreement as to the intended matrimonial place of residence may no doubt be evidence, and cogent evidence, of adoption of a new domicil as from a date anterior to the marriage, or it may be evidence of an agreement as to the law which shall govern the movable property of the parties marrying. But I can find no case in which an inferred agreement, as distinguished from an express agreement, has been allowed to outweigh the *primâ facie* inference that the law of the country of the husband's domicil is to govern the movable property of the married couple. If my conclusion is right, and if one ought to come to the conclusion from the evidence of the husband's conduct in making his home in England for an indefinite time and in going into such a business as by French law put an end to his French domicil and gave him an English domicil, that he adopted an English domicil at the time of his marriage, then at the time his wife's movables became his property, and I think that, his wife's property in the movables having thereby ceased, it follows, quite independently of the 18th section of the Wills Act, that this loss of the power of disposition put an end to her will, while it was still ambulatory, and rendered it of no effect, and that nothing but republication could revive it. If, however, the French domicil of the husband continued at, and after, the marriage and down to the wife's death, then it would follow that the French law, by which alone this will can be supported (for it is not in the form to satisfy the English Wills Act), must govern the testamentary validity of this will, and also the rights of property of the husband and wife, unless there be found some binding marriage contract determining the relative rights of property of the two parties. Jeune, P., has found, as I understand, that there is such an agreement or contract. Assuming that there is, I differ from his conclusion in law on this assumption, for I think that the rule of the English law which makes a woman's will null and void on her marriage is part of the matrimonial, and not of the testamentary, law of this country, and that probate of this will ought not to be granted. But as I am not sure that we ought to infer that there was at the time of the marriage an agreement that the English law should govern the matrimonial property, I prefer to ground my judgment on the change of the husband's domicil at the time of marriage; and I think that if he did change it from a French to an English domicil, then his subsequent reversion to a French domicil will not prevent English law continuing to govern the matrimonial property. In my opinion the effect of the husband's domicil on the matrimonial property is based on the presumption that you must read the law of the husband's domicil into the marriage contract as a term of it unless there is some express agreement to the contrary; because the husband's domicil at the time of the marriage does not control the mutual rights of the husband and wife to each other's movables otherwise than as being a fact from which the inference is drawn in the absence of evidence to the contrary that the husband and wife intended to make it a term of the marriage contract that the law of the husband's domicil at the time of the marriage should control the mutual rights to movables. I think, therefore, that the decision of the court below ought to be reversed, and the grant of letters of administration with the will annexed revoked.

*Appeal allowed.*

Solicitors, *Blount, Lynch, & Petre; H. Herbert.*

---

From Prob. Div. & Adm. Div. (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) — May 15.

"The Philadelphian." (*a.*)

*Ship — Collision—Anchor lights—Vessel exceeding* 150 *feet in length—"In the forward part of the vessel"—Regulations for Preventing Collisions at Sea,* 1897, *art.* 11.

*By article* 11 *of the Regulations for Preventing Collisions at Sea,* 1897, *a vessel of* 150 *feet or upwards, when at anchor, shall carry "in the forward part of the vessel" a white light, and another at or near the stern.*

*A vessel,* 313 *feet in length, at anchor, carried her forward light in the fore-rigging abreast of the foremast,* 72 *feet from the stem.*

*Held, that the light was carried "in the forward part of the vessel" within the meaning of article* 11.

*Decision of* Bucknill, J. (ante, *p.* 431, [1900] *P.* 43), *on this point dissented from.*

Appeal from the judgment of Bucknill, J. (reported *ante*, p. 431, [1900] P. 43).

The action was brought by the owners of *The Ella Sayer*, a steamship 313 feet in length, against the defendants, the owners of the steamship *Philadelphian*, to recover damages for a collision.

*The Ella Sayer* was lying at anchor in the River St. Lawrence, off Quebec, after dark when *The Phila-*

(*a.*) Reported by W. F. Barry, Esq., Barrister-at-Law.

*delphian*, on a voyage from Montreal to Liverpool, ran into her and damaged her.

The defendants pleaded that *The Ella Sayer* was not exhibiting proper anchor lights as required by article 11 of the Regulations for Preventing Collisions at Sea, 1897.*

*The Ella Sayer* was carrying two anchor lights, the forward one being in the fore-shroud of the starboard fore-rigging, abreast of the foremast, and 72 feet from the stem.

Bucknill, J., held that *The Philadelphian* was to blame for navigating at an excessive speed and for not keeping a proper look-out. He also held that the forward light on *The Ella Sayer* was not "in the forward part of the vessel" as required by article 11, but that the infringement of the rule could not by any possibility have contributed to the collision. He therefore held *The Philadelphian* alone to blame.

The defendants appealed.

*Joseph Walton, Q.C.* (*Aspinall, Q.C.*, and *W. S. Glynn* with him), for the defendants.—The defendants do not appeal from the finding of the learned judge that *The Philadelphian* was to blame. It is contended, however, that *The Ella Sayer* was also to blame. The forward light of *The Ella Sayer* was not "in the forward part of the vessel" within the meaning of article 11. In construing those words the object of the rule must be considered. The object is to indicate to other vessels, by the position of the lights, the length of the vessel at anchor. Therefore, "in the forward part of the vessel" cannot merely mean forward of amidships. That construction would defeat the object of the rule and render it useless. The rule must mean that the forward light is to be placed somewhere near the stem of the vessel. At any rate, a distance of 72 feet from the stem cannot come within the rule. A light put on the fore-stay would be a compliance with the rule. The learned judge was therefore right upon this point, but he was wrong in coming to the conclusion that the infringement of the rule could not by any possibility have contributed to the collision. [The court intimated that they were against the defendants upon the first point, and that therefore it was unnecessary to argue the second question.]

*Laing, Q.C.*, *Dawson Miller*, and *Adair Roche*, for the plaintiffs, were not called upon.

A. L. SMITH, L.J.—The question we have to decide depends entirely upon the construction of article 11. We must construe the rule according to the language used in it. *The Ella Sayer* had a proper anchor light in the fore-shroud of the starboard fore-rigging. She had also a proper anchor light at or near the stern. The question is whether the forward anchor light was "in the forward part of the vessel" within the meaning of article 11. My brother Bucknill held that it was not, but he also came to the conclusion that the infringement of the rule could not by any possibility have contributed to the collision, because there was such a bad look-out on *The Philadelphian* that those on board of her never saw any light at all. In my opinion the learned judge was wrong upon the construction of the rule. The language of article 11 is plain. In the first part of the rule, which deals with vessels under 150 feet in length, the word "forward" seems to me to be used in contradistinction to "aft." In the second part of the rule, which is the part applicable to the present case, when dealing with the position of the forward light, the words used are "in the forward part of the vessel." The rule does not use the words "at or near the stem." The light in the present case was placed about a quarter of the ship's length from the stem. It is clear that the spot where it was placed was not the after part of the vessel. Why is it not the forward part of the vessel? To my mind it is. When describing the position of the after light the rule does not say "in the after part of the vessel"; it uses very different words, "at or near the stern." The learned counsel for the defendants contended that the words "in the forward part of the vessel" ought to be read "at or near the stem." What justification is there for introducing such language as that into the rule? The framers of the rule have said that the forward light shall be in the forward part of the vessel and the after light at or near the stern. Why should we alter those words? It is pressed upon us that if we do not construe the rule as contended for by the defendants, we shall be defeating the object and intention of the framers of it—namely, to indicate to passing vessels by the position of the lights the length of the vessel at anchor. If that was the intention which the framers of the rule had in mind, I can only say that they have not carried out that intention. In my opinion this light, which was in the fore-shroud of the starboard fore-rigging, was, in the words of the rule, in the forward part of the vessel, and *The Ella Sayer* did not infringe the rule. I may refer, in confirmation of my opinion, to article 2, which deals with the lights which a steamship under way is to carry. That rule says that a steamship under way is to carry on the foremast, or if there is no foremast "then in the fore part of the vessel," a white light. That tends to show what is meant by the fore part or forward part of the vessel. As we hold that the lights on *The Ella Sayer* were in their proper position, it is unnecessary to go into the question upon which Bucknill, J., decided the case in favour of the plaintiffs. The appeal must be dismissed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. We have been asked to read article 11 as if the words "in the forward part of the vessel" meant "at or near the stem." I cannot do so. The rule, when dealing with the after anchor light, substantially fixes the spot where it is to be placed by using the words "at or near the stern," whereas, when dealing with the forward anchor light, the rule does not give any precise spot where the light is to be placed, but leaves the fixing of the spot "in the forward part of the vessel" largely in the discretion of the master.

ROMER, L.J., concurred.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Botterell & Roche.*

Solicitors for the defendants, *Thomas Cooper & Co.*, for *Hill, Dickinson, Dickinson, & Hill*, Liverpool.

---

* Article 11: "A vessel under 150 feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile. A vessel of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20 feet and not exceeding 40 feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15 feet lower than the forward light, another such light."

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) April 25, 26, 30.

VIDITZ v. O'HAGAN. (a.)

*Settlement — Domicil — Infant — Husband a domiciled Austrian—Ratification—Repudiation—Austrian law —Application of English law.*

*In 1864 an Irish lady, an infant, married an Austrian at Berne. Previously to her marriage she executed a settlement. According to the law of her domicil after marriage, which was Austrian, she was unable to ratify the contract, or to place it out of her power to revoke it.*

*In 1893 the husband and wife executed a document in Austria to annul the settlement.*

*Held, that the wife never had, either before marriage or after, power to make an irrevocable settlement.*

*The effect of the change of the domicil was that the English doctrine as to the repudiation of a contract by an infant within a reasonable time became inapplicable by reason of the impossibility of effectually ratifying it.*

*Decision of* Cozens-Hardy, J. (47 *W. R.* 571, [1899] 2 *Ch.* 569), *reversed.*

This was an appeal from a decision of Cozens-Hardy, J. (reported 47 W. R. 571, [1899] 2 Ch. 569).

In November, 1864, Mrs. Viditz, an Irish lady, was, at the age of eighteen, married to Mr. Viditz, who was then and still is a domiciled Austrian. The marriage took place in Switzerland.

Prior to the marriage, marriage articles, dated the 24th of November, 1864, were executed at Berne, at the British Embassy, between Mr. Viditz of the first part, Mrs. Viditz of the second part, trustees of the third part, and the lady's father of the fourth part, and it was thereby declared and agreed by and between the parties thereto, and Mr. Viditz covenanted with the trustees, that in case the intended marriage should take place all such personal property as Mrs. Viditz was then entitled to in possession, reversion, remainder, or expectancy, and also all such sums of money, stocks, funds, or other personal property, whether in possession, remainder, or expectancy, as might at any time during the joint lives of the husband and wife come to the lady or to her and her husband in her right under any will, settlement, or by gift or otherwise (save and except pecuniary legacies), should be vested in the trustees upon the usual trusts for the benefit of the lady for life for her separate use, with a restraint upon anticipation, and after her death upon trusts for the issue of the marriage, with an ultimate trust for the father absolutely. There was a provision empowering the father to alter and vary any of the provisions, clauses, matters, or things therein contained, and to add or supply any other provisions, clauses, matters, or things which might be deemed necessary or proper.

Mrs. Viditz attained twenty-one in 1867.

In 1870 Mrs. Viditz, on the death of her mother, became entitled to a sum of £6,000, which was paid over to the trustees of the deed of 1864 and invested in Consols.

In 1880 a deed in English form was executed in Paris, which purported to be a settlement made in pursuance of the articles. Mr. and Mrs. Viditz, the trustees, and her father were all parties to this deed. It recited the investment of the Consols and declared trusts of that sum similar, so far as material, to the trusts in the articles, and it contained a covenant to settle after-acquired property differing from the covenant in the articles, inasmuch as pecuniary legacies were not excepted.

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

In 1882 the father died, and Mrs. Viditz thereupon became entitled in possession to a sum of £2,000, which was received by the trustees of the settlement and invested. This £2,000 and the £6,000 were sums to which Mrs. Viditz was at the date of her marriage entitled in reversion contingently upon attaining twenty-one. The father by his will left all his property to charity. Litigation ensued, and Mrs. Viditz sought to set aside the will The result was that a compromise was effected in March, 1884, under which a sum of £13,000 was to be settled upon her and her children, and a sum of £5,000 was to be paid to her. In 1892 the trustees informed Mrs. Viditz that the £5,000 payable to her under the compromise would have to be paid to the trustees of the marriage settlement. This led to advice being taken, and on the 18th of November, 1893, a document was executed by Mr. and Mrs. Viditz in Austria, by which they purported to annul and put an end to the settlement. There was evidence that according to Austrian law, it is competent to a husband and wife to revoke a marriage contract, notwithstanding the birth of issue.

Mr. and Mrs. Viditz and their children, who have attained twenty-one, brought this action claiming a declaration that the settlement created by the deeds of 1864 and 1880 had been got rid of by the transaction of 1893.

Cozens-Hardy, J., held that the marriage articles of 1864 were valid and were governed by English law, and that Mrs. Viditz, not having repudiated them within a reasonable time after she attained twenty-one, was absolutely bound by them, and that she could not, therefore, elect from time to time during the joint lives of her husband and herself as property fell in whether she would affirm the articles. Consequently the £5,000 was bound by the settlement.

The plaintiffs appealed.

*Dicey, Q.C.*, and *Micklem, Q.C.*, for the plaintiffs.

*Hughes, Q.C.*, and *Ingpen, Q.C.*, for the trustees.

LINDLEY, M.R.—There are two questions which arise—first, there is the question of the construction of this document—assuming it to be a binding document—I mean the settlement on which so much turns; and the point which arises upon that is whether, upon the true construction of these marriage articles of November, 1864, a sum of £5,000 which has been set apart and is claimed by the lady, under circumstances which I will allude to presently, is comprised in this settlement, or whether it is not.

Now, if this question turned merely upon the wording of the agreement to settle her after-acquired personal property, I should feel very great difficulty in saying that it was not covered by it; but that is not the whole question. In this same settlement there is a clause which deals with her real property, and the agreement to settle her real property was not binding upon her. This sum of £5,000 appears to me, I confess, to be in substance—although not of course in form, because it is money—a portion of the real estate which she claimed. It arose in this way. Her father had died leaving a will giving her a rent-charge of £400 upon some Irish property; and he disposed of the residue of his property amongst some charities (the Mortmain laws do not apply to Ireland), and she disputed the will. She claimed this real estate, and a compromise was come to, and by the terms of that compromise she accepted £13,000, which she ultimately settled, and a sum of £5,000 and a further sum which represented the rent-charge of £400 a year. In consideration of these sums she gave up all claims to these estates. She agreed to abandon some proceedings which she had taken to impeach the will—that was part of the compromise;

and the money was not a sum paid down by her opponents to her to get rid of her, but it was the proceeds of the sale of real estate which by the terms of the compromise was to be sold, and she was to be paid under a power contained in the compromise, and the money which she was to receive was to be a portion of those proceeds. Now, when you come to look at that and ask yourself what this £5,000 was, it was not given to her by will or anything of the sort, it was not given to her by any settlement; it came to her otherwise, no doubt; but it was part of a bargain, and it was, in substance, a substitution for the real estate which she was claiming. Having regard to that and bearing in mind what I have said about the introduction of the covenant relating to real estate, it appears that this sum of £5,000 would be covered by the real estate covenant, rather than by the covenant relating to personal estate. This point was not raised, as I understand, by the learned judge; there is no trace of it in his judgment; he decided upon a construction of the words of the personal covenant without anything more. I think that the true view is that the £5,000 was not included in the settlement at all.

Now that brings me to the second point, which is a much more difficult one; and that is the question whether this settlement has become binding on this lady or not. She was an Irish lady. The settlement was executed at Berne, in Switzerland, and in the English language and with English trustees—not in the Consular Court. but in the Minister's Court or the Ambassador's Court, I forget which it is—and it was executed previous to and in contemplation of her marriage with an Austrian gentleman; and it was contemplated that after marriage they should, as they did, go and live in Austria; in other words, that she should become domiciled in Austria. So far there is no doubt at all.

Now according to the English law this settlement by her was a voidable contract, in the sense explained by the House of Lords in *Edwards* v. *Carter*, [1893] A. C. 360, to which I will refer presently. She lived two or three years in Austria, and then became of age—twenty-one. By the Austrian law she was unable to ratify this contract or to confirm it, or to place it out of her power to revoke it; and now we have to consider the consequences of that. She did, in the course of her married life, execute certain documents and settlements which, if they are to be governed by our law, would clearly amount to a ratification of her marriage settlement; there is no doubt at all about that. By the Austrian law, some of the documents were invalid in so far as they purported to be irrevocable ratifications.

The position of affairs is a simple one; it is this: This lady never had, either before marriage or after marriage, power to make an irrevocable settlement. Can we hold, therefore, that this settlement has become irrevocable? That is the paradox which is put to us. Cozens-Hardy, J., has taken this view of it. He says, first, that upon the authority of the case of *Van Grutten* v. *Digby*, 11 W. R. 230, 31 Beav. 561, this was an English settlement to be governed by English law; and by the English law as expounded by the House of Lords in *Edwards* v. *Carter* (which affirmed the decision of this court), covenants in a marriage settlement, or a settlement made on a marriage by infants, are voidable, and are binding unless repudiated within a reasonable time. It is said that she always had power, at all events, to repudiate, and that she could do that by Austrian law and you cannot apply the English law to that state of things, and that inasmuch as she has not repudiated within a reasonable time this contract has become irrevocable. Is that sound reasoning? To my mind it is not, and for this reason: In the first place, as regards the case of *Van Grutten* v. *Digby*, the points which we have to consider did not arise for discussion or determination at all. There was no question there about incapacity to contract. It was a settlement made by people of mature age binding upon them when made, and it is clear Lord Romilly was right in saying that that was a contract which was to be decided according to the law of England, regardless of any change of domicil afterwards. But here we are faced with a difficulty which arises from the capacity to contract, and that difficulty does not appear to me to be touched, and still less governed, by the decision in *Van Grutten* v. *Digby*.

Now, what is the effect of the English law as expounded by the House of Lords in *Edwards* v. *Carter*? No doubt the English law is what the House of Lords there said, but what is the theory of it? The theory of it is this, I apprehend, that there are some contracts of infants which are settled by English law to be absolutely void. There are a few, but not a great many, contracts which in the view of the English law cannot possibly be for the benefit of the infant, and I rather think the common law cases show—take a bond with penalties as an illustration—they are void and an infant cannot contract. There are a few such cases and only a few; there are not many. The great bulk of infants' contracts are voidable. What does that mean? It means this, that when they come of age they can elect to do one of two things — they can elect to affirm them or they can elect to disaffirm them. If they do nothing the presumption is that they affirm them and that the contracts are binding and have been binding on them ever since they attained twenty-one, unless they prove the contrary by repudiating them within a reasonable time. But I think it would be an entire mistake to apply that part of the English law which relates to repudiation within a reasonable time, if you shut out the other part, the ability to ratify.

Now, by the alteration of the domicil here the ability to ratify was lost. Are we, then, to apply the rest of the English doctrine, or what I should call the mutilated doctrine, and say that the doctrine relating to infants was to apply and that this contract was to become irrevocable unless repudiated within a reasonable time. That appears to me to be contrary to good sense, and it would land us in the paradox with which I started, that we should have to hold that the contract had become irrevocable although the lady never had the capacity to enter into the irrevocable contract either before or after she was married. In point of authority the nearest case that has been cited, and the nearest case I know, is *Cooper* v. *Cooper*, in the House of Lords, 13 App. Cas. 88, 36 W. R. Dig. 98, where the very same difficulty had to be faced and was faced by the House of Lords, but the point as to the reasonable time did not receive attention. In point of fact, an infant did succeed there in repudiating a marriage settlement after a very long time—after the lapse of more than a reasonable time, if you shut out the change of domicil between the time of the execution of the marriage settlement and the repudiation. The point was not discussed, but so far as it goes it is the only case which appears to me to be at all close upon the question. My view, therefore, is that the effect of the change of the domicil was that the English doctrine became inapplicable by reason of the impossibility of effectually ratifying it. There is an alternative view, and perhaps it is the same view in another shape—that the effect of the change of domicil was to enlarge the time for repudiation. That is not, perhaps, quite so satisfactory a way of putting it, but I do not see, I

confess, how we can say that the reasonable time for repudiation had expired when there was no opportunity of doing anything else. That is the second mode of looking at it, involved probably in the first, and I prefer to put it on the broader ground that we are not bound to make such a paradoxical decision as we have been invited to do. I might refer to Lord Watson's *dictum* in *Cooper* v. *Cooper* in 13 App. Cases. At p. 106 he says: "Being of opinion that the capacity of the appellant to bind herself by the marriage contract must be determined by the law of England, I agree with your lordships that the discharge which she seeks to set aside cannot stand in the way of her claiming her legal rights as a Scotch widow. The rule seems to be clear that an infant cannot during minority effectually subject herself to any contractual obligation which cannot be shown to have been for her benefit. She may ratify the contract after attaining majority, and so become liable to implement it; but in the circumstances of the present case, any such ratification of the contract would, according to the law of Scotland, have been revocable by her as a donation *inter virum et uxorem*," and so on. That, so far as it goes, although I say it does not quite touch the point, appears to me to be the nearest case and, so far, an authority for the conclusion at which I have arrived.

I think, therefore, the appeal must be allowed, and a declaration made as asked by the notice of appeal.

RIGBY and COLLINS, L.JJ., concurred.

Solicitors, *Kearsey, Hawes, & Walsh; Blount, Lynch, & Petre.*

---

## High Court of Justice.

Chan. Div.
Kekewich, J. } March 8.

ATTORNEY-GENERAL *v.* COMPANY OF PROPRIETORS OF MARGATE PIER AND HARBOUR. (*a.*)

*Company—"Company acting in execution of public duties"—Company incorporated by Act of Parliament to manage pier and harbour—Paying a dividend out of profits—Commercial company—Limitation of action—Public Authorities Protection Act,* 1893 (56 & 57 *Vict. c.* 61), *Title, s.* 1 (a).

*A company incorporated by private Act of Parliament for the purposes of completing and maintaining a pier and harbour, and empowered to raise money by rates and dues to be applied for those purposes, and also for the purpose of paying to the shareholders a yearly dividend limited in amount, is a commercial company, and is not a company acting in the execution of statutory or other public duties within the benefit of the Public Authorities Protection Act,* 1893.

*The* dictum *of* Jeune, P., *in* The Ydun, [1899] P. 236, 47 W. R. Dig. 166, *followed.*

This was an action brought by the Attorney-General on the relation of the Corporation of Margate and by the Corporation of Margate as plaintiffs, against the Company of Proprietors of Margate Pier and Harbour as defendants.

The pier and harbour of Margate were, prior to the year 1812, vested by local statutes in "Commissioners of the Pier and Pavement," on whom (in addition to the duties of improving, building, and preserving, &c., the pier and harbour) were imposed the duties of widening, paving, repairing, cleansing, lighting, and and watching the streets of the town of Margate.

In 1812, the duties with reference to the pier and harbour were by a local Act, 52 Geo. 3, c. 186, separated from those with reference to the streets of the town, the former being entrusted to the defendant company which was then incorporated, while the latter remained in the hands of the commissioners.

By the Act of 1812 the defendant company were authorized (*inter alia*) to complete and maintain the pier and harbour, and to raise money for these purposes by the issue of shares, and to levy rates and duties. And it was enacted that all moneys received on account of rates and duties should be applied: (1) In discharging interest on all moneys due on the credit of rates payable under previous Acts; (2) in payment of a certain sum to the "Commissioners of the Pier and Pavement" for paving and lighting the streets of the town; (3) in paying all interest due on any money to be borrowed by the defendant company under the Act; (4) in payment of the charges and expenses of carrying out, finishing, maintaining, repairing, and preserving the pier, harbour, and works; and (5) that after all such payments had been made the residue of the rates and duties should be divided amongst the shareholders of the defendant company rateably, with the proviso that no dividend in any one year should exceed the rate of 10 per cent. per annum; and that all surplus profit, income, and gains beyond such dividend should be annually set apart as a sinking fund to defray the expenses of any future repairs or improvements of the pier, harbour, and works as the court of directors of the defendant company should from time to time think necessary; and that in the meantime such surplus should be invested and the interest added thereto and accumulated until the sinking fund amounted to £20,000, when no further surplus was to be added. The Act further provided for ultimately paying off all the shares of the defendant company and for its dissolution when the pier, harbour, and works and the sinking fund were to be transferred to, and vested in, the Commissioners of the Pier and Pavement.

In 1857, under a charter of incorporation granted to the inhabitants of Margate, the rights, powers, and duties of the "Commissioners of the Pier and Pavement" became vested in the plaintiff corporation, who thus became interested in the ultimate reversion of the pier and harbour.

The defendant company carried on their duties and accumulated a sinking fund which in the year 1889 amounted to upwards of £11,000. In that year an Act was passed, called the Margate Coal Dues Act, by which a sum of India 3½ per cent. Stock then in court was directed to be carried to the account of the sinking fund and invested and accumulated. And the defendant company were directed to furnish to the plaintiff corporation annually an audited statement of their accounts. These accounts when furnished showed that the defendant company had applied the income arising from the sinking fund and India Stock to their ordinary expenses and to payment of dividends to their shareholders instead of carrying it to the credit of the sinking fund.

In 1897 the dividend paid to shareholders was 9 per cent. The plaintiff corporation contended that the defendant company had not complied with the directions contained in the Acts of Parliament thus affecting the value of plaintiffs' reversion, and asked for an order that the defendant company might be directed before any further dividends were paid to make good to the sinking fund all moneys improperly diverted therefrom. The defendant company contended that they had not acted improperly in apply-

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

ing the income of the sinking fund in expenses for such repairs and improvements of the pier and harbour as the directors thought necessary, that they had furnished accounts since 1889 showing the plaintiffs exactly what had been done, that the plaintiffs had acquiesced in what had been done, and that if the value of the plaintiffs' reversion had been affected thereby, the plaintiffs' action was barred by their acquiescence.

The defendant company also especially relied on the Public Authorities Protection Act, 1893.

*Macmorran, Q.C., Younger, Q.C.*, and *Christopher James*, for the plaintiffs.—The defendant company has not applied their revenue of the sinking fund as directed by their Act of 1812. The Public Authorities Protection Act, 1893, does not protect them, as they are a commercial company, just as a railway company is a commercial company, and not within the benefit of the Act: *Fielding* v. *Morley Corporation*, 47 W. R. 295, [1899] 1 Ch. 1; *The Ydun*, [1899] P. 236, 47 W. R. Dig. 166. This action is one of account, and does not relate to any public duty.

*Swinfen Eady, Q.C.*, and *Vaughan Hawkins*, for the defendant company.—The company has always acted *bonâ fide;* further, it is within the Public Authorities Protection Act. It is not mainly a trading company, but its main purpose is to discharge "public duties." The statute is to be construed benevolently.

KEKEWICH, J., after dealing at length with matters not material to the present report, continued: Then comes a question which is of far greater importance. I say of far greater importance, because up to now I have only dealt with an action brought against this particular pier company, and in which we are now considering the Act of 1812. I have not referred to later Acts because I think that what I have said with regard to the Act of 1812 is sufficient; but now we come to an Act of a general nature; and although the point arises with reference to this particular pier and harbour company, it really is a matter of great importance on which there is at present a dearth of authority. The general Act to which I am referring is one the short title of which is the Public Authorities Protection Act, 1893, but the title of the Act itself—the long title, if I may use the expression—is, "An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties"; and if, as the Master of the Rolls says (*Fielding* v. *Morley Corporation*), you are entitled to look at the short title in order to understand the meaning of an Act of Parliament, I take it it follow *a fortiori* that you may look at the title that is put at the head of the Act itself, or, as I have ventured to call it, the long title. That is the title, and it enacts, among other things, that where you are dealing with a body which is within the meaning of the Act (section 1 (*a*): "The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof." I need not pause to question about time. I will not even pause to consider whether this action in its main purport could be brought within this Act at all, seeking as it does declarations, mainly, as to how the accounts of the company ought to be kept, and how the moneys ought to be applied, and I might run off and shirk the question by saying, as I did just now, on the other point, "but as I propose to dismiss the last part of the claim on an entirely different ground, I need not consider that here." But I think the point that has been raised is one of very great importance, and it is right that I should say what it occurs to me to say about it.

The first section of the Act, of which I read the sub-section (*a*) just now, defines the parties in this way: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act." Now, is the defendant company within the meaning of that section which I have just read, craving in aid what I call the long title and also the short title? Let us remember what it is. The company was brought into existence in its present name in the year 1812. In the last century the pier and harbour were vested in commissioners, who not only looked after the pier and harbour, which, no doubt, themselves are of great importance, but they also looked after the "widening, paving, repairing, cleansing, lighting, and watching the streets in the town of Margate." Those, are, no doubt, public duties and have always been recognized as such; and if those commissioners had continued to exist they could not have been regarded otherwise than as public persons—persons within the meaning of the Act discharging public duties. But in 1812 there was a severance, and those municipal duties were kept in the commissioners now represented by the corporation, and the pier and harbour became vested in the company then called "The Company of Proprietors of Margate Pier and Harbour," and they to-day hold them in the way I have mentioned. They have parted from the commissioners, they are a separate entity created by the Act of 1812, and not only their existence, but their duties and liabilities, are defined by that Act. Now, they are a company for maintaining the pier and the harbour. Quite irrespective of Margate, or any other place, a pier and harbour are, no doubt, very important items, I should think, to the public, and the maintenance of them is for the public utility, but the same remarks apply to a railway, a tramway, a canal, and one might mention many other things in the same way. They are to spend their money in paying interest on charges, they are to keep up their pier and harbour, and, beyond that, except that they are limited to a 10 per cent. dividend, and there is to be a sinking fund and the Legislature has thought fit to make provisions about that, they are a commercial company intended to earn, and in fact they have earned, considerable dividends year by year. I do not myself see the distinction between such a company and a railway company incorporated by private special Act with reference to the Lands Clauses Acts and the Railway Clauses Consolidation Act, 1845, and subsequent Acts. They are companies intended to benefit the public. No special Act of Parliament of that kind is ever passed without the recital that the construction and maintenance of the line (or of the tramway or canal, as the case may be) is for the public benefit, and the powers which they are given, such as the power of compulsory purchase of land, are all given on the footing that they are doing a public benefit; and yet they are commercial companies, and it would be difficult to say that they are not, except in the one sense which I am now considering here, public companies doing public duty. If I were left entirely alone I might be very much puzzled to know whether a railway company came within this Act of Parliament. In the long title the words are "acting in the execution of statutory and other public duties." I do not know that the long titles of Acts of Parliament are better drafted than the Acts of Par-

themselves, and those are notoriously badly drafted; but I suppose that the draughtsman of this title meant that it was in the execution of public duties which are statutory or otherwise. He says "statutory and other public duties," and if that were to be taken in its most literal construction any company exercising any power by virtue of any Act of Parliament would come within that meaning. I cannot think that that was intended. The Master of the Rolls, in *Fielding* v. *The Morley Corporation*, says [1899] 1 Ch. on p. 3: "The act in question is intituled," and then after reading it goes on "I read the title advisedly because now and for some years past the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old books we were told not so to regard it, but now the title is an important part of the Act, and is so treated in both Houses of Parliament." That rather strengthens my observations which I made just now. But the exact point was considered by the President of the Probate Division in the case of *The Ydun*. That was an Admiralty case. There the President had to consider whether a municipal authority, which was also discharging certain navigation and dock duties, was, for that purpose, a public body. Of course it was a public body as a municipal authority, but was it a public body when it was discharging the duties then in question, as, for instance, if it was discharging the duties of a water or gas company? He expressed the opinion undoubtedly, and that is what he gave his judgment on, that so connected you had undoubtedly a public body, but in some introductory remarks he said: "It is not easy to see why a railway company, for example, a corporation which certainly does acts in pursuance or execution of an Act of Parliament, is not included. This clearly, however, is not what the Act means." That decision was affirmed by the Court of Appeal, but the Court of Appeal took it for granted, I think, that the corporation there was a public body, and, so far as I can see there was no criticism of what was said by the President in the court below. But I have that distinct authority, although it was not necessary for the purpose of his decision for the President to give that expression of his opinion; and I gladly accept his interpretation. On those grounds, therefore, I hold that this action will lie.

Solicitors, *Warren, Murton, & Miller*, for *E. Brooke*, Margate; *Kingsford, Dorman, & Co.*, for *T. H. Boys*, Margate.

---

Chan. Div.
Cozens-Hardy, J.
(for Wright, J.)

Jan. 24.

*In re* Vimbos (Limited). (*a*.)

*Company—Winding up—Debentures—Receiver—Agency—Jurisdiction.*

*Where debentures by way of mortgage over the whole property of a company give power to the debenture-holders to appoint a receiver without stating that he is the agent of the company or what he is to do with any surplus which may come into his hands after paying the debenture-holders, such receiver is the agent of the debenture-holders only, and not of the company.*

*The liquidator of a company cannot by summons in the winding up obtain an order to make a receiver of it account for any surplus in his hands, as the court has no jurisdiction to consider the matter. If he wishes to enforce such a claim, he must bring an action against the receiver in the ordinary way.*

(*a*.) Reported by C. W. Mead, Esq., Barrister-at-Law.

Summons by the liquidator of the company that the amount of remuneration payable to the receiver for the debenture-holders might be fixed, and that any balance remaining in his hands should be paid over to the liquidator.

The company had issued debentures in the form of separate mortgages charging by way of floating security all the company's undertakings and heritable and real and personal property with the payment of principal and interest secured by the debentures. Each debenture ranked, *pari passu*, with the others. Three-fourths of the debenture-holders were empowered to appoint a receiver at any time after the principal moneys became due, the receiver having power (1) to take possession of the property charged by the debentures; (2) to carry on or concur in carrying on the business of the company; (3) to sell or concur in selling any of the property charged by the debentures; (4) to make any arrangements or compromise which they or he shall think expedient in the interest of the debenture-holders of this series.

On the 30th of November, 1898, a receiver was appointed by the debenture-holders. The company went into voluntary liquidation in March, 1899, which was afterwards continued under supervision. The receiver took possession and sold the business and assets of the company, and collected the book debts.

The debenture-holders were paid in full and the receiver handed over to the liquidator a certain sum together with the accounts. He stated in an affidavit that this was done to save the trouble of having to send them to his principals direct, who would in their turn have delivered them to the liquidator. The receiver claimed to retain £1,608 5s. as remuneration.

*A. R. Kirby*, for the liquidator.—The receiver is really the agent of the company. His duty is to receive income, keep down interest, and account for the surplus to the mortgagor—*i.e.*, the company: *Gaskell* v. *Gosling*, [1896] 1 Q. B. 669, 44 W. R. Dig. 132.

*Stewart Smith*, for the receiver.—The receiver is the agent of the debenture-holders, the mortgagees—not of the company, the mortgagor. There is no general rule which would make him the company's agent. He might be if appointed under the Conveyancing Act, 1881, or if there was a special contract to that effect as in *Jeffreys* v. *Dickson*, 14 W. R. 322, L. R. 1 Ch. App. 183. Even if he were the agent of the company, the liquidator can only bring an action against him, he cannot make him account in the winding up.

Cozens-Hardy, J.—The case really resolves itself into a question of jurisdiction. It is an application by the liquidator of a company that the amount of remuneration payable to the debenture-holders' receiver may be fixed, and that he may be ordered to pay the applicant any balance he may have in his hands. I thought it was coming on by arrangement to assess a *quantum meruit*; but the receiver's counsel takes the objection, which he is perfectly at liberty to take, that I have no jurisdiction to make the order, and it is therefore necessary for me to consider what is the position of the receiver.

Now, the mortgage debentures in this case are in a somewhat peculiar form. There is no covering deed; each debenture-holder had a separate debenture charging, in the most general terms, the present and future property of the company with the debenture, and by the fourth condition of the debenture indorsed upon it, it was stated as follows: [His lordship read the condition, and continued:] It is remarkable that this power differs in almost every material respect from the ordinary power which is given to mortgagees. There is nothing to say that the receiver is to be the agent of the mortgagor, who is solely to be respon-

ble for his acts and defaults, as in the Conveyancing Act. There is nothing whatever to say what he is to do with moneys which he receives. There is no direction to him to keep down the interest on the mortgage, or to pay any arrears or surplus over to the mortgagor. There are none of those provisions one finds in an ordinary receivership deed, and it does seem to me that the receiver in these circumstances was the agent of the persons appointing him, not the agent of the mortgagor, and it follows from that, of course, that the debenture-holders themselves would be answerable for all the faults and omissions of the receiver. If that is so it seems quite plain that the liquidator has no right at all in these proceedings to get the remuneration of the agent, not of the company, but of the debenture-holders, assessed by the court. The receiver does not come here asking for remuneration. He has got some money in his hands which the liquidator says is more than he is entitled to. The liquidator says the debenture-holders have been paid off, that the receiver has money in his hands which he ought not to keep. I think, on that footing—viz., that the receiver is agent for the mortgagees, and that this is the money of the mortgagees, and not of the company, that this application must fail.

But suppose I am wrong in that view, suppose that the true view be this, that although it is not expressed it is implied that the receiver is the agent of the mortgagor—that is, of the company, and that the company alone would be responsible for his acts and defaults. I cannot conceive that the liquidator is in any better position. It is not the law that the liquidator can get any claim made by any agent employed by the company assessed by the court in a proceeding like this. Suppose it had been an auctioneer or a stockbroker, who had undoubtedly been employed by the company, and who had some money in his hands, I cannot find any authority whatever for the proposition that I could in this summary manner and in winding-up jurisdiction, direct that the proper remuneration of the auctioneer or stockbroker should be ascertained, and order him to pay over the balance. It seems to me that the ordinary course of law would have to be followed—viz., an action commenced by the liquidator against the alleged agent (the auctioneer or stockbroker in the case I put) claiming this money as the money of the company, and then the auctioneer or stockbroker, as the case might be, would have to raise his contention that he was entitled to retain, out of the money in his hands, the remuneration which he claims. I, therefore, without going at all into the merits of the case, am bound to find that I have no jurisdiction, and that I must dismiss the summons.

Solicitors, *Murray, Hutchins, Stirling, & Murray; Sutton, Ommanney, & Rendall.*

---

Chan. Div. }
Farwell, J. } March 13.

WATTS v. DRISCOLL. (a.)

*Partnership—Mortgage of share by one partner—Dissolution—Right to an account—Partnership Act,* 1890 (53 & 54 *Vict. c.* 39), *s.* 31.

*By section* 31 *of the Partnership Act,* 1890, *a mortgagee of a share in a partnership has a right to an account and to ascertain what the share of his mortgagor really is from the date of the dissolution of the partnership. The mortgagor is not entitled to say that he has settled the value of his share with his partner before the date of dissolution, and thus take away his mortgagee's right to an account for the purpose of ascertaining that share.*

This was an action (1) for a declaration that a partnership carried on between the defendants Dennis Driscoll, and William Seymour Watts was dissolved as from the 12th of September, 1899; (2) that the plaintiff was entitled to a charge on the share of the said W. S. Watts in the partnership assets; (3) for an account.

The defendant Driscoll carried on a retail business. It was agreed between him and the plaintiff that the latter should purchase a share of his business for the benefit of the plaintiff's son, W. S. Watts, who was the other defendant. Articles of partnership dated the 9th of January, 1899, and made between the defendants Driscoll and W. S. Watts, were accordingly drawn up, whereby in consideration of the sums of £1,500 and £141 3s. 2d. expressed to be paid by the defendant W. S. Watts to the defendant Driscoll it was agreed that they should become partners for the term of fourteen years determinable as therein mentioned, and subject to the clauses and stipulations therein contained. The defendant W. S. Watts also agreed to provide £250 as working capital. These various sums were paid to the defendant Driscoll, the money being found by the plaintiff, who took as a security for the advance a deed of assignment dated the 23rd of March, 1899, from the defendant W. S. Watts of his share in the assets and profits of the partnership business. By this deed the defendant W. S. Watts covenanted with his father that he would keep him informed as to the partnership business and give him access to the partnership books and until the advance was repaid would pay the plaintiff the weekly drawings of the defendant W. S. Watts less a weekly sum agreed on. It was held as a fact that Driscoll knew that the money had been advanced by the plaintiff, and had full knowledge and notice of this deed.

Friction arose between the partners, and on the 14th of August, 1889, the defendants agreed to dissolve their partnership on the terms that the defendant Driscoll should buy from W. S. Watts his share in the partnership business for the sum of £500, and that W. S. Watts should accept £40 in consideration of his share of the profits made during the partnership. This agreement was made without the knowledge or consent of the plaintiff. Accounts had been made and approved by the partners up to the 30th of June, and by this deed it was determined that the partnership should be dissolved from that date. In consequence of this the plaintiff brought this action.

*Bramwell Davis, Q.C.,* and *J. H. Boome,* for the plaintiff.—The mortgagor, W. S. Watts, here sold his share of the business to his partner for a lump sum; this he had no right to do without the plaintiff's, the mortgagee's, assent. The plaintiff is entitled to the declarations prayed for and to an account.

*Hughes, Q.C.,* and *F. P. Onslow,* for the defendant Driscoll.—An assignee or mortgagee takes subject to equities: *Smith* v. *Parkes,* 16 Beav. 115, *Kelly* v. *Hutton,* 15 W. R. 916, L. R. 3 Ch. App. 703. The mortgagee is only entitled to an account from the time he takes possession: *Whetham* v. *Davey,* 33 W. R. 925, 30 Ch. D. 574. By section 31 of the Partnership Act, 1890, the assignee of any partner is not entitled to require any accounts, but must accept the account of profits agreed to by the partners. The mortgagee here must therefore accept the share as settled by the partners.

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

FARWELL, J.—In my opinion the defendant's counsel is well founded in the whole of his argument except the one point necessary for his success. I think he is quite right in saying that the true construction is that an assignee or mortgagee takes subject to equities—that is to say, he is right in saying that the partners can, during the continuance of the partnership, settle the accounts as they arise between them in the management or administration of the partnership, and that the mortgagee or assignee has no right whatever to interfere in the management or administration, or to require any accounts, or to inspect the books, but he is bound to take the profits as agreed to by the partners; that is the first sub-clause of section 31. Then the second sub-clause goes on to provide: "In the case of a dissolution the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and for the purpose of ascertaining that share to an account as from the date of dissolution." That obviously points to a dissolution and to such a dealing between the partners as I have already mentioned—namely, the ordinary dealing in a going concern, with accounts arising from half year to half year, settled between the partners in the ordinary administration of the partnership assets and the partnership business, and this the mortgagee or assignee has to accept. When, however, you come to a dissolution of partnership a different set of circumstances arises, and then, leaving untouched all accounts relating to management and administration of the business during the partnership, you are to proceed to ascertain what the share of the mortgagor partner is, and for the purpose of ascertaining that share, leaving, as I say, untouched all previous accounts such as I have mentioned, the mortgagee is then entitled to an account as from the date of dissolution to ascertain what that share is. Sale appears to me to be a matter outside the section altogether. The deed I have before me purports to sell in consideration of £500; that is the purchase-money for the share of the mortgagor partner, the whole of his share of the business. That, in my opinion, is not within the section of the Act at all. What the Act refers to is, first of all, the due administration of the partnership during its continuance; and, secondly, the settling of the shares of the partners after dissolution. A sale is a matter outside that altogether. This does not say that £500 is during the partnership agreed to be the amount of the share of the partners. It is selling for a lump sum, which is said to be £500, that which the mortgagor had no power to sell without the consent of the mortgagee. It appeared to me that if I were to hold in accordance with the defendant's contention I should be striking out the second sub-clause of the 31st section of the Partnership Act; because it would appear to follow that the other partner might say to the mortgagee of a mortgagor partner: "You are not entitled to any account as from the date of dissolution, because we have already agreed with the partner that, when the dissolution comes, his share is to be so much." To my mind, that would not be in accordance with the Act, and I therefore hold that the mortgagee in this case, the plaintiff, is entitled to the account for which he asks as from the date of dissolution. I cannot interfere with the decision of the partners as to the date which they have agreed shall be regarded as the date of dissolution. There will, then, be a declaration that the plaintiff is entitled to a charge on the share of the defendant Watts in the assets as on the 30th of June, 1899; and the plaintiff is entitled to an account as from that date.

Solicitors, *T. Durant; W. M. Bond.*

Chan. Div.
Buckley, J. } May 16, 17.

ROSENBAUM v. BELSON. (a.)

*Vendor and purchaser—Principal and agent—Sale by agent—Authority—Contract for sale.*

*An authority given by the owner of land or houses to an agent to sell them is* primâ facie *an authority to make a sale effectual in point of law, including the execution of a contract in writing where the law requires it.*

Action.

This was an action for specific performance of an agreement entered into by agents on behalf of the owner to sell certain houses, and the question was whether the agents had the requisite authority.

On the 4th of December, 1899, the defendant gave to Messrs. Dickson & Newman, auctioneers and estate agents, a memorandum signed by him as follows: "Wellesley-street, Stepney Green. Ground-rent £17 10s. 8d; mortgage £740, reduced to £640; £800. Please sell for me my houses 75, 77, 79, 79A, 81, 83, Wellesley-street, Stepney Green, and I agree to pay you by way of commission the sum of 2½ per cent. on the purchase price accepted. L. BELSON."

Dickson & Newman accordingly obtained an offer from the plaintiff of £785 for the property, which they communicated to the defendant, who on the 7th of December, 1899, wrote to them:

"Dear Sirs,—75 to 83, Wellesley-street.—I hereby agree to accept your client's (Mr. Rosenbaum) offer of £785 for the above property.—Yours faithfully, L. BELSON."

On the 11th of December the agents received £78 10s. as deposit from the plaintiff and gave him a receipt for it, and at the same time signed the following agreement: "It is hereby agreed between Messrs. Dickson & Newman as agents on behalf of the vendor Mr. L. Belson and Mr. S. Rosenbaum, of 5, Bell-lane, Spitalfields, that this 11th day of December, 1899, the said S. Rosenbaum has become the purchaser of the leasehold property (twenty-four years) known and situate at (75-83) Wellesley-street, Stepney Green, for the sum of seven hundred and eighty-five pounds (£785), and that he had paid to the said Dickson & Newman the sum of seventy-eight pounds ten shillings as a deposit and in part payment of the said purchase-money. As witness our hands this 11th day of December, 1899. This contract is made subject to the particulars given by the vendor being correct.

"DICKSON & NEWMAN,
"S. ROSENBAUM."

The defendant having refused to complete, the plaintiff brought this action. The defendant pleaded that Dickson & Newman had no authority to enter into the alleged agreement of sale or to sign the memorandum in writing of the same date, and that the Statute of Frauds had not been complied with.

At the trial the plaintiff adduced evidence that the defendant had, in addition to the written authority, given verbal instructions to the agents to enter into the agreement for sale. This was denied by the defendant.

*Jolly*, for the plaintiff.—The authority given by the plaintiff to sell includes an authority to enter into an agreement for sale.

*W. S. M. Knight* (*Montefiore* with him), for the defendant.—The authority to the estate agents to sell meant only to negotiate a sale and find a purchaser.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

and not to enter into a binding contract: *Chadburn* v. *Moore*, 41 W. R. 39, 67 L. T. 257, 61 L. J. Ch. 674. It is not the business of an estate agent to draw up contracts for the sale of land. That is a dangerous thing for anyone but a solicitor to do, and the defendant cannot be taken to have intended to give them any such authority.

The cases of *Smith* v. *Webster*, 24 W. R. 894, 3 Ch. D. 49; *Hamer* v. *Sharp*, 23 W. R. 158, L. R. 19 Eq. 108; *John Griffiths Cycle Corporation* v. *Humber & Co. (Limited)*, [1899] 2 Q. B. 414; and *Goodall* v. *Harding*, 33 W. R. 160, 52 L. T. Rep. 126, were also referred to during the argument.

BUCKLEY, J.—The contract relied on being signed by agents, the plaintiff must make out that the act was within the agents' authority. The defendant's counsel contended that an agent for sale had not authority to sign a contract unless express authority to sign the contract as distinguished from authority to sell, was proved. In my opinion this is not the law. A sale *primâ facie* means a sale effectual in point of law, including the execution of a contract where the law requires a contract in writing. I do not find anything in the circumstances of this case which induces me to say that the word "sell" here means less than that. The authorities upon the point are few. In *Hamer* v. *Sharp*, the authority was, "I request you to procure a purchaser and to insert particulars in your monthly circular until further notice." In *Godwin* v. *Brind*, 17 W. R. 29, L. R. 5 C. P. 299*n*, the advertisement intimated that "to treat and view" applications were to be made to certain persons. In *Chadburn* v. *Moore*, the learned judge found the instructions, which were not in writing, to be "to find a purchaser" and "negotiate a sale." In *Prior* v. *Moore*, 3 Times L. R. 624, the owner instructed the estate agent "to put the property on his books for sale." In all these cases it was held that the agent was not authorized to sign a contract for sale. None of them, in my judgment, covers the present case. In *Hamer* v. *Sharp* Hall, V.C., did not say that the agent had no right to enter into a contract at all, but only into such a one as he had entered into, and he in his discretion refused specific performance. In *Saunders* v. *Dence*, 33 W. R. Dig. 229, Field, J., distinguished that case from that of *Hamer* v. *Sharp*, and held that the auctioneers had authority to make a binding contract for sale. I have been unable to find any case where it has been held that instructions given by A. B. to sell for him his house and an agreement by him to pay so much on the purchase price accepted is not an authority to make a binding contract, including an authority to sign an agreement. Surely a power of attorney to one to sell would empower him to conclude an agreement for sale. It is not alleged that the agreement is not a reasonable and proper one having regard to the nature of the property. Beyond this question of law I find as a fact that the defendant on the 7th of December was told that Dickson & Newman would sign a contract in exchange for the deposit, and that he assented. The agents had thus, in addition to the letter of the 4th of December, 1899, a verbal authority to sign a contract.

*Judgment for plaintiff.*

Solicitors, *Brighten & Lemon; J. B. Sorrell, jun.*

---

## IN BANKRUPTCY.

Q. B. Div.
(Wright and Phillimore, JJ.) March 12, 15.

*In re* WARREN.
*Ex parte* THE TRUSTEE. (*a.*)

*Bankruptcy—Fraudulent preference—Payment by debtor to bank with the object of benefiting debtor's surety—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48, *sub-section* 1.

*A payment made by a debtor within three months prior to the bankruptcy in order to prevent a surety from being called upon to pay in his default is not a fraudulent preference of such surety.*

In re Mills, Ex parte The Official Receiver, 5 *Morrell* 55, 58 *L. T. Rep.* 871, 36 *W. R. Dig.* 15, *followed.*

In re Paine, Ex parte Read, 45 *W. R.* 190, [1897] 1 *Q. B.* 122, *not followed.*

Appeal against a decision of the county court judge at Manchester.

Mrs. Eliza Warren, the debtor, was insolvent on the 19th of June, 1899. At that date, amongst her other debts, she owed £202 to the Union Bank of Manchester, secured by a joint and several promissory note signed by herself and by her husband, G. W. Warren, as surety, and £250 to the Union Loan and Discount Bank, secured by a joint and several promissory note signed by herself and by her husband and one J. H. Harrison as sureties.

On the 20th of June she paid the debt owing to the Union Bank of Manchester, and on the 22nd of June she paid the debt owing to the Union Loan and Discount Bank, thereby releasing her husband and J. H. Harrison from liability.

A receiving order was made against Mrs. Warren within three months of the 19th of June, she was adjudicated bankrupt and a trustee was appointed, who moved in the county court at Manchester against G. W. Warren and J. H. Harrison for an order directing them to pay to him the sums of £202 and £250, on the ground that they had been fraudulently preferred by the debtor to that extent by the release of their liabilities to the banks as sureties for the debtor's loans.

The county court judge dismissed the application, holding that, although the payments had been made with a view to prefer, they were not in fact preferences, because the payments were not made to the creditors intended to be preferred. In arriving at this conclusion the learned judge relied on the cases of *Ex parte Taylor, In re Goldsmid*, 35 W. R. 148, 18 Q. B. D. 295, and *In re Mills, Ex parte The Official Receiver*, 5 Morrell 55, 58 L. T. Rep. 871, 36 W. R. Dig. 15.

The trustee appealed.

*Byrne*, for the appellant.—I contend that the county court judge should have followed the case of *In re Paine, Ex parte Read*, 45 W. R. 190, [1897] 1 Q. B. 122, where Vaughan Williams, J., held that a payment by the debtor into his own bank to meet a bill accepted by the respondent for his accommodation was a fraudulent preference of the respondent.

*Reed, Q.C.*, and *Muir Mackenzie*, for the respondent, were not called upon.

WRIGHT, J.—In this case the appellant has to make out that the payment was made by the debtor to or in favour of the respondents, with a view of giving them a preference over her other creditors. The

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

county court judge has found, and no doubt rightly, that the dominant view of the debtor in making the payment was to prefer the respondents. In my judgment there is no sufficient ground for treating the payments by the debtor to the banks as payments to or in favour of the respondents. The money was paid by the debtor to discharge her indebtedness to the banks, and was kept by them, and not applied to any other purpose. The result of this payment was that the promissory notes which had been signed by the respondents as sureties were released. The only difficulty is as to the case of *In re Paine, Ex parte Read*, and I agree with counsel for the appellant that *primâ facie* the court there appears to have held that the payment off by the bankrupt of the creditor was to be treated as a payment to, or for the benefit of, the acceptor of the accommodation bill for the bankrupt. I think, however, that the money was there paid in substance to enable the acceptor to take up the bill.

At variance with that view we have, however, the judgments of the Court of Appeal in the case of *In re Mills, Ex parte The Official Receiver*; and those judgments, though based on the decision in *In re Taylor, Ex parte Goldsmid*, nevertheless contain *dicta* which we cannot overlook. The Lords Justices there seem to take the view that to constitute a fraudulent preference the payment must be made to the person intended to be preferred. I think, therefore, the appeal fails.

PHILLIMORE, J.—I am of the same opinion. The motion here is launched on the assumption that the respondents have received the bankrupt's money. That, however, is not the case; the money was received by the banks. The trustee could not have moved to make the respondents repay the money, nor could he have sued them for money had and received. I think that the proper view of *In re Paine, Ex parte Read*, is that the payment in that case (though made by the debtor into his own bank) was treated by the court as in substance a payment to the credit of the respondent, the accommodation acceptor. I agree that the appeal must be dismissed.

*Appeal dismissed.*

Solicitor for the appellant, *J. H. Cooper*, Manchester.

Solicitors for the respondents, *Wheatly, Son, & Daniel*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

---

Prob. Div. & Adm. Div. Divorce. } Dec. 11. 18; Jan. 29; Feb. 19.

WARD (OTHERWISE DORMER) v. WARD. (a.)

*Divorce—Nullity of marriage—Impotence—No possibility of children—Power to vary settlements—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 108). *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.

*The powers of the court under section 5 of the Matrimonial Causes Act*, 1859, *and section* 3 *of the Act of* 1878, *can be exercised in the case of a decree of nullity of marriage on the ground of impotence, and are not confined to cases where there are or might have been children.*

*The words "property settled" in section 5 of the Act of* 1859 *refer only to the property the benefit of which is by the marriage settlement conferred on the parties or their children in the ordinary way.*

*There is no power to bring into settlement a fund or estate which is not to come into settlement until a certain event happens—before it happens, in fact.*

*The ordinary practice of the court of ordering a settlement to be read as if a party to it were already dead is merely a convenient method of carrying out what otherwise the court has power to do, and cannot be used for the purpose of evading the rule as stated above.*

This was an application by the wife for variation of settlements, she having obtained a decree for dissolution of marriage against her husband on the ground of impotence.

Dec. 11, 18, and Jan. 29.—*Bargrave Deane, Q.C.*, and *Danckwerts*, for the petitioner.

*Jelf, Q.C., H. J. Parker*, and *Priestley*, for the respondent.

The facts and arguments are fully set out in the judgment.

*Cur. adv. vult.*

Feb. 19. — BARNES, J., delivered the following considered judgment: Two questions are raised in this case, one of general importance—viz., as to the construction of two sections of the Matrimonial Causes Acts of 1859 and 1878—and the other depending upon the terms of an ante-nuptial settlement made on the marriage of the petitioner and respondent and dated the 27th of May, 1885. The parties were married on the 28th of May, 1885, the petitioner being then under age, and afterwards they resided together; but on the 22nd of October, 1895, the petitioner commenced a suit in this court against the respondent, claiming a declaration that her marriage with him was null and void, on the ground of the impotence of the respondent. This suit was heard before the President, and a decree *nisi* was pronounced by him on the 21st of December, 1896, and this decree was made absolute on the 28th of June, 1897. The petitioner on the 12th of June, 1899, by leave of the court, presented a petition to the court under the said Acts to obtain a variation of the said settlement for her benefit. The petition having been referred to Mr. Registrar Pritchard, he reported that the respondent raised, amongst other points, the question of the jurisdiction of the court to vary settlements in the case of a marriage declared void by reason of impotence, and thereupon the matter was brought before the court, and the questions which I now have to decide were by arrangement argued before me.

The first point taken by the respondent was that the powers of the court conferred by the two sections could not be exercised in the case of a decree of nullity of marriage on the ground of impotence, and that the sections only applied to cases where there were or might have been children. The fifth section of the Act of 1859 is as follows: "The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit." It was decided in the case of *Thomas* v. *Thomas*, 8 W. R. 476, 504, 2 Sw. & Tr. 89, that this clause gave no power to the court to deal with settlements in cases where no child of the marriage had been born, and in the cases of *Bird* v. *Bird*, 14 W. R. 1023, L. R. 1 P. & D. 231, and *Corrance* v. *Corrance*, 16 W. R. 893, L. R. 1 P. & D. 495, that the court had no power to do so unless there was issue of the marriage living at the time of the application. These decisions turned on the use of the word "parents" in the latter part of the section, and the criticisms on the

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

judgments in those cases apparently led to the passing of the third section of the Act of 1878, which is in the following terms: "The court may exercise the powers vested in it by the provisions of section 5 of the Act of the 22nd and 23rd years of Victoria, c. 61, notwithstanding that there are no children of the marriage." The argument for the respondent was that, as under the said fifth section the powers of the court could only be exercised where there was issue of the marriage living at the time of the application, the marriages referred to in the words in the first part of the section "final decree of nullity of marriage or dissolution of marriage" must be marriages capable of being productive of children, and that the third section of the Act of 1878, in extending the powers of the court to cases where there are no children of the marriage, only did so with reference to the class of marriages contemplated by the said fifth section. This argument is ingenious, but in my opinion endeavours to place a restricted meaning on the first words of the said fifth section which they never were intended to bear. In my opinion the words "final decree of nullity of marriage or dissolution of marriage" are used in their ordinary meaning, just as they are in other sections of the Matrimonial Causes Acts, and apply to any marriages declared null or dissolved. The section then meant that the court, after any decree of nullity of marriage or dissolution of marriage, might inquire as to the existence of settlements, and then, if there was issue living, might make orders as contemplated by the latter part of the section; and now under the third section of the Act of 1878 these orders may be made although there is no issue of the marriage. I am of opinion that under the two sections combined the court has jurisdiction in this case to deal with the settlement in question.

The point raised by the respondent upon the terms of the settlement was that, having regard the terms of the settlement, there is no property settled which in the events which have happened the court can, or ought, in the circumstances to order to be applied for the benefit of the petitioner. Under an indenture of settlement dated the 8th of December, 1874, made between the respondent's father (who died before the date of the marriage settlement) and the respondent and certain trustees, the lands and hereditaments comprised in the schedules to the marriage settlement of the 27th of May, 1885, together with other hereditaments, were limited (subject as to part to a jointure rent-charge of £1,200 payable thereout to the respondent's mother during her life and to a term of 500 years for securing the same) to such uses, upon such trusts, and with and under such powers, agreements, and declarations as the respondent should, by any deed or deeds, with or without power of revocation and new appointment to be executed by him after his father's death, or by his will, or any codicil or codicils thereto, from time to time appoint, but subject and without prejudice to any lease and every contract for a lease or leases subsisting at the date of the said indenture of settlement, and subject thereto, to the use of the respondent and his assigns for his life without impeachment of waste, with divers remainders over; and in the same indenture was contained a power for the respondent after his father's decease by deed or will to charge the settled premises with the payment to himself or any other person of any money not exceeding £8,000 and interest as therein mentioned, and to appoint all or any part of the same premises for any term or terms of years for securing the same, but which power had not at the time of the marriage settlement been exercised. And in the same indenture was also contained a power for the respondent either before or after his marriage with any woman by deed with or without power of revocation and new appointment, or by will or codicil, to appoint to any woman whom he might marry, for life or for any less period as from the day of his death if she should survive him, any yearly rent-charge or rent-charges of any amount whatsoever payable after his father's death, whether the respondent should survive him or not, such rent-charge or rent-charges to be in bar or not to be in bar of dower and free-bench as to the respondent should seem fit, and to be charged upon and payable out of all or any of the premises by the said indenture of settlement assured without any deduction and to be paid at such times and in such manner as to the respondent should seem meet, and to appoint to such woman the usual powers and remedies for recovering and enforcing the same. And to appoint the premises so charged to any person or persons for any term or terms of years with or without impeachment of waste upon trusts for better securing payment of the rent-charge or rent-charges by mortgage (with a power of sale if thought fit), or otherwise as to the respondent should seem meet.

By the marriage settlement made between the respondent, the petitioner, her father, and certain trustees, the respondent in consideration of the intended marriage covenanted with the trustees that if the said intended marriage should take place the respondent would, during the joint lives of himself and the petitioner, pay to the trustees a yearly sum of £200 to accrue from day to day, but to be payable by equal quarterly payments, the first of such payments to be made on such of the quarterly days as should happen next after the solemnization of the said intended marriage, and the trustees were to pay the said annual sum of £200 as the same should become due so long as the same should continue payable to the petitioner, but so that she should not have any power of anticipation. And in consideration of the said intended marriage and in exercise of the special power vested in him by the said indenture of settlement, the respondent limited and appointed to the use of the petitioner and her assigns during her life in case the said intended marriage should take effect and she should survive him the rent-charges following—that is to say, if and so long as his mother should be living, the yearly rent-charge of £1,300, and from and after her death the yearly rent-charge of £1,600, the said rent-charges or such of them as should take effect to be in full for her jointure and in bar of all dower and free-bench whatsoever, and to be charged upon and issuing out of all the hereditaments and premises comprised in the first schedule thereto (subject as to part of the said hereditaments to the said yearly rent-charge of £1,200 and the said term of 500 years, and subject as to all the said hereditaments to the powers of leasing, and sale, and exchange, and management contained in the said indenture of settlement), such rent-charges to be considered as accruing from day to day, but to be payable quarterly without any deduction except succession duty, if any, the first of such payments as to the said rent-charge of £1,300 to be paid at the end of three calendar months after the death of the respondent if the petitioner and the respondent's mother should then both be living, and as to the said rent-charge of £1,600 to be made at the end of three calendar months after the death of the survivor of the respondent and his mother if the petitioner should then be living. And in consideration of the said intended marriage, and in exercise of the special power vested in him for that purpose by the indenture of settlement, the respondent as beneficial owner

county court judge has found, and no doubt rightly, that the dominant view of the debtor in making the payment was to prefer the respondents. In my judgment there is no sufficient ground for treating the payments by the debtor to the banks as payments to or in favour of the respondents. The money was paid by the debtor to discharge her indebtedness to the banks, and was kept by them, and not applied to any other purpose. The result of this payment was that the promissory notes which had been signed by the respondents as sureties were released. The only difficulty is as to the case of *In re Paine, Ex parte Read*, and I agree with counsel for the appellant that *primâ facie* the court there appears to have held that the payment off by the bankrupt of the creditor was to be treated as a payment to, or for the benefit of, the acceptor of the accommodation bill for the bankrupt. I think, however, that the money was there paid in substance to enable the acceptor to take up the bill.

At variance with that view we have, however, the judgments of the Court of Appeal in the case of *In re Mills, Ex parte The Official Receiver*; and those judgments, though based on the decision in *In re Taylor, Ex parte Goldsmid*, nevertheless contain *dicta* which we cannot overlook. The Lords Justices there seem to take the view that to constitute a fraudulent preference the payment must be made to the person intended to be preferred. I think, therefore, the appeal fails.

PHILLIMORE, J.—I am of the same opinion. The motion here is launched on the assumption that the respondents have received the bankrupt's money. That, however, is not the case; the money was received by the banks. The trustee could not have moved to make the respondents repay the money, nor could he have sued them for money had and received. I think that the proper view of *In re Paine, Ex parte Read*, is that the payment in that case (though made by the debtor into his own bank) was treated by the court as in substance a payment to the credit of the respondent, the accommodation acceptor. I agree that the appeal must be dismissed.

*Appeal dismissed.*

Solicitor for the appellant, *J. H. Cooper*, Manchester.

Solicitors for the respondents, *Wheatly, Son, & Daniel*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

---

Prob. Div. & Adm. Div. Divorce. } Dec. 11. 18; Jan. 29; Feb. 19.

WARD (OTHERWISE DORMER) v. WARD. (a.)

*Divorce—Nullity of marriage—Impotence—No possibility of children—Power to vary settlements—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 108). *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.

*The powers of the court under section 5 of the Matrimonial Causes Act*, 1859, *and section* 3 *of the Act of* 1878, *can be exercised in the case of a decree of nullity of marriage on the ground of impotence, and are not confined to cases where there are or might have been children.*

*The words "property settled" in section 5 of the Act of* 1859 *refer only to the property the benefit of which is by the marriage settlement conferred on the parties or their children in the ordinary way.*

*There is no power to bring into settlement a fund or estate which is not to come into settlement until a certain event happens—before it happens, in fact.*

*The ordinary practice of the court of ordering a settlement to be read as if a party to it were already dead is merely a convenient method of carrying out what otherwise the court has power to do, and cannot be used for the purpose of evading the rule as stated above.*

This was an application by the wife for variation of settlements, she having obtained a decree for dissolution of marriage against her husband on the ground of impotence.

Dec. 11, 18, and Jan. 29.—*Bargrave Deane, Q.C.*, and *Danckwerts*, for the petitioner.

*Jelf, Q.C., H. J. Parker*, and *Priestley*, for the respondent.

The facts and arguments are fully set out in the judgment.

*Cur. adv. vult.*

Feb. 19. — BARNES, J., delivered the following considered judgment: Two questions are raised in this case, one of general importance—viz., as to the construction of two sections of the Matrimonial Causes Acts of 1859 and 1878—and the other depending upon the terms of an ante-nuptial settlement made on the marriage of the petitioner and respondent and dated the 27th of May, 1885. The parties were married on the 28th of May, 1885, the petitioner being then under age, and afterwards they resided together; but on the 22nd of October, 1895, the petitioner commenced a suit in this court against the respondent, claiming a declaration that her marriage with him was null and void, on the ground of the impotence of the respondent. This suit was heard before the President, and a decree *nisi* was pronounced by him on the 21st of December, 1896, and this decree was made absolute on the 28th of June, 1897. The petitioner on the 12th of June, 1899, by leave of the court, presented a petition to the court under the said Acts to obtain a variation of the said settlement for her benefit. The petition having been referred to Mr. Registrar Pritchard, he reported that the respondent raised, amongst other points, the question of the jurisdiction of the court to vary settlements in the case of a marriage declared void by reason of impotence, and thereupon the matter was brought before the court, and the questions which I now have to decide were by arrangement argued before me.

The first point taken by the respondent was that the powers of the court conferred by the two sections could not be exercised in the case of a decree of nullity of marriage on the ground of impotence, and that the sections only applied to cases where there were or might have been children. The fifth section of the Act of 1859 is as follows: "The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit." It was decided in the case of *Thomas v. Thomas*, 8 W. R. 476, 504, 2 Sw. & Tr. 89, that this clause gave no power to the court to deal with settlements in cases where no child of the marriage had been born, and in the cases of *Bird v. Bird*, 14 W. R. 1023, L. R. 1 P. & D. 231, and *Corrance v. Corrance*, 16 W. R. 893, L. R. 1 P. & D. 495, that the court had no power to do so unless there was issue of the marriage living at the time of the application. These decisions turned on the use of the word "parents" in the latter part of the section, and the criticisms on the

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

judgments in those cases apparently led to the passing of the third section of the Act of 1878, which is in the following terms: "The court may exercise the powers vested in it by the provisions of section 5 of the Act of the 22nd and 23rd years of Victoria, c. 61, notwithstanding that there are no children of the marriage." The argument for the respondent was that, as under the said fifth section the powers of the court could only be exercised where there was issue of the marriage living at the time of the application, the marriages referred to in the words in the first part of the section "final decree of nullity of marriage or dissolution of marriage" must be marriages capable of being productive of children, and that the third section of the Act of 1878, in extending the powers of the court to cases where there are no children of the marriage, only did so with reference to the class of marriages contemplated by the said fifth section. This argument is ingenious, but in my opinion endeavours to place a restricted meaning on the first words of the said fifth section which they never were intended to bear. In my opinion the words "final decree of nullity of marriage or dissolution of marriage" are used in their ordinary meaning, just as they are in other sections of the Matrimonial Causes Acts, and apply to any marriages declared null or dissolved. The section then meant that the court, after any decree of nullity of marriage or dissolution of marriage, might inquire as to the existence of settlements, and then, if there was issue living, might make orders as contemplated by the latter part of the section; and now under the third section of the Act of 1878 these orders may be made although there is no issue of the marriage. I am of opinion that under the two sections combined the court has jurisdiction in this case to deal with the settlement in question.

The point raised by the respondent upon the terms of the settlement was that, having regard the terms of the settlement, there is no property settled which in the events which have happened the court can, or ought, in the circumstances to order to be applied for the benefit of the petitioner. Under an indenture of settlement dated the 8th of December, 1874, made between the respondent's father (who died before the date of the marriage settlement) and the respondent and certain trustees, the lands and hereditaments comprised in the schedules to the marriage settlement of the 27th of May, 1885, together with other hereditaments, were limited (subject as to part to a jointure rent-charge of £1,200 payable thereout to the respondent's mother during her life and to a term of 500 years for securing the same) to such uses, upon such trusts, and with and under such powers, agreements, and declarations as the respondent should, by any deed or deeds, with or without power of revocation and new appointment to be executed by him after his father's death, or by his will, or any codicil or codicils hereto, from time to time appoint, but subject and without prejudice to any lease and every contract for a lease or leases subsisting at the date of the said indenture of settlement, and subject thereto, to the use of the respondent and his assigns for his life without impeachment of waste, with divers remainders over; and in the same indenture was contained a power for the respondent after his father's decease by deed or will to charge the settled premises with the payment to himself or any other person of any money not exceeding £8,000 and interest as therein mentioned, and to appoint all or any part of the same premises for any term or terms of years for securing the same, but which power had not at the time of the marriage settlement been exercised. And in the same indenture was also contained a power for the respondent either before or after his marriage with any woman by deed with or without power of revocation and new appointment, or by will or codicil, to appoint to any woman whom he might marry, for life or for any less period as from the day of his death if she should survive him, any yearly rent-charge or rent-charges of any amount whatsoever payable after his father's death, whether the respondent should survive him or not, such rent-charge or rent-charges to be in bar or not to be in bar of dower and free-bench as to the respondent should seem fit, and to be charged upon and payable out of all or any of the premises by the said indenture of settlement assured without any deduction and to be paid at such times and in such manner as to the respondent should seem meet, and to appoint to such woman the usual powers and remedies for recovering and enforcing the same. And to appoint the premises so charged to any person or persons for any term or terms of years with or without impeachment of waste upon trusts for better securing payment of the rent-charge or rent-charges by mortgage (with a power of sale if thought fit), or otherwise as to the respondent should seem meet.

By the marriage settlement made between the respondent, the petitioner, her father, and certain trustees, the respondent in consideration of the intended marriage covenanted with the trustees that if the said intended marriage should take place the respondent would, during the joint lives of himself and the petitioner, pay to the trustees a yearly sum of £200 to accrue from day to day, but to be payable by equal quarterly payments, the first of such payments to be made on such of the quarterly days as should happen next after the solemnization of the said intended marriage, and the trustees were to pay the said annual sum of £200 as the same should become due so long as the same should continue payable to the petitioner, but so that she should not have any power of anticipation. And in consideration of the said intended marriage and in exercise of the special power vested in him by the said indenture of settlement, the respondent limited and appointed to the use of the petitioner and her assigns during her life in case the said intended marriage should take effect and she should survive him the rent-charges following—that is to say, if and so long as his mother should be living, the yearly rent-charge of £1,300, and from and after her death the yearly rent-charge of £1,600, the said rent-charges or such of them as should take effect to be in full for her jointure and in bar of all dower and free-bench whatsoever, and to be charged upon and issuing out of all the hereditaments and premises comprised in the first schedule thereto (subject as to part of the said hereditaments to the said yearly rent-charge of £1,200 and the said term of 500 years, and subject as to all the said hereditaments to the powers of leasing, and sale, and exchange, and management contained in the said indenture of settlement), such rent-charges to be considered as accruing from day to day, but to be payable quarterly without any deduction except succession duty, if any, the first of such payments as to the said rent-charge of £1,300 to be paid at the end of three calendar months after the death of the respondent if the petitioner and the respondent's mother should then both be living, and as to the said rent-charge of £1,600 to be made at the end of three calendar months after the death of the survivor of the respondent and his mother if the petitioner should then be living. And in consideration of the said intended marriage, and in exercise of the special power vested in him for that purpose by the indenture of settlement, the respondent as beneficial owner

liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, relating to navigation."*

*Kilburn*, for the appellants, owners of the steamship *Rodney*.—It is admitted that *The Rodney* was seaworthy as required under the provisions of the Harter Act, but the judge of the court below allowed the defendant to recover on his counterclaim because in the opinion of the court the act of the boatswain in puncturing the drainage pipe in the forecastle and thereby causing the water, which would otherwise have been carried off by the pipe, to damage the cargo was not an error in the management of the vessel; but the term "management" in the exempting section includes just such an act as caused the damage here. In fact this case is governed by the case of *The Glenochil*, [1896] P. 10, 44 W. R. Dig. 148, where it was held that the not having discovered that the sounding pipe of the ballast tank of a vessel was broken was an error in the management of the vessel. The act here was an act done for the benefit of the crew and of the vessel, and the word "management" brings within the exemption, acts which are much wider than those done in respect of the navigation of the vessel.

He referred to *Dobell* v. *The Steamship Rossmore Co.*, 44 W. R. 37, [1895] 2 Q. B. 408; *The Ferro*, [1893] P. 38, 41 W. R. Dig. 223; *Good* v. *The London Steamship Owners' Protection Association*, 20 W. R. 33, L. R. 6 C. P. 563; *The Sylvia*, 68 Federal Rep. 230.

*Scrutton*, for the respondent, defendant in the court below.—The court below was right and the appeal ought to be dismissed. The breakage of the pipe in the present case was brought about by an act done by the boatswain, not in the management of the ship, but in order that the forecastle might be freed from water and the comfort of the crew better secured. Moreover, the exemptions incorporated in the bills of lading do not exempt the shipowners from damage caused by failure to take proper care of the cargo, and in this case there was a failure to take care of the cargo as the pipe should have led directly overboard and not through the cargo hold, when no damage to the cargo could have resulted from the pipe having been broken.

He cited *Norman* v. *Binnington*, 38 W. R. 702, 25 Q. B. 475; *Dobell* v. *The Steamship Rossmore Co.*

*Kilburn* was not required to reply.

JEUNE, P.—The principles laid down in *The Glenochil* appear to me to apply to this case. This case goes a little beyond that case, because, undoubtedly, in *The Glenochil* the act done was one which it was necessary to do for the direct purpose of the management of the ship. It consisted in that case, in water being run into the ballast tank of a ship for the purpose of stiffening her, and in so doing the engineer let water into the cargo. That was, as we thought in *The Glenochil*, an act which was part at any rate of the management of the ship. This case is a little different, but to my mind it is a very little different. The ship experienced bad weather and the forecastle became flooded, and thereupon the boatswain, in order to clear the forecastle of water—especially because no doubt that formed his own quarters—endeavoured to clear a pipe which, if it had been clear, would have carried off the water, but he did the work negligently, and made a hole in the pipe instead of clearing it of the obstacle. Is that an act done in the management of the ship? I think it is. The object was to clear the forecastle of water—that is, to render the forecastle habitable for the crew, for the purpose of rendering the ship proper for the purpose for which it was intended. This case appears to me to fall within the view taken in the case of *The Glenochil*. To put the matter in a very small compass, I think the court below has somewhat unduly limited the meaning of the word management. The learned judge says: "The cases I think show that the word must be confined to the performance (though improper) or non-performance of such acts as are or ought to be done for the safety of the vessel and for her maintenance in a seaworthy condition." I think that is too narrow a view. The acts need not be done for the safety of the vessel or her maintenance in a seaworthy condition. If you extend them to keeping the vessel in her proper condition, then the act in this case is an act done in the management of the vessel and falls within the principle of *The Glenochil*.

BARNES, J.—It seems to me, as the President has pointed out, that the court below has unnecessarily confined the meaning of the words "management of the ship." Practically there is little difference, if any, between the case of *The Glenochil* and this case, except that in the former case there are to be found some expressions referring to the act as having been done for the safety of the ship, but those expressions were not intended to limit the meaning of the words "management of the ship." I think that the words "faults or errors in the management of the vessel" include improper handling of the ship as a ship which affects the safety of the cargo.

Solicitors for appellants, *Holman, Birdwood, & Co.*

Solicitors for respondent, *King, Wigg, & Co.*

* Section 3 of the Act of Congress referred to (the Harter Act), provides as follows: "That if the owner of any vessel transporting merchandize or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the said vessel."

## Court of Appeal.

From Chan. Div. (Webster, M.R., and Rigby and Collins, L.JJ.) — May 22.

*In re* SANITARY BURIAL ASSOCIATION (LIMITED). *Ex parte* WINGFIELD. (*a.*)

*Company — Winding up — Voluntary winding up — Liquidator—Subsequent supervision order—Remuneration of liquidator — Costs of solicitor — Priority—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 110, 133 (3), 144, 151—*Companies Winding-up Rules*, 1890, *r.* 31.

*The costs of a solicitor properly incurred during the voluntary winding up a company are payable in priority to any remuneration awarded by the company to its liquidator.*

Appeal from an order of Wright, J., made on the 2nd of August, 1899.

On the 16th of November, 1897, a petition for compulsory winding-up was presented by an alleged shareholder, named Paynter, against the Sanitary Burial Association (Limited); but on coming on for hearing the petition was abandoned by Paynter, and on the 3rd of December, 1897, a creditor, named Ball, obtained leave to be substituted as petitioner in his stead.

On the 8th of December, 1897, the association passed a resolution for voluntary winding up, and appointed Mr. Ehrenfeldt as liquidator; and the latter employed the appellant, Wingfield, as his solicitor in the voluntary winding up.

On the 28th of December, 1897, the petition was heard and dismissed; but on the 28th of March, 1898, the Court of Appeal ordered that the voluntary winding up should be continued under the supervision of the court.

Shortly prior to the 11th of February, 1898, a meeting of the association had voted the sum of fifty guineas to the liquidator by way of remuneration for his services, and this sum the liquidator had retained for himself out of certain moneys of the association which had come to his hands.

On the 17th of June, 1898, the liquidator issued a summons calling on Wingfield to pay to him within three days all moneys which he had collected on behalf of the association; and on this summons being adjourned into court before Wright, J., and on it appearing from the admission of Wingfield that he then had in hand the sum of £173 11s., received by him on behalf of the association as solicitor in the said liquidation, the court made an order for dealing with this money, the short effect of which was that the balance which would ultimately have been retained by Wingfield would not have been sufficient to discharge his costs, unless he had been allowed to have access to the fifty guineas, part of the assets of the association, already alluded to as retained by the liquidator in payment of his remuneration.

From this order Wingfield now appealed.

*Eve, Q.C.*, and *A. F. Peterson*, for the appellant.—The costs of the solicitor ought always to be paid before the costs of the liquidator: Companies Act, 1862, ss. 110 and 144; Companies Winding-up Rules, 1890, r. 31. This is only just, for the solicitor has no claim against the liquidator personally, but only against the assets: *In re Trueman's Estate, Hooke* v. *Piper*, 20 W. R. 700, L. R. 14 Eq. 278; *In re Anglo-Moravian Hungarian Junction Railway, Ex parte Watkin*, 24 W. R. 122, 1 Ch. D. 130. As for *In re New York Exchange Co.*, [1893] 1 Ch. 371, 41 W. R. Dig. 42, that case applied only to the costs of a liquidator, not to his remuneration at all. Rule 31 of the Companies Winding-up Rules, 1890, is incorporated by section 151 of the Companies Act, 1862, into the process of a winding up under the supervision of the court.

*Muir Mackenzie*, for the respondent, the liquidator.—Rule 31 applies only to compulsory winding up. In this case, too, the shareholders voted the liquidator's remuneration under the powers conferred on them by section 133 (3) of the Companies Act, 1862.

*A. F. Peterson* replied.

WEBSTER, M.R.—In this case Wright, J., has held in effect that the sum of fifty guineas, which has been voted to the liquidator by way of remuneration for his services in respect of the period of time during which the company was in voluntary liquidation, before the supervision order was made, is to have priority of payment over the costs of the solicitor employed by him in connection with the liquidation during the same period. The practical result of the judgment is this—that if this remuneration of the liquidator is paid in full, there will not be enough money in the assets of the company to pay the costs of the solicitor. It was decided, moreover, in *In re Trueman's Estate, Hooke* v. *Piper*, by Bacon, V.C., that the solicitor in a voluntary liquidation has no claim against the liquidator personally. This, then, is the difficulty that we have to deal with. But in my opinion the remuneration of the liquidator should come after all costs, charges, and expenses properly incurred. The result of the decisions appears to me to be this, that if the money recovered is not sufficient to pay the whole of the costs of the persons who are employed by the liquidator, the money, so far as it will go, should be applied in payment of those costs before the liquidator can receive any remuneration. I should like to draw attention to the scheme of priority contemplated by rule 31 of the Companies (Winding-up) Rules of 1890, which scheme is in accordance with the principle I have just laid down. I asked counsel for the respondent in the course of the argument why that principle should not apply here, and I was answered that the terms of that rule did not include such a case as the present one, and that the provisions of section 133 of the Companies Act, 1862, gave the shareholders the right to fix this remuneration. But, in my opinion, the right so given cannot affect the question of priority. It is to be remembered, too, in this case, that the resolution giving the liquidator his remuneration was not passed till after the date of the supervision order. I do not know that that is a conclusive test, but it seems reasonable that such a resolution, passed at such a time, ought not to affect the rights of parties in respect of services rendered before the supervision order was made. I do not think that what I am now saying is opposed to what was said by Kekewich, J., in *In re New York Exchange Co.* The question for decision there does not arise in this case, and it is only by an attempted extension of the doctrine there applied to a different state of circumstances that that decision can be said to be any authority for what Wright, J., has done here. The appeal must be allowed.

RIGBY, L.J.—I am of the same opinion, and for the same reasons.

COLLINS, L.J.—I agree.

*Appeal allowed.*

Solicitors, *W. J. Bernard Blew; Robinson & Stanne*

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

the Rolls, and I do not mean to repeat what he has said. As to the authorites, *Dayrell* v. *Hoare* only shows that the lessor under such a power cannot impose a burden on the rest of the land. I interpret the language of Littledale, J., as having reference to the case before him, and that only, and I know of no authority for saying that he intended what has been attributed to him. The other case, *Buckley* v. *Howell*, turned upon the provision for the re-investment of the purchase-money, and the effect of that decision has been removed by subsequent legislation. There is enough to enable us to say that conveyancers have not taken so narrow a view of the usual leasing power as we are asked to do here. I do not understand that Cozens-Hardy, J., expressed any opinion of his own. He only thought he ought not to overrule the decision of a judge of co-ordinate authority, but to leave it to us to take the responsibility of reversing it.

COLLINS, L.J.—I am of the same opinion.

*Appeal allowed.*

Solicitors, *Farrar, Porter, & Co.*, for *Barker & Rogerson*, Chester.

---

From Q. B. Div. (Collins and Romer, L.JJ.) April 9.

GIBBS & CO. (LIMITED) v. NEVILLE & CO. (*a.*)

*Practice — Pleading — Counterclaim — Counterclaim in reply—Right of plaintiff to plead set-off to counterclaim—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-section* 3—*Ord.* 19, *r.* 3; *ord.* 21, *rr.* 10-17.

*The plaintiffs claimed a balance of an account. The defendants counterclaimed for damages for breach of contract. The plaintiffs in their reply denied the contract, and further pleaded that, if there was such a contract, the defendants had broken it, and they claimed damages for such breach.*

*Held, that, although the cause of action in respect of which the plaintiffs claimed damages in their reply existed before the issue of the writ, the plaintiffs were entitled to raise the matter in their reply, and were not bound to introduce it into their statement of claim by amendment.*

Toke *v.* Andrews, 30 *W. R.* 659, 8 *Q. B. D.* 428, *approved.*

Appeal from the refusal of Phillimore, J., to strike out a paragraph of the plaintiffs' reply.

The plaintiffs, who carried on business as manufacturers of hot water apparatus, sought to recover from the defendants the sum of £650, the balance of an account for work done and materials supplied.

The defendants by their defence admitted liability under the claim to the amount of £113; but they set up a counterclaim, alleging that prior to August, 1892, the business carried on by the plaintiffs had been carried on by Robert Renton Gibbs; that, by an agreement in writing dated the 20th of June, 1892, between Gibbs and the defendants, Gibbs undertook that he would not for a period of twelve years manufacture or supply any heating apparatus for or to any person in Spain other than the defendants, or canvass or solicit orders for any heating apparatus in Spain; that in August, 1892, the plaintiffs, on acquiring the business heretofore carried on by Gibbs, agreed in writing to take over the liability of Gibbs under the agreement of the 20th of June, 1892, and the defendants assented thereto; and that the plaintiffs in breach of the agreement had canvassed and solicited orders in Spain and sold heating apparatus to customers there. The defendants claimed £3,000 damages.

The plaintiffs, in their reply, joined issue as to the defence, and as to the counterclaim they denied that the liability of Gibbs under the agreement of the 20th of June, 1892, had been taken over by them. They further pleaded in paragraph 13 of the reply as follows: "The defendants from August, 1892, to the year 1898 acted as the plaintiffs' agents in Spain for the sale of and to obtain orders for the installation of heating apparatus, and during such period in breach of their duty towards and of their implied promise to the plaintiffs as such agents, and without the knowledge of the plaintiffs, added unreasonable and excessive amounts by way of commission or remuneration for themselves to the plaintiffs' estimates before submitting the same to the intending customers, and thereby caused the plaintiffs to lose orders and suffer loss, which loss the plaintiffs claim to set off against the counterclaim of the defendants (if any) herein. In the alternative, if the said alleged agreement of the 20th of June, 1892, was ever binding upon the plaintiffs (which is denied), then in breach of their duty towards and of their implied promises to the plaintiffs arising thereunder and from the mutual relationship thereby established, and without the knowledge of the plaintiffs, the defendants added unreasonable and excessive amounts by way of commission or remuneration for themselves to the plaintiffs' estimates before submitting the same to the intending customers, and thereby caused the plaintiffs to lose orders and suffer loss, which loss the plaintiffs claim to set off against the counterclaim of the defendants (if any) herein."

On the application of the defendants the District Registrar of Liverpool ordered paragraph 13 of the reply to be struck out. Phillimore, J., reversed the order of the district registrar.

The defendants appealed.

*Leslie Scott*, for the defendants.—The question is, whether a plaintiff can counterclaim in his reply. The right to counterclaim is given by section 24, sub-section 3, of the Judicature Act, 1873, and that sub-section expressly limits the right to a defendant, as also do ord. 19, r. 3, and ord. 21, rr. 10, 17. The plaintiffs' proper course is to amend their statement of claim: *James* v. *Page*, 85 Law Times, 157. The learned judge thought he ought to follow the case of *Toke* v. *Andrews*, 30 W. R. 659, 8 Q. B. D. 428. But there the cause of action in respect of which the plaintiff was allowed to counterclaim was one which arose after the issue of the writ. The case of *Alsop and Gandia Railway and Harbour Co.* v. *Greenhill*, 44 W. R. 117, [1896] 1 Ch. 19, was also referred to.

*W. D. McConkey*, for the plaintiffs, was not called upon to argue.

COLLINS, L. J.—I am of opinion that this appeal should be dismissed. The plaintiffs, who are a limited company, claim for the balance of an account. The defendants set up a counterclaim on an agreement alleging a bargain which they say the plaintiff company adopted by way of novation, and for breach of which they claim damages. The plaintiffs in their reply deny that the agreement is binding on them, and further in effect say that, if the agreement is binding on them, the defendants broke it, and that the plaintiffs, have a claim against the defendants in respect of such breach for unliquidated damages. They use this claim as a set off against the defendants' counterclaim. The point is now taken that the plaintiffs have set up a counterclaim in their reply, and that the rules do not contemplate such a thing

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

being done. Reference is made to the case of *James* v. *Page*, where, however, the counterclaim was one in the full sense of the term—that is to say, it was used as a sword and not as a shield. The defendants contend that the plaintiffs' counterclaim ought to be struck out of the reply, and the statement of claim amended. The question is whether the rules are so strict as to compel us to order the plaintiffs to follow that course. The plaintiffs do not want to rely on the agreement on which the defendants base their counterclaim; and, if they were forced to deal with it in their statement of claim, they would have to set up two inconsistent causes of action, on one of which they would only want to rely in the case of the defendants raising a particular defence. It seems to me it would be obviously unjust to force the plaintiffs to introduce this matter into their statement of claim by amendment. I think they have put it in its proper place by pleading it in their reply. In my opinion the case of *Toke* v. *Andrews* establishes a principle which justifies us in affirming the decision of Phillimore, J.

ROMER, J., concurred.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Lydall & Sons*, for *T. & T. Martin, Webb, & Martin*, Liverpool.

Solicitors for the defendants, *Field, Roscoe, & Co.*, for *Alsop, Stevens, Harvey, & Crooks*, Liverpool.

---

Appeal.
(Collins, Vaughan Williams, and Romer, L.JJ.) April 5.

WRIGHT v. JOHN BAGNALL & SONS (LIMITED). (a.)

*Master and servant—Employers' liability—Accident—Compensation—Claim not made within six months—Waiver—Agreement to pay compensation—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-section* 1.

*A workman was injured by an accident arising out of and in the course of his employment, which totally incapacitated him from work. His employer paid him half the amount of his average weekly wages from the second week after the accident, and negotiations took place between them as to paying the workman a lump sum in lieu of the weekly payment. The parties were unable to agree upon the amount, and after the expiration of six months from the accident the negotiations ceased and the weekly payment was stopped. The workman thereupon took proceedings to have the compensation assessed under the Workmen's Compensation Act*, 1897, *when the employer took the objection that the claim for compensation was not made within the six months.*

*Held, that, in the circumstances, there was evidence of an agreement by the employer to pay compensation under the Act, the only question left open being the amount of compensation, and that, in such a case, the employer was precluded from taking the objection that the claim for compensation was not made in time.*

Appeal from the award of the deputy judge of the Walsall County Court under the Workmen's Compensation Act, 1897.

The appellant, George Wright, was a wagoner in the employment of the respondents, John Bagnall & Sons (Limited), who were iron manufacturers, and on the 23rd of November, 1898, he received personal injuries by accident arising out of and in the course of his employment. He was taken to the hospital suffering from permanent injuries. At the time of the accident his wages were 21s. a week. On the 26th of November, 1898, the appellant's wife saw the respondents' clerk, who told her to get a note from the hospital and bring it in three weeks' time to the works, when her husband would be "due for compensation," and that she would get half his wages. At the end of the three weeks she went with the hospital note to the works, and received 10s. 6d., and from that time either the appellant or his wife continued to receive that sum each week until the 6th of September, 1899, either from the respondents or from the insurance company with whom the respondents were insured. About Easter, 1899, the appellant saw the respondents' manager, when an offer of £15 was made to him as compensation, but the appellant refused to take it. A few days afterwards the appellant saw the manager again, when the appellant said that he would take £200. The manager said: "If you talk about £200 we will go to the court with you." At Whitsuntide the manager offered the appellant £30, saying that he thought that the insurance company would give that amount.

The weekly payments having stopped on the 6th of September, 1899, the appellant filed a request for arbitration to assess the compensation payable under the Act of 1897. The respondents, in their answer, took the objection that the claim for compensation was not made within six months from the occurrence of the accident, as required by section 2, sub-section 1, of the Act. In reply to this objection the appellant contended that the respondents were by their conduct precluded from setting it up.

The deputy county court judge held that "the claim for compensation" meant the filing of the request for arbitration, and that, therefore, the application was out of time.* He further said that the payment by the respondents to the appellant each week up to the 6th of September, 1899, of the exact sum to which the appellant was entitled under the Act, and the commencing of such payments at the time required by the Act, were calculated to make the appellant believe that he was receiving these payments by virtue of the Act and to lull him into a state of false security; but, on the other hand, the appellant should have known his rights under the Act, and if he thought that he had arrived at an arrangement with the respondents, he should have got them to enter into a memorandum of agreement embodying the terms of the arrangement, and registered the memorandum. He did not think that the respondents were precluded from raising any defence they might have on account of the lateness of the appellant's claim. He did not think that the respondent's conduct could dispense with the requirements of the statute, the language of section 2, sub-section 1, being peremptory, that proceedings "shall not be maintainable" unless the claim for compensation were made within six months. He accordingly held that the appellant was not entitled to compensation, and made an award in favour of the respondents.

*Disturnal*, for the appellant.—The respondents by their conduct have waived the requirement of the Act as to making the claim for compensation within

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

* Since the hearing before the deputy county court judge the Court of Appeal decided in *Powell* v. *Main Colliery Co.*, *post*, p. 534, that "the claim for compensation," which was required by section 2, sub-section 1, to be made within six months after the accident, meant the filing of the request for arbitration. The decision of the deputy county court judge upon that point was, therefore, not sought to be ...ed.

maintainable unless notice of the accident has been given as soon as practicable after the happening thereof." Then they change the phraseology altogether as used in section 4 of the Act of 1880; they do not say, "unless notice of claim for compensation be given," but what they say is, "and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident." What is the "claim for compensation"? Does it mean a notice by the workman to the master that he claims compensation, or does it mean the initiation of some proceeding which will give to some tribunal the power of deciding under the Act whether he has a right to obtain compensation from the master? Now, there are difficulties in this Act, as one cannot deny. Take section 1, sub-section 3. I should say that the expression "proceedings" in that section does not mean the initiation of legal proceedings in a court. Take section 1, sub-section 2 (*b*), where you have the expression "and shall not be liable to any proceedings independently of this Act." I think that that means the same as "proceedings" means in section 2, sub-section 1—viz., the initiation of proceedings, whether before the committee, the county court judge, or before the arbitrator who is agreed upon between the parties.

Now, it has been argued that that is not so. It was said: How does a workman commence proceedings which will culminate in an adjudication? I do not see any difficulty myself. The man would go to the committee which represents himself and his master and say, "I have met with an accident in my master's pit, and I ask you to adjudicate between my master and me. Please take up the proceeding and adjudicate thereon." That would be, in my judgment, a claim for compensation. The same thing would happen, in my opinion, with regard to an arbitrator. He might try and appoint an arbitrator, or if an arbitrator was not appointed, he could say, "This is my claim which is to be arbitrated upon between me and my master."

In this case the workman met with an accident on the 21st of December, 1898; on the 2nd of May, 1899, he sent these two notices to the master: "Please take notice that on the 21st of December, 1898, William Powell, of Mount Pleasant," and so on, "was injured," and so on, dated the 2nd of December, signed William Powell. This notice is in print, and evidently is sent out on behalf of the man by some union or agency. Then on the same day the following notice is also sent: "Take notice that I claim the sum of 15s. per week from the 4th of January, 1899, until such date as I shall be able to resume work, as compensation for injuries received on the 21st of December." Now, I should have thought *primâ facie*, and I did think *primâ facie* at one time, that that was a good claim for compensation within the meaning of section 2, sub-section 1, but having heard this case argued, I have come to the conclusion that it is not so. "Proceedings" in section 1, sub-section 3, may mean something different to what I am going to say: but when I come to sub-section 2 of section 1, I think the meaning of the word "proceedings" and "claim for compensation" can be discovered. Take section 1, sub-section 4, where we find the words, "if within the time hereinafter in this Act limited for taking proceedings." What is the meaning there of the expression "taking proceedings"? Does it mean the sending of a notice to the master that he, the workman, is going to claim compensation? I do not think so. I think it means the initiative proceedings in the court which would culminate in a judgment or in an award. Then what is the meaning of the words in section 2, sub-section 1, "unless the claim for compensation with respect to such accident has been made within six months"? What is the "claim for compensation"? My view is that it is the claim before the court or tribunal which is to decide it.

Now, I wish to point out for myself what would be the position if the other reading is correct. I say that the master is entitled to six months; I mean he is entitled to immunity after six months after the date of the accident. If a man makes a claim, as in this present case—viz., "I claim compensation," and he does not go on, but lets it hang, it may be, for twelve months or fifteen months or twenty months, what is a master to do? It is said "Oh, he can initiate proceedings for himself." I do not agree with that. This Act was passed for the purpose of giving workmen a claim against their masters, although one or two precautions are put in in favour of the master, such as the six months' limit. It is said that all the rules can be altered, but I think it must be admitted that every rule which has been drawn for the purpose of carrying out this Act has only application to the workman taking proceedings and not to the master taking proceedings. It is said that they could all be altered, and they could all be made to fit in with the master taking proceedings against the man. I do not agree; but what I will say is this: That if this Act was drawn with the view that the master should take proceedings against the man so as to prevent a claim (as in the present case) hanging over the master's head, it is strange that the Legislature did not put some explicit provision into the Act; whereas if the claim for compensation be what I say it is—viz., the initiation of the proceedings before the assessing tribunal, if the workman did not go on, the master could compel him to proceed.

Form 1 in the Appendix to the Workmen's Compensation Rules, 1898, is headed thus: "Application for arbitration by an injured workman with respect to the compensation payable to him." That is the heading of the matter. "In the county court of ——." Then they give the name and address of the applicant and the name and address of the respondent. Then "An arbitration under the Workmen's Compensation Act, 1897, is hereby requested between A. B." (the applicant) ". . . and C. D. & Co. (Limited)" (the respondents) ". . . as to the amount of compensation payable to the said A. B. . . . under the said Act in respect of personal injury caused to the said A. B. . . ." It then goes on and says, "Amount claimed as compensation. Date of service of statutory notice of accident on respondents, and whether given before workman voluntarily left the employment in which he was injured." Then the name and address of the applicant (the man), and the name and address of the respondent (the master), and their respective solicitors. If a claim for compensation other than this document was contemplated by the statute, is it not a remarkable thing that there should not have been put into these particulars the date when the claim for compensation was lodged or served on the defendant? But there is not a word said about the service of the notice of the claim, or the giving of a notice of a claim upon the master. It is left out. Why is that? It seems to me that that was left out simply because this form, which I have just read, is the very form of the claim for compensation which the statute contemplated the workman should have to give. For these reasons I come to the conclusion that this document which was served on the master is not a "claim for compensation" within section 2, sub-section 1. Seeing that a claim for compensation as in this case has been held to be bad by two of the judges

in Scotland, although the other two apparently came to a different conclusion, and it has been equally held to be bad in Ireland, I think myself, without in any way being bound by those decisions, that those learned judges came to the right conclusion, and that therefore the workman in this case was not in time. So far as I am concerned the appeal must therefore be allowed.

COLLINS, L.J.—I am of the same opinion. My lord has gone so fully through the grounds upon which he rests his view that I propose to add only a few words. I agree with him that we are entitled to look at the state of legislation at the time when this Act was passed. We find there that it was the policy of the Legislature to impose a limit of six months upon the bringing of these actions, and we find the two conditions which were imposed in the Employers' Liability Act, 1880, reproduced with very slight differences in the Act now under discussion.

I do not think it is possible to give any clear and satisfactory interpretation which will be perfectly consistent with all the provisions of this Act. I have long since come to the conclusion that that is impossible, and therefore I have to make the best guess that I can of what the Legislature must be taken to have meant in the particular sections that we are dealing with, and I think that we have one clear indication contained in sub-section 4 of section 1, and in sub-section 1 of section 2. I think there is a clear indication that the Legislature intended to impose a limit of six months upon the commencement of legal proceedings under this Act. In section 1, sub-section 4, are these words: "If, within the time hereinafter in this Act limited for taking proceedings, an action is brought." Then we look down to see what is the time thereinafter limited for taking proceedings, and we find that the only words that can be referred to are in section 2, sub-section 1, "the claim for compensation with respect to such accident has been made within six months." Those are the words under which the time limit is given. Then what does the Legislature do? It says that if an action is brought, whether at common law or under the Employers' Liability Act, and it is determined in such action that the injury is one for which the employer is not liable in such action, the applicant shall have a right to a remedy under the Workmen's Compensation Act, but only if the action is brought within the time limited in the Workmen's Compensation Act—that is, within six months. Why is that limit imposed in that section, if, under the Workmen's Compensation Act, it is possible to bring an action and to take legal proceedings at any time? If that contention be right, what is the meaning of the Legislature in providing in section 1, sub-section 4, that a workman, who has brought an action otherwise, may claim the benefit "of the Workmen's Compensation Act, but only if the action has been brought within six months." Is not that a clear indication that the legal proceedings shall not be brought after six months after the accident? It seems to me that that is absolutely clear as the intention of the Legislature. It may be that there are other provisions which it is difficult to square with that intention; but I think that is a clear indication of intention which we are justified in following. But it is argued if that is so the word "proceedings" there means "judicial proceedings." I think that is what the word means in that sub-section. But I do not think it is necessary to limit throughout the Act the word "proceedings" to proceedings in a court of law. The meaning which I put upon that word is that there must be proceedings which put in suit the right of the claimant, and which introduce the jurisdiction of that tribunal whose function it is to decide the matter between the parties, to put compulsion upon them; and it does not merely mean anything which indicates an intention on the part of the claimant at some time or other to invoke the jurisdiction of the tribunal. It must itself be the invocation of the jurisdiction of the tribunal. The claim in the case before us is not an initiation of proceedings. It is merely a threat that in certain events legal proceedings will be taken. It does not appear to me to be that step which constitutes the initiation of the proceedings, and therefore is not, in my opinion, a "claim for compensation" within section 2, sub-section 1.

Now, that really is the sheet anchor upon which my decision rests. I agree with what my lord said, that if you look through the forms, they certainly *primâ facie* are not intended to give the master any right of initiating proceedings at all. If that be so, if the respondent's argument is right, there would be this extraordinary position of affairs, that a master having had this notice served upon him, which does not initiate proceedings, is bound to wait, I do not know how long, with the risk of proceedings being taken against him and with no means of ascertaining finally whether they are going to be taken against him or not. Well, that anomaly has been met very ingeniously by Mr. Evans, who has pointed out words in the different forms which, I do not deny, may by a considerable amount of ingenuity, and I think by some strain upon one's imagination, be made to cover the case of a master initiating proceedings. But I do not think that anyone can look fairly and frankly, uninstructed by the ingenuity of Mr. S. T. Evans, at these rules and come to any other conclusion than that they were designed to do what they purport to do—namely, to deal with applications by the applicant—that is, the workman, and not applications by the master, except in one given case, where the statute itself contemplates either side invoking the jurisdiction of the county court. I am fortified in this conclusion by the decision of the court in Scotland and the decision of the Court of Appeal in Ireland.

ROMER, L.J.—I regret very much that in this case I feel bound to differ from my brethren, especially as I find I also differ from certain learned judges in both Scotland and Ireland on the point, but as I do take a clear view with regard to the construction of this Act I think it is my duty to express that view.

Now, the only section of the Act which really in precise terms puts any time limit to proceedings of any kind is section 2. Section 1, sub-section 4, may be referred to as casting a light upon section 2, but section 2, sub-section 1, in itself must be the section to which you have to refer to find what time limit has been imposed upon proceedings. Section 2, sub-section 1, in itself only says that before proceedings for the recovery under this Act of compensation for an injury can be maintained, apart from the notice of the accident having to be given, a claim for compensation with respect to such accident must have been made within six months from the occurrence of the accident causing the injury. Those words, I should have thought, are reasonably clear in themselves. I agree that they mean a specific claim for compensation made specifically under the Act, but I fail to see why, by mere implication and, as I hope to show, not a necessary implication, one should depart from what appears to me to be really the plain words of the Act. The words of sub-section 1 of section 2 are "unless the claim for

compensation . . . has been made within six months"; it does not say "unless proceedings have been taken for arbitration"; it does not necessitate that application should have been made to the special committee referred to in the second schedule to the Act, still less does it refer to any application made to the county court judge as arbitrator. It appears to me that we ought not to enlarge this Act of Parliament unnecessarily. I think what the Act contemplated was that there should be something done within the six months which would place the workman in the position of one who was intending to claim under the Act, and I think section 2 refers to what had been provided in section 1, sub-section 2 (*b*), by which it is enacted that where the injury had been caused by the personal negligence or wilful default of the employer, the workman may at his option either claim compensation under this Act or take the same proceedings as were open to him before the passing of this Act—that is to say, it appears to me that the policy of this Act was that the workman should, within six months, definitely make up his mind whether or not he is going to claim compensation under this Act. If within six months he has made his claim, it seems to me that he has done all that was required of him under section 2, sub-section 1.

Let me give an illustration so as to show what I mean, if I have not already made my meaning clear. Suppose a workman within six months of an accident serves on his employer this notice: "I hereby claim under the Workmen's Compensation Act, 1897, the following compensation for my injury," giving the particulars of the compensation claimed, and of the injury, so that it is perfectly clear beyond question that it is a claim made for compensation under this Act. Why is that not to be regarded as a claim for compensation within section 2, sub-section 1? I fail to see it. It is to be borne in mind that before you can go to the arbitration at all, either before the special committee or before any other arbitrator there, must be a difference which has arisen between the parties. How can there be a difference which will entitle either party to go to the committee or to the arbitrator unless a claim has been made which is challenged. Then and only then does a difference arise.

The claim for compensation, then, is really the essence of the proceedings by the workman, and it is, as I think I can show from other parts of this Act, contemplated as a proceeding in itself, and, as I am pointing out, it is the most important proceeding, for when the claim is made, unless there is a dispute, the master may accede to it, and the matter is at an end. Suppose a claim has been made under the Act by a workman within the six months, and the master is not certain whether or not he will accede to the terms, and negotiations ensue till the six months have expired, and then it turns out that they cannot agree, and the dispute thus arises, it must then be said against the workman, according to the opposite view, that he is debarred from his remedy. He has made his claim for compensation; he could not have gone, as I wish to point out, to arbitration before, because until his claim had been refused, there was no question in dispute. Of course, if the master was shilly-shallying, the workman could then, I have no doubt, treat that as a refusal to comply with his demand for compensation, and so could say a question had arisen within the meaning of the Act.

Now, I think great light is thrown upon this question by section 1, sub-section 3, which says: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this Act, be settled by arbitration, in accordance with the second schedule to this Act." That is to say, and it is important, that before you go to arbitration proceedings under the Act must have arisen. So that in this Act "proceedings" contemplate something done before arbitration. What are those proceedings? They can only mean the claim for compensation and the master's refusal to comply with it. So that in the purview of this Act the claim for compensation is a proceeding under the Act, and so it is, as I have pointed out, the most important proceeding that can be taken.

That sub-section also casts light upon what is meant by sub-section 4. It is really owing to the curious wording of sub-section 4 that, to my mind, the whole difficulty in this case arises, but I think that that difficulty is got rid of when you bear in mind what has been said in sub-section 3, as well as the word "proceedings," which, as I have pointed out, includes something done before you go to arbitration. Now you come to sub-section 4, and a light is cast upon it. Now sub-section 4 says: "If within the time hereinafter in this Act limited for taking proceedings." In other words, for the purposes of that sub-section, as well as for the purposes of sub-section 3, "proceedings" includes the claim for compensation, and under section 2, sub-section 1, proceedings must be taken within six months from the date of the injury.

That, to my mind, makes the whole Act plain and intelligible, and I do not see any reason, either in the Act itself or in principle, why the plain words of this Act should be enlarged. Now, certain forms and rules of the county court have been referred to. I do not propose to go through them. It is sufficient for me to say that in my opinion there is nothing in them which in any way would justify the court in coming to the conclusion that "the claim for compensation" means anything more than what, in my opinion, those words plainly mean.

It was suggested by Collins, L.J., that if my view be correct a difficulty would arise under section 1, sub-section 4, because it was said that a workman might make a claim for compensation within the six months and then bring an action at common law after the six months, and then, if he failed in that common law action, might proceed with his claim under the Act. But in the first place I may observe that if a workman made a claim under the Workmen's Compensation Act and then after the six months brought a common law action, I cannot help thinking he would waive his claim, bearing in mind the provisions in section 1, sub-section 2 (*b*), as to the obligation cast upon the workman to elect. But even if I were wrong in that view, and the workman is not bound to elect and did not waive his notice by such a common law action, I may point out that the very same difficulty suggested by Collins, L.J., would arise, because if the construction contended for on the opposite view were correct—namely, that some legal proceedings must have been initiated before the special committee or the county court judge—the workman might just initiate those proceedings within the six months and commence his common law action afterwards.

There is, I agree, a more difficult point. It was contended that if the words "the claim for compensation" meant simply the notice of claim served on the master, the master might thereby be kept dangling on for a period of six years, and would

not be able to force his workman to proceed with his claim. If that contention were correct I agree it would be a formidable argument against the view I am taking. In my opinion it is not correct. If the workman once makes a claim for compensation and the master contends that he is not entitled to what he claims, what is to be done? I think that the word "proceedings" in section 1, sub-section 3, means the claim made for compensation and its refusal. In the case I have supposed why has not a question arisen in proceedings under this Act. The workman has made his claim and the master disputes it. A question has then arisen, and the Act says that question shall be settled by arbitration. What is there to prevent in such a case the master at once taking the dispute that has arisen to the special committee? Nothing that I can see. If the special committee cannot deal with the question, why should it not then go before the learned county court judge? There is nothing that I can see—nothing either in the Act of Parliament or in the rules. The only thing which can be suggested as showing that he cannot do so is the forms in the appendix to the rules. But forms are mere machinery. If the right to go is clear by Act of Parliament (and in my opinion it is) a form cannot prevent the party going to the tribunal pointed out by the Act. But no difficulty, to my mind, arises on the forms. The forms deal only with the most likely cases to arise, they are not intended to meet extraordinary cases. Now, would it not be an extraordinary case to suppose that when a workman had made a claim for compensation and the master refused to agree to it that the workman should stand by for six years and not proceed. It would be a most extraordinary case. Is it to be wondered at that no form specially dealing with such a case has been made? The objection that the master cannot compel the workman to go on in such a case is theoretical, but assuming the theory, it can be met by a theory—and a good theory too—that the master can force the workman to go on with his claim in such an extraordinary case. That there is no form specially made to meet an extraordinary case need not be wondered at. If there had been no such rule in the Workmen's Compensation Rules, 1898, as rule 67, I should still have said the forms are only machinery, and the absence of a special form makes no answer to the right of the master to demand arbitration, when, as I have pointed out, the Act of Parliament has clearly given him the right to demand it. But I do find that n rule 67 this is said: "The forms in the appendix, where applicable, and where they are not applicable orms of the like character, with such variations as he circumstances may require, may be used in proceedings under the Act." The master has only to ake a form adapted to his special case and in my pinion he is entitled to demand arbitration under he circumstances I have indicated, and to compel he county court judge, if there is no special committee, to arbitrate upon the question. Therefore in y opinion this objection taken to the view I have dicated is based on an entirely wrong ground. or these reasons it appears to me that we ought to ep to what I have already said was the clear eaning of the Act. We have no right to extend it implication; and, moreover, I think that doing so ould be to create great difficulties in the way of th master and workman, and would cause great rdships. I cannot think that the conclusion at ich my brethren have arrived is, for the reasons I ve given, the right conclusion. In my opinion the trary ought to have been held, although I agree point is one of some difficulty, and I have differed h great reluctance.

*Appeal allowed.*

Solicitor for the appellants, *H. P. Becher*, for *Vazie Simons*, Pontypridd.

Solicitors for the respondent, *Sharpe, Parker, & Co.*, for *Cuthbertson & Powell*, Neath.

---

## High Court of Justice.

Chan. Div. } Stirling, J. } April 27; May 24.

AINSWORTH v. WILDING. (a.)

*Practice—Discovery—Privilege—Solicitor's correspondence and bill of costs—Note by solicitor of order in judge's chambers—R. S. C., ord.* 31, *r.* 18 (2).

*A statement in a letter from a solicitor to his client reporting proceedings in chambers, and communicated for the purpose of obtaining information or instructions from the client necessary for the conduct of the action, is privileged as a professional confidential communication. But those parts of a bill of costs which consist merely of memoranda or notes of proceedings in chambers recorded by a solicitor are not so privileged.*

Semble, *there is no valid distinction between notes of proceedings in open court and of those in chambers.*

Greenough *v.* Gaskell, 1 *My. & K.* 98, at pp. 102-104, *and* In re Worswick, 36 *W. R.* 685, 38 *Ch. D.* 370, at p. 373, *followed.*

This was a summons raising a question as to whether certain documents were privileged communications or not, in an action commenced in August, 1890, by T. Ainsworth (since deceased) against Wilding, Smith, and others for an account of what was due on a deed of charge dated the 7th of October, 1877.

In 1878 an action had been brought by Smith (since deceased) against J. & R. Wilding for an account of what was due on the same charge; on the 28th of March, 1878, an order was made that the deed of the 7th of October, 1877, should stand as a security for what was due at that date from Smith to the defendants the Wildings on the balance of account of the dealings and transactions between them, with interest. An account was brought in under the order and was disputed on behalf of Smith by the late plaintiff Ainsworth, then his solicitor.

On the 29th of July, 1879, after Ainsworth had taken his second mortgage, Smith changed his solicitor, and on the 4th of August, there was a settlement of accounts to which Ainsworth was not a party, and which his legal personal representatives, the present plaintiffs, submitted was not binding on him, or if binding, ought to be opened; they said a large sum was charged to Smith for costs which had never been taxed or agreed, and moneys received by the Wildings from mortgagees which ought to have been credited in the account were omitted therefrom, and Smith was charged with moneys not advanced by the Wildings, but by mortgagees, some of whom have since taken possession of the mortgaged property; to this the defendants replied that no suggestion to take the accounts upon the principle of a current account had been made until November, 1894, and that the plaintiffs had throughout been well aware that the defendants had, since the 7th of October,

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

1877, claimed to be ordinary mortgagees under the deed of that date; further, that the plaintiffs had by their conduct and acquiescence left the defendant in the belief that the plaintiffs were bound by the proceedings in *Smith* v. *Wilding* and the settlement of accounts. In their reply the plaintiffs further said that the question as to the account being continued as a current account was raised in chambers in 1878 and an order made as to the same, to which the defendants in their rejoinder now replied that even if that was so (which they denied) it was not in the presence of the Wildings or either of them. There was now, therefore, an issue as to what took place in chambers as to the principle on which the accounts were taken.

On the 21st of December, 1899, the plaintiffs obtained an order directing the defendant to make a further and better affidavit of documents more clearly identifying certain correspondence and disclosing (*inter alia*) certain bills of costs in *Smith* v. *Wilding*.

The defendant objected to produce (1) the correspondence, on the ground that it was made solely for the purpose of enabling the solicitors for the defendants in *Smith* v. *Wilding* to conduct that action; and (2) the bills of costs or certain parts of them, on the ground that they were "copies of or extracts from memoranda or notes made by the defendants' solicitors pending the action of *Smith* v. *Wilding* solely for the purpose of enabling them to conduct the litigation and to advise with reference thereto."

By their present summons the plaintiffs asked for discovery of such parts of the correspondence and bills of costs as did not consist of legal professional confidential advice, but merely of statements of facts as to the proceedings in *Smith* v. *Wilding*.

*Upjohn, Q.C.* (*O. L. Clare* with him), for the plaintiffs.—In order to secure privilege from production for a document passing between solicitor and client it must not only pass between solicitor and client as such, but it must be a communication of a confidential character passing for the purpose of obtaining or giving professional legal advice; if counsel's endorsement of an order or a shorthand writer's report is *publici juris*, why not a solicitor's notes of an order made in chambers: *Gardner* v. *Irvine*, 27 W. R. 442, 4 Ex. D. 49, at p. 53; *O'Shea* v. *Wood*, [1891] P. 286, 39 W. R. Dig. 184; *Nicholl* v. *Jones*, 13 W. R. 451, 2 Hem. & M. 588; *Goldstone* v. *Williams, Deacon, & Co.*, 47 W. R. 91, [1899] 1 Ch. 47, at p. 51; *Chant* v. *Brown*, 9 Hare, 790; *Burton* v. *Dodd*, 35 SOLICITORS' JOURNAL 39; *Turton* v. *Barber*, 22 W. R. 438, L. R. 17 Eq. 329; *In re Worswick*, 36 W. R. 685, 38 Ch. D. 370, at p. 373; *Nordon* v. *Defries*, 30 W. R. 612, 8 Q. B. D. 508; Annual Practice (1900), vol. 1, p. 414.

*Butcher, Q.C.* (*Austen Cartmell* with him).—There is privilege once the legal relation is established; and when there is a professional confidential communication the mere fact of its being sent by the solicitor to the client does not destroy the privilege (Bray on Discovery, pp. 372, 391; *Minet* v. *Morgan*, 19 W. R. 374, L. R. 11, Eq. 284; even assuming it is not privileged as a whole, the memorandum of proceedings in chambers which happened to get into a bill of costs is privileged in portions, for it is a note of the general impression of what occurred as recorded by the intelligence of the solicitor for the purposes of his litigation, and so is different from a shorthand note, which is a more accurate record; while a counsel's notes of judgment should be taken as part of his professional duties (*Ex parte Skerratt*, 28 SOLICITORS' JOURNAL 376, Annual Practice (1900), vol. 2, p. 340) and might be disclosed, there is no decision that they ought to be disclosed; there is no authority that chambers are like open court in this respect.

*Cur. adv. vult.*

STIRLING, J., said: This application is based on the proposition that mere records of what takes place in chambers in the course of a hostile action in the presence of parties on both sides are not privileged. It has been held that a shorthand writer's notes of what takes place in open court are not privileged: *Nicholl* v. *Jones* and *In re Worswick*. The same thing has been held as to the shorthand writer's notes of proceedings before an arbitrator: *Rawsons* v. *Preston Corporation*, 33 W. R. 795, 30 Ch. D. 116. In *In re Worswick* North, J., says: "A mere verbatim report of the evidence, whether by the solicitor's clerk, the solicitor, or counsel, would not, in my opinion, be privileged." With that I agree. I am unable to see that for this purpose any valid distinction can be drawn between proceedings in open court and proceedings in chambers. It is therefore sought to obtain production (1) of correspondence between the solicitor and the client; and (2) entries in the solicitor's bills of costs. Somewhat different considerations apply to the two classes of documents. The foundation of the privilege is stated by Lord Brougham, C., in *Greenough* v. *Gaskell*, 1 My. & K. 98, at p. 103, and by Cotton, L.J., in *Southwark and Vauxhall Water Co.* v. *Quick*, 26 W. R. 341, 3 Q. B. D. 315, at p. 321. Now, the letters of which production is sought are sworn to be "professional communications of a confidential character . . . having been made solely for the purpose of enabling my solicitor to conduct the said litigation in *Smith* v. *Wilding* on behalf of my co-defendants and myself." It is said that a letter or a statement in a letter as to what had been done in chambers is not privileged. I am unable to see why. It may well have been, and I should infer from the affidavit that the communication was made for the purpose of obtaining information or instructions from the client necessary for the conduct of the action. If I were to hold that such letters or statements were not privileged, it seems to me that I should be imposing on the free communication with his solicitor, to which the client is entitled, a fetter hitherto unrecognized in any authority. It seems to me contrary to principle that I should do so. I see no reason to doubt the statements in the affidavit, and I think that this portion of the summons must be refused.

I now come to the entries in the bill of costs. As a general rule a bill of costs relating to litigation, actual or contemplated, is privileged: *Chant* v. *Brown* and *Turton* v. *Barber*. No objection is, however, raised to the production of the bill as a whole; the bill has been produced, but certain entries in it are sealed up, and privilege is claimed in respect of these entries on the following ground: "That the same are copies or extracts from, &c." (see above) or are not relevant to this action. [His lordship again referred to *Greenough* v. *Gaskell*, 1 My. & K., pp. 102, 104.] There has been some discussion as to whether in the first passage the law has not been stated somewhat too widely. I am not concerned to inquire into that: the important point for the present purpose is that memoranda made by the solicitor are placed on the same footing as communications; they are only privileged where communications would be: *Lyell* v. *Kennedy*, 31 W. R. 691, 23 Ch. D. 387. It is to be observed that the memoranda or notes are not in the affidavit sworn to be confidential. It is quite consistent with the affidavit that they may be of the character described by Lord Brougham in the second passage (p. 104), as, for example, if they contained a simple note by the solicitor or his clerk of the proceedings at

chambers on the occasions as to which discovery is sought. In my opinion the privilege is not effectually claimed by affidavit. [His lordship, having looked at certain of the entries, said that, while portions were clearly protected, too much had been covered up, and suggested that the defendant's counsel would have no difficulty in examining the documents and in seeing what should be disclosed.]

Solicitors, *Bower, Cotton, & Bower; Robbins, Billing, & Co.*

---

Chan. Div. } April 24, 25; May 18.
Stirling, J. }

*In re* THE TRUSTS OF THE ABBOTT FUND.
SMITH *v.* ABBOTT. (*a.*)

*Trustee—Resulting trust—Fund raised by means of circular inviting subscriptions—Death of objects of the fund—Unapplied surplus—Resulting trust for subscribers.*

*Where funds are raised by circulars inviting subscriptions, and there is no declaration of trust, on the death of the objects of the fund there is a resulting trust for the subscribers.*

Originating summons.

Frederica Abbott and Katherine Abbott were the daughters of Mr. Alexander Scott Abbott, who died in 1844.

In 1889 and 1890, Dr. Fawcett, of Cambridge, shortly before his death, collected for the benefit of these ladies, who were in destitute circumstances, the sum of £248 10s. 6d., and placed it at the bank of John Mortlock & Co., to an account called the Abbott Fund. Dr. Fawcett died in 1890, and at that time no part of the fund had been withdrawn from the bank.

After his death the matter was taken up by Mr. James Hamblin Smith, who sent round a circular to various friends of the family detailing the circumstances, and stating that the sum collected by Dr. Fawcett was quite insufficient to secure for the ladies a permanent means of support, and expressing his desire to raise by annual subscriptions, supplemented from the Abbott Fund year by year, an amount which would enable the ladies to continue to reside in lodgings in Cambridge.

After the issue of this circular, the Abbott Fund was transferred by the executors of Dr. Fawcett to Mr. Hamblin Smith and a Mr. Gross, who was a friend of the Abbott family, as treasurers of the additional fund which it was proposed to raise.

From 1891 to 1899 considerable sums were received in response to the circular, and quarterly payments were made to the ladies.

They both died in 1899, the one in April, and the survivor in June of that year, and there was now standing at the bank to the credit of the fund the sum of £366 13s. 9d., the title to which was now in question.

The questions raised by the summons taken out by the plaintiffs, the trustees of the Abbott Funds, were: Whether the subscribers to the Abbott Funds collected for the benefit of Frederica Abbott and Katherine Abbott were, in the events which had happened, entitled to the unapplied balance of the funds, or whether Frederick Charles Abbott was entitled to the unapplied balance as the legal personal representative of Frederica Abbott and Katherine Abbott.

*G. Henderson*, for the plaintiffs.

*Brinton*, for the subscribers.

*Peterson*, for the representatives of the ladies.

STIRLING, J., said that the difficulty arose from the fact that there was no declaration of trust. The case was one which not infrequently happened. The question was whether so much of the fund as remained unapplied belonged to the estates of the deceased ladies, or whether it was subject to a resulting trust for the subscribers. I cannot believe that the fund was ever meant to be the absolute property of the ladies. It was not intended that they should be in a position to demand a transfer of it to themselves, but that it should be administered by the trustees for their benefit. They never became absolute owners of the fund. They had a right in the fund, because it was obviously intended for their benefit, and if the trustees had not done their duty the ladies might have successfully applied to the court to have the fund properly administered. In the view I take there is a resulting trust of the surplus of the fund for the subscribers.

Solicitors, *Cole & Jackson*, for *Eaden & Spearing*, Cambridge; *Field, Roscoe, & Co.*, for *Ginn & Mathew*, Cambridge; *Abbott & Hudson.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

---

Chan. Div. } April 26.
Kekewich, J. }

*In re* CLEMOW.
YEO *v.* CLEMOW. (*a.*)

*Will—Testamentary expenses—Administration expenses—Costs of probate action—Estate duty.*

*The expression "testamentary expenses" includes estate duty.*

*A testator, after giving the income of his residue to his wife for life, directed his executors, after his widow's death, out of the residue to pay "my widow's funeral and testamentary expenses and debts." The testator's wife survived him, and died leaving what purported to be a will. B., one of the two next-of-kin of the widow, brought an action in the Probate Division for a grant of letters of administration of the widow's estate to him. The judge pronounced against the will, but made no order as to costs. Letters of administration were subsequently granted to Y., the other next-of-kin of the widow, with the assent of B. The widow's estate consisted entirely of personalty. Upon summons to determine what costs and expenses ought to be allowed out of the testator's estate as testamentary expenses of the widow,*

*Held, that costs and expenses properly incurred in the administration of the estate of the intestate widow were within the meaning of the term "testamentary expenses," and that there must be allowed as such testamentary expenses the costs of B. of the probate action and also the estate duty payable on the death of the widow.*

Robert Clemow, who died on the 15th of October, 1894, by his will dated the 11th of February, 1893, appointed his wife, Gertrude Clemow, and H. W. Clemow and Mary Yeo, his executors and trustees, and after giving certain legacies gave the residue of his real and personal estate to his trustees upon trust for sale and conversion and to pay the income of the proceeds to his wife during her life for her sole and separate use. And from and after her decease the testator directed his executors and trustees with and out of the residue, "after paying my widow's funeral and testamentary expenses and debts," to appro-

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

priate and pay certain sums as therein directed. The testator gave his residue to the persons in his will named.

Gertrude Clemow survived the testator and died in March, 1899, leaving what purported to be a will under which she appointed H. W. Clemow executor.

Mary Yeo and T. A. Buck, the widow's only two next-of-kin, entered a *caveat* against probate of her will, and T. A. Buck eventually brought an action in the Probate Division to have a grant of letters of administration of her estate made to him, and he obtained a decree against the will but no order was made as to costs.

In December, 1899, letters of administration to the widow's estate were granted to Mary Yeo with the assent of Buck.

The executors of the testator's will paid the funeral expenses and debts of the widow.

This was a summons taken out by Mary Yeo as administratrix of the widow, to which H. W. Clemow (co-executor with herself of the testator's will) and the residuary legatees of the testator were made defendants, to determine whether the executors of the testator were bound or entitled to pay as "testamentary expenses" of the widow (*a*) the costs of Buck of the action in the Probate Division; (*b*) all costs properly incurred by Mary Yeo in obtaining the grant of letters of administration to the widow's estate; (*c*) the estate duty payable on the death of the widow; and (*d*) the costs, charges, and expenses of, and in connection with, the administration of the widow's estate.

The widow's estate consisted of personal property only.

*Renshaw, Q.C.*, and *Manby*, for the plaintiff, Mary Yeo.—Expenses incurred in the administration of the estate of an intestate are "testamentary expenses": *Sharp* v. *Lush*, 27 W. R. 528, 10 Ch. D. 468. Buck's costs of the probate action and the expenses of taking out letters of administration are testamentary expenses: *In re Price, Williams* v. *Jenkins*, 34 W. R. 291, 31 Ch. D. 485; *In re Pearce, McLean* v. *Smith*, 35 W. R. 358; *In re Shaw, Bridges* v. *Shaw*, 43 W. R. 159, [1894] 3 Ch. 615. Estate duty takes the place of probate duty; it is a testamentary expense: Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6 (2), 8 (1); Customs and Inland Revenue Act (44 & 45 Vict. c. 12) s. 30.

*Warrington, Q.C.*, and *W. M. Cann*, for the residuary legatees.—There cannot be testamentary expenses where there is no testament. But if there can, Buck's costs of the probate action are not payable as such, for the administratrix is not liable for them. Besides, the judge in the probate action made no order as to costs: *In re Prince, Godwin* v. *Prince*, 47 W. R. 25, [1898] 2 Ch. 225. Estate duty is not a testamentary expense.

They also referred to *Sharp* v. *Lush*.

*R. J. Parker* and *A. M. White*, for the testator's executor.

KEKEWICH, J.—There fall for decision here some curious and novel varieties of a question in itself not novel. What is the meaning of the expression "testamentary expenses"? The novelty consists in the strange peculiarity that this direction for the payment of testamentary expenses is not one for the payment of testamentary expenses of the testator himself, but of someone else—namely, his wife. The first point taken is that testamentary expenses can have no application here, for there are none, as the lady died, according to the decree of the Probate Court, intestate, and that there cannot be testamentary expenses where there is no testament. That is a strong thing to say, though etymologically there is justification for it. I will first decide that point. There are two grounds of argument against it. First, on the construction of the will, the testator contemplates that his executors are to pay not only funeral and testamentary expenses, but also debts, and that what is to be distributed is what may be left after clearing his wife's estate. He contemplates that it might be necessary to expend all his estate in order to clear hers, but hers is to be cleared out of his before his is distributed. Now, it seems to me absurd to say that he intended his wife's funeral and testamentary expenses and debts to be paid if she died leaving a will and only her funeral expenses and debts if she died leaving no will. Of course I am importing, and I think I must consider the testator to have imported, into "testamentary expenses" that meaning which has been attributed to them by judicial decision. Sir G. Jessel says in *Sharp* v. *Lush*: "I cannot distinguish between executorship expenses and testamentary expenses. As I understand the words executorship expenses are expenses incidental to the proper performance of the duty of the executor in the same way as testamentary expenses are." But then I am asked to say that if there is only an administrator there can be no testamentary expenses. That is a strained and unnatural construction which I do not think I ought to adopt if I can possibly construe testamentary expenses otherwise, and I think I can independently of the words of the will itself on general grounds. In the first place the term testamentary expenses has received a full explanation in several cases, to two of which I will refer—*Sharp* v. *Lush*, before Sir G. Jessel, and *In re Prince, Godwin* v. *Prince*, before Stirling, J., who obviously had before him, and adopted, Sir G. Jessel's judgment. Now, the meaning of testamentary expenses as expounded there goes beyond expenses connected with the will. No doubt in the beginning, as I have already pointed out, Sir George Jessel says "expenses incidental to the proper performance of the duty of the executor"; but he goes on almost immediately afterwards to talk of "administration costs," and I do not think that one ought to consider he meant simply administration costs where the administration is at the suit of or against the executor, and not at the suit of or against the administrator. It is only in the particular case of there being no will that this question can arise, for a direction to pay testamentary expenses cannot require to be construed where there is a will, not even if the executor renounces, and there is administration given *cum testamento annexo*. It is still *cum testamento annexo*, and you are dealing with administration expenses incidental to a will notwithstanding there is only a grant of administration. The question can only arise in a case of this kind, and therefore of course it was not considered by Sir G. Jessel in the case before him, although he talks of administration in general terms. Reading the judgment through, I cannot see myself that if Sir G. Jessel had been asked, "Do you limit that to the case of an executor?" he would have said otherwise than that he would decide the case as it might arise. But I have authority, as I pointed out during the argument, the authority of a dictionary of some weight, as to the meaning of "testamentary." The Century Dictionary puts as the first meaning of testamentary "relating or pertaining to a will or wills; also relating to the administration of the estates of deceased persons," and it quotes a passage from Blackstone. The word has ceased to have its purely etymological meaning. The existence of a testament does not seem to me now to be essential to the proper use of the word testamentary, and I think

it may be equally applied to the case where there is no testament, but where the estate is being administered according to the law of the land. There is one observation I may make here, though it is not the foundation of my decision. No one, according to the law, really does die intestate, because the law makes a will for everyone so dying, and that does illustrate what I have been saying, that testamentary refers to the administration of an estate, whether there is a will or not. That being so, it is admitted that points (*b*) and (*d*) would fall within the meaning of testamentary expenses.

Then there is one other point on this part of the case. This widow had made a will and a *caveat* was entered against the probate by two persons, Mrs. Yeo and Mr. Buck, who were in the same relation to the alleged testatrix, so that they were the persons entitled to letters of administration. They entered the *caveat* which was warned, and it became necessary to bring an action which might be brought either by Mrs. Yeo or Mr. Buck, or by both, and Mr. Buck brought it and was successful and in the result the will fell to the ground, and letters of administration were issued, which were granted to Mrs. Yeo. The question then arises, can the costs of that action incurred by Buck be paid out of the testator's estate as testamentary expenses of the widow? Can Mrs. Yeo require the testator's estate to pay Buck's costs, she not having incurred them and not being liable to pay them herself? That is the question. If Buck had himself got letters of administration he would clearly be entitled to his costs, but is Mrs. Yeo entitled to get them? To say that she is not must be founded upon the technicality that she herself is not liable to pay the costs and cannot be required to do so. But I myself think that the proper inference is that they were really incurred for the benefit of the widow's estate—that is to say, for the benefit of her next-of-kin, and whether the costs were incurred by one or the other of them, Yeo or Buck, is immaterial. I do not say that Buck acted as the agent of Yeo, but I do say that these costs were incurred for the benefit of the widow's estate, and the next-of-kin would be entitled to nothing unless these costs were paid. The widow's will has been got out of the way at the expense of her estate, and therefore I think that I ought to allow the costs of that litigation—that is to say, Buck's costs, as testamentary expenses of the widow.

Then there is one more argument. It is said that the judge in the probate action did not allow any costs out of the estate. That is quite true. But I do not understand that he said there had been any improper litigation or extravagance in the matter of costs. If he had said that, of course I should pay attention to it and look into it. But all the judge said was that it was not a case in which he would allow the costs of either party out of the estate. That, I think, leaves me at large to allow or disallow these costs. But besides that, I am not considering whether these costs ought to be allowed out of the estate or not; I am considering whether they were testamentary expenses within the meaning of this will. The learned judge in the Probate Court had one question before him, I have a different one—the question of the construction of a will, which he probably never saw and certainly did not attempt to construe. I will call attention to a point here. In *re Prince, Godwin* v. *Prince*, Stirling, J., dealing with costs which the judge of the Probate Court thought ought to be allowed out of the estate, said they were not testamentary expenses, showing plainly that the two things are not necessarily the same, and may be quite different.

There is one other point, and that is the question whether estate duty is payable as a testamentary expense. It is not out of place to observe here that we are dealing with personal estate only. I do not say the case would be different if there was real estate, but it might be. At any rate, what I say only applies to personal estate and the estate duty payable under the Finance Act, 1894, s. 6 (2). Estate duty may be said to have taken the place of probate duty—at least, probate duty has been merged in it, and an executor does not now pay probate duty. Was probate duty a testamentary expense? There is no authority on that point. In the case of *Sharp* v. *Lush* Jessel, M.R., went into the meaning of testamentary expenses, and he gave several instances, but he did not mention probate duty, and for the reason that in the will he was there dealing with probate duty was expressly included; and in no case that I know of has the question whether probate duty was a testamentary expense been raised. But in any case probate duty had to be paid before the grant of probate or of letters of administration. It was a *sine quâ non* that you paid that, before you got your grant, whether of probate or of letters of administration, and it almost follows as a matter of course that that duty was a testamentary expense—that is to say, an executorship expense if the executor pays it. I do not see my way out of it. I have considered it carefully. I am reluctant to introduce a new rule and to add to "testamentary expenses" which have already been expounded generously, but having arrived at the conclusion that you could not have refused to treat probate duty as a testamentary expense, I cannot see my way to avoid going on and saying that estate duty which takes its place is also a testamentary expense. For all practical purposes you cannot get a grant of probate or of letters of administration without paying estate duty, any more than you could have got them without paying probate duty, and I myself see no difference between the payment of estate duty and the payment of the half-crown or shilling stamp which must be affixed to the necessary affidavits. They are both costs which the executor or administrator is bound to incur in order to put himself in the position of legal personal representative. It is true that the estate duty may be a large sum while the affidavit sum is but a small one, but all of them, small or large, are incidental, and necessarily incidental, to obtaining the grant. Reluctantly I must say that estate duty is a testamentary expense. I do not see my way to say that it is not. The result is that this estate duty must be paid out of the estate of the testator in exoneration of the estate of his widow.

Solicitors, *Boxall & Boxall; Lanfear, Tanner, & Lanfear; W. J. Foster.*

---

## IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — April 30.

*In re* VAVASOUR.
*Ex parte* VAVASOUR. (*a*.)

*Bankruptcy — Practice — Power of trustee to employ solicitor — Permission of committee of inspection— Taxation—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 57, *sub-section* 3; *s.* 73, *sub-section* 4—*Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 15, *sub-section* 3.

*A resolution by a committee of inspection granting permission to the trustee to employ a solicitor must not be*

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

*in general terms, but must in some way or other specify the particular purpose for which the solicitor is to be employed.*

Application by the debtor for a review of the taxation of the bill of the solicitors employed by the trustee.

The debtor in this case had been adjudicated bankrupt on his own petition upon the 2nd of July, 1897, and the official receiver became trustee in the bankruptcy with a committee of inspection.

Upon the 23rd of July a meeting of the committee was held, at which a resolution was passed that Messrs. Adams & Adams, solicitors, should be employed in certain matters specified by the trustee, the costs not to exceed £200. Messrs. Adams & Adams accordingly acted in the matters specified, and their bill for these matters was duly taxed and paid and no further question arose upon it.

Upon the 4th of May, 1898, the respondent Miller was appointed trustee in place of the official receiver, and on the 18th of May he called a meeting of the committee and stated that he desired to continue the employment of Messrs. Adams & Adams without limit to the costs to be incurred by them.

The committee accordingly passed the following resolution, which was entered in their minute book: "Resolved, that Messrs. Adams & Adams be employed by the trustee when necessary."

During the course of the bankruptcy, the trustee had occasion to let various farms on the bankrupt's estates, and upon each letting he employed Messrs. Adams & Adams as solicitors without any further authorization than the resolution set forth above.

The creditors in the bankruptcy were eventually paid in full, and a surplus was left over for the bankrupt.

When the bills of Messrs. Adams & Adams came before the master for taxation, the bankrupt objected, *inter alia*, to the costs incurred in letting the farms, contending that the trustee should have obtained from the committee of inspection a separate authorization to employ solicitors in each case. The trustee, on the other hand, laid before the master an affidavit by the members of the committee of inspection, stating that they had intended their resolution to cover all the cases in which the trustee had employed solicitors.

The master held that the employment of the solicitors had been duly authorized, and passed their bill.

The bankrupt applied to review his decision.

*Ringwood*, for the application.—The trustee ought to have obtained permission from the committee of inspection in each case in which he employed the solicitors. Section 57 of the Bankruptcy Act, 1883, provides that the permission of the committee of inspection to employ a solicitor shall not be general, but shall only be a permission to employ a solicitor to do a particular piece of work. In the same way, if the official receiver is trustee without a committee of inspection, he has to get permission from the Board of Trade every time he desires to employ a solicitor: *In re Duncan, Ex parte Duncan*, 40 W. R. 159, [1892] 1 Q. B. 331.

*Reed, Q.C.* (*Carrington* and *Frank Mellor* with him), for the trustee.—The taxing-master was right in passing the bill; his duty under section 73, sub-section 3, of the Bankruptcy Act, 1883, is to satisfy himself that the employment of the solicitors has been duly sanctioned. He had before him the resolution of the committee of inspection, and the affidavit in which they swore that their resolution was intended to cover all the cases in which the solicitors were employed, and he was satisfied that the employment had been duly sanctioned. It is not necessary that there should be an authorization entered in the minute book in each case.

*Ringwood* replied.

WRIGHT, J.—This case involves a point of practice which is both difficult and important. By section 73, sub-section 3, of the Bankruptcy Act, 1883, the taxing-master before passing the bill of a solicitor employed by the trustee in bankruptcy has to satisfy himself that the employment of the solicitor has been duly sanctioned. Section 15, sub-section 3, of the Bankruptcy Act, 1890, enacts that the sanction required under section 73 of the Bankruptcy Act, 1883, must be a sanction obtained before the employment, and rule 117 requires the trustee to produce before the taxing-master a copy of the resolution sanctioning the employment.

On the other hand, there is no provision in the Acts or rules, nor does any decision on the subject require that the authority should be in any particular form so long as it does not transgress the concluding words of section 57 of the Bankruptcy Act, 1883: "The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases."

Now, the first question I have to decide in this case is, whether it has been proved that the resolution of the committee of inspection was, in fact, intended to cover all the work which has been done by the solicitors. The taxing-master accepted the affidavit of the members of the committee that the resolution was so intended, and I agree with that finding of fact, and think that the committee did intend the solicitor to do what he has done.

The second question is whether the resolution of the committee transgresses the provisions of section 57 of the Bankruptcy Act, 1883, which I have cited above. I should hesitate long before deciding that fresh authority is needed for every step in an action, but there must be a line drawn somewhere, and I think that the terms of the permission in this case "Resolved, that Messrs. Adams & Adams be employed by the trustee when necessary," are too wide to comply with the provisions of section 57. The resolution must in some way or another specify the particular things to be done or proceedings to be taken, and if I were to hold the resolution before me sufficient I should nullify the provisions of section 57. The case must be sent back to the taxing-master with an intimation to that effect.

*Application allowed.*

Solicitors for the applicant, *Robinson, Wilkins, & Walton.*

Solicitors for the trustee, *Adams & Adams.*

## House of Lords.

From C. A. (England). Feb. 19.

FIELDING v. MAYOR, &c., OF MORLEY. (a.)

*Practice — Costs — Solicitor and client costs — Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (6).

*Where an action is dismissed against a public body acting in execution of statutory or other public duty, the Public Authorities Protection Act*, 1893, *s.* 1, *gives the defendant corporation, solicitor and client costs in the action, but the Act does not apply to appeals.*

*Decision of the* Court of Appeal, sub nomine, Fielding *v.* Morley Corporation, 47 *W. R.* 295, [1899] 1 *Ch.* 1, *affirmed.*

The appellant brought an action against the respondents to restrain them from doing certain acts which they maintained they were authorized to do by their special Act.

The action was dismissed, with costs as between solicitor and client, and this was affirmed by the Court of Appeal (47 W. R. 295, [1899] 1 Ch. 1, where the facts of the particular action are set out).

The House (Earl HALSBURY, L.C., and Lords MACNAGHTEN, MORRIS, SHAND, JAMES OF HEREFORD, and BRAMPTON) dismissed the appeal.

*Cripps, Q.C.* (*Moulton, Q.C.*, and *Leigh Clare* with him), for the appellant, mentioned the question of costs.

*Eve, Q.C.*, and *R. J. Parker*, for the respondents.

Earl HALSBURY, L.C., said the Act might be a hard one, but was plain as to the costs of the action; it did not apply to appeals.

*Orders appealed from affirmed, and appeal dismissed, with costs.*

Solicitors for the appellant, *Firth & Co.*, for *J. E. Craven*, Todmorden.

Solicitors for the respondents, *Sharpe, Parker, & Co.*, for *R. B. Hopkins*, Morley.

## Court of Appeal.

From Q. B. Div. (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) May 25.

HOGARTH & CO. v. WALKER. (b.)

*Insurance* (*marine*)—*Policy on ship—Furniture—Grain cargo—Dunnage mats and separating cloths.*

*Dunnage mats and separating cloths, which are used on board a ship in connection with the carriage of a grain cargo, are covered by a time policy on ship in the ordinary Lloyd's form, although they are not being used on the voyage in the course of which the loss occurred.*

*Judgment of* Bigham, J. (ante, *p.* 47, [1899] 2 *Q. B.* 401), *affirmed.*

Appeal of the defendant from the judgment of Bigham, J., in an action tried without a jury in the Commercial Court, reported *ante*, p. 47, [1899] 2 Q. B. 401.

The action was brought by the owners of the steamship *Felbridge* to recover a loss under a policy of insurance subscribed by the defendant.

The policy, which was a time policy, in the ordinary Lloyd's form, was expressed to be "during the space of twelve calendar months from noon June 1, 1897, and ending at noon June 1, 1898, as employment may offer in port and at sea, in dock or graving dock, and on way, gridirons, pontoons, at all times, and in all places and on all occasions, services, and trades whatever and wheresoever under steam or sail, on the body, tackle, apparel, ordnance, munitions, artillery, boats, and other furniture of or in the good ship or vessel *Felbridge*."

The question was whether the policy covered a loss of dunnage mats and separating cloths used in connection with the carriage of grain cargoes, *The Felbridge* being a vessel usually engaged in the Black Sea grain trade, in which trade it is customary for the ships to carry these mats and cloths. The mats are used to prevent the cargo from getting damp, and the cloths are used for the purpose of separating the different parcels of goods. At the time of the loss, *The Felbridge* was on a voyage from America and the mats and cloths were not being used, boards being substituted for the mats, and the cloths not being required as there was only one consignment of goods. The mats and cloths were therefore stored away in the fore peak. During the voyage the ship came into collision with a pier-head, stem on, and a number of the mats and cloths were washed away and lost.

Bigham, J., gave judgment for the plaintiffs.

The defendant appealed.

*Joseph Walton, Q.C.*, and *J. A. Hamilton*, for the defendant.—These mats and cloths formed no integral part of the ship, but merely afforded facilities for the carriage of the cargo. They are therefore not covered by the policy: McArthur on Marine Insurance (2nd ed.) p. 57; *Hoskins* v. *Pickersgill*, 3 Doug. 222; *Gale* v. *Laurie*, 5 B. & C. 156. There is a distinction between a shipowner in his capacity as owner of a ship and as a carrier of goods by sea. Things required by him in the latter capacity are not covered by a policy on ship, and the word "furniture" in this policy must be construed as referring to something *ejusdem generis* as "boat" or "artillery." Bigham, J., said this ship would not have been seaworthy without having the mats and cloths on board. That is not so, for the mats and cloths were only used in connection with a particular kind of trade, and had nothing to do with the seaworthiness of the ship from the point of view of the owner.

*Robertson* v. *Ewer*, 1 T. R. 127; *Brough* v. *Whitmore*, 4 T. R. 206; and *Hill* v. *Putten*, 8 East 373, were also referred to.

*Rufus Isaacs, Q.C.*, and *Montague Lush*, for the plaintiffs, were not called upon.

A. L. SMITH, L.J.—I am of opinion that this appeal must be dismissed. This is a time policy covering a trading ship in the largest possible way, and it is not disputed that the trade in which the ship was engaged was contemplated by this policy. [His lordship read the portions of the policy set out above.] The evidence is uncontradicted that in the Black Sea grain trade dunnage mats and separating cloths are always required on such voyages as that on which the ship usually sailed. If that is so, the mats and cloths, in my opinion, obviously form part of the furniture of the ship. The defendant

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

(b.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

takes exception to the statement by Bigham, J., that the ship would be unseaworthy if she went to sea with out the mats or cloths. The mats are used for laying on the floor of the ship to preserve the cargo from damage by water, and I agree with Bigham, J., that without them the ship would not be seaworthy. With regard to the separating cloths, there is uncontradicted evidence that they form part of the furniture of the ship. Bigham, J., said as to this: "I can see no distinction between these and movable bulkheads, which it was admitted by the defendant would form part of the ship's furniture." The same admission was made in this court, and if movable bulkheads would form part of the furniture of the ship, why are not the separating cloths also part of the furniture? I see no distinction between the two cases. The appeal must be dismissed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion, for the same reasons.

ROMER, L.J.—I agree. A time policy such as this includes fittings and things in the nature of fittings, though not fixed to the ship, if provided by the shipowner for the purposes of the ship and reasonably necessary for the carriage of the cargo ordinarily carried by the ship, even though not actually in use at the time when the loss occurred.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Botterell & Roche*, for *Vaughan & Roche*, Cardiff.

Solicitors for the defendant, *Waltons, Johnson, Bubb & Whatton.*

---

From Chan. Div. (Lindley, M.R., Rigby and Vaughan Williams L.JJ.) — March 20, 22; April 9.

ALEXANDER *v.* AUTOMATIC TELEPHONE CO. (*a.*)

*Company — Shares — Subscribers to memorandum of association—Liability on shares—Payments on allotment—Special bargain—Directors—Breach of duty.*

*Subscribers to a memorandum of association of a company limited by shares are only liable by virtue of their subscription to pay up the amount of their shares as and when called up.*

*It follows that, in the absence of any special agreement or article requiring a subscriber of a memorandum of association to make some payment on subscription or allotment, nothing is payable by him as a subscriber in respect of his shares until calls are made on them.*

*Where, however, directors who were subscribers to the memorandum of association of a company allotted to themselves the shares set opposite their names in the memorandum without payment on allotment, but required payment on allotment from other shareholders, and then proceeded to make a further call on the shares without paying the allotment money on their own shares,*

*Held, that, as the other shareholders had not known or sanctioned the directors obtaining the advantage of deferring their own contributions to the company at the expense of the other shareholders, there was a distinct breach of duty on the part of the directors, and that they were bound to pay up the allotment moneys in the same manner as the other shareholders.*

*Decision of* Cozens-Hardy, J., [1899] 2 Ch. 302, *reversed.*

This was an appeal from a decision of Cozens-Hardy, J. (reported [1899] 2 Ch. 302, 47 W. R. Dig. 33).

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The action was brought by Messrs. M. J. Alexander and J. D. Gibbs, "suing on behalf of themselves and all the other shareholders" in the defendant company, against the company and three of its directors—viz., Messrs. Max Margowski, J. Woolf Cohen, and H. G. Sworn. The other members of the board were the two plaintiffs.

The company was incorporated on the 1st of July, 1897, with a capital of £100,000 in shares of 5s. each. The eight signatories to its memorandum of association were Margowski for 19,400 shares, the same gentleman as managing director of the Honduras Government Banking and Trading Co. (Limited) for 6,000 shares, the plaintiff Alexander for ten shares, the plaintiff Gibbs for ten shares, Baron Cohen for ten shares, Justin Mendelson for ten shares, the defendant Cohen for 200 shares, and the defendant Sworn for 800 shares.

Clause 5 of the articles of association provided that the shares of the company should be "under the control of the directors, who may, subject to the terms of the company's memorandum of association, issue, allot, or otherwise dispose of the same to such persons, for such consideration, and upon such terms and conditions as the board may determine . . . and may make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid and in the time of payment of such calls." The last words of the clause are, it should be observed, justified by section 24 of the Companies Act, 1867. Article 13 provided that the directors might "(subject to any special terms made on allotment) from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit, provided that one month's notice at least is given of the time and place for payment, and that no one call shall exceed 20 per cent. of the nominal amount of the shares, and that such calls shall be made at intervals of not less than one month." The memorandum shares and a number of other shares were allotted, and on all of them, except those held by Margowski, J. W. Cohen, Sworn, and the Honduras Co., the sum of 3s. payable on allotment had been paid. In respect of the excepted shares the plaintiffs alleged that only £784 in all had been paid, and that on these shares there was still due and payable the sum of £3,176, and the plaintiffs complained that the three defendant directors, being a majority of the board, were able to, and did, control its action by their votes, and in breach of their duty as directors and against the interests of the defendant company prevented the passing of resolutions for taking steps to enforce payment by those defendants or the Honduras Co. (in which they were said to be interested), of the amounts due on their shares and the shares held by the Honduras Co. This, however, the plaintiffs complained, did not prevent the defendant directors by means of their voting power making a further call of 1s. per share, and the plaintiff's case was that the defendant directors were acting in furtherance of their own interests and in fraud of the rights of the other shareholders, and were using the powers entrusted to them as directors for their own ends, and not for the benefit of the company. It was also alleged that the defendant directors had control of the majority of the votes of the shareholders of the defendant company. The plaintiffs accordingly asked for a declaration that the holders of the memorandum shares were bound to pay up 3s. per share—viz., 6d. on application and 2s. 6d. on allotment, in the same way as the holders of other shares. For the defence it was pleaded that on the 30th of June, 1897, before the company was incorporated, it was agreed

at a meeting of the signatories that nothing should be payable by any of the defendant directors or the Honduras Co. on application or allotment in respect of their memorandum shares, and that the memorandum was signed by them on this condition; that at a board meeting, after incorporation—viz., on the 5th of July, 1897, two resolutions were passed (both plaintiffs being present and voting in their favour) for the allotment of shares; that by the first resolution the memorandum shares were allotted without requiring any payment on allotment, and that by the second resolution a payment of 2s. 6d. per share in respect of other shares was required on allotment, 6d. per share having been already paid on application for these shares. The defendant directors also said that they were acting under the articles and in the interests of the company, and had committed no breach of duty. The case was heard before Cozens-Hardy, J., on the 11th and 12th of May, 1899, who delivered the following judgment:

"In my judgment this action is misconceived. I assume in favour of the plaintiffs — but without in the least deciding, or even expressing an opinion in their favour—that the plaintiffs are competent to sue on behalf of themselves and all other the shareholders of the defendant company. What they ask is a declaration that all the shares allotted to the signatories of the memorandum of association were held upon the same terms and subject to the same conditions as the shares taken by the public, or, in other words, subject to the obligation to pay a deposit of 6d. per share on application and a further sum of 2s. 6d. on allotment. Now, this claim seems to be based upon the ground that there is an immediate debt due from every member of the company in respect of uncalled capital. That appears to me to be an entire fallacy. In the words of Lindley, M.R., in *In re Russian Spratt's Patent*, 46 W. R. 514, [1898] 2 Ch. 149, uncalled capital is not a debt—it is a right to make a call and create a debt. It is not correct to say that the signatories to the memorandum of association, by virtue of which they agreed to become and became members of the company, became at once debtors to the company to the full amount of their shares. Their position in this case is this, and this only—that they are subject to article 13. What is the effect of article 13? A member is to be liable, apart from any special terms, to pay such calls as the directors may from time to time make upon him; but he is not to be liable and cannot be compelled to pay otherwise than in that way. There is a further limitation that he cannot be required to pay any call exceeding 20 per cent. of the nominal amount of the shares, nor can he be required to pay a call except at intervals of one month. It is quite true that there is a power to make special terms on allotment, but the argument on the part of the plaintiffs seems to have proceeded on the assumption that it is necessary for the signatories to prove that some special terms are made in their favour. On the contrary, as I read article 13, it is for those who allege any obligation to pay otherwise than on account of the calls made at due intervals and with due notice to prove some other special terms or bargain. Now we have the special terms and bargain made with other members with reference to the 6d. and 2s. 6d. The applications for the shares in respect of which those amounts were to be paid were made and were accepted expressly upon those terms—that 6d. should be paid on application and 2s. 6d. on allotment. That was in strict accordance with article 13. But where is any such arrangement made with respect to the shares of the signatories? I can find nothing, and I find evidence of what is clearly inconsistent with any such arrangement. I do not attach weight to what took place on the 30th of June, 1897, which obviously does not bind the company; but it furnishes a motive for and an explanation of what undoubtedly did take place on the 5th of July after incorporation. At the meeting which took place on that day the allotments were made. Not only were separate resolutions for allotments then passed, but applications for allotments were then considered, and it is perfectly clear that in respect of these signatories, with whom alone I have to deal, the allotments were made on the terms that nothing should be payable on application or allotment. This is really an attempt, when allotments have been made and accepted on those terms, to alter the entire contract entered into between the signatories and the company, and strangest of all, it is an attempt made by two gentlemen who themselves approved of and took part in passing the resolutions, and who now ask me to say that these shares could only have been properly allotted upon the terms of the signatories paying 6d. on application and 2s. 6d. on allotment. I can find no foundation in fact and nothing in law to justify me in arriving at such a conclusion. A member of a company is not liable to pay anything except in respect of calls made in the manner provided by the articles. This is an attempt to make members of the company pay for shares otherwise than in accordance with the articles. In my judgment the attempt wholly fails, and I dismiss the action with costs."

The plaintiffs appealed.

*Rawlinson, Q.C.*, and *Dobb*, for the appellants.—The respondents, on the incorporation of the company, became then and there shareholders to the amount they had agreed to take by the memorandum of association. They became, accordingly, immediately liable to pay the full amount of 5s. per share. Articles 5 and 13 of the articles of association do not apply to these shares at all: *Fothergill's case*, 21 W. R. 301, L. R. 8 Ch. App. 270, at p. 275. Even if the shares did not pass on incorporation, but only on the 5th of July, 1897 (the day of their purported allotment), yet, since nothing was then said as to their payment, payment in full became immediately due. Even assuming these shares were excepted from payment of application and allotment moneys by agreement of the 30th of June, 1897, application and allotment moneys are not "calls," and the respondents remained liable to these latter. Apart from these technical grounds, these directors were in the position of trustees, and had no right to use their powers to forward their own benefit. [*Rufus Isaacs, Q.C.*, objected that this point was given up in the court below.] (*a*) The mere fact of their not making calls on themselves is *ipso facto* evidence of *mala fides*. (*b*) But we have also positive evidence to prove *mala fides*: *Gilbert's case*, 18 W. R. 938, L. R. 5 Ch. App. 559. [LINDLEY, M.R.—Your two clients did not dissent—they were parties to what was done—how can they now complain of *mala fides?*] There is nothing to show we understood how the scheme would really work out.

*Rufus Isaacs, Q.C.*, *P. F. Stokes*, and *Hon. F. Russell*, for the company and Margowski.—There was no *mala fides* in the case. We subscribed on these special terms to try and prevent the whole matter falling through.

*Astbury, Q.C.*, and *Hamilton, Q.C.*, for Dr. Sworn.—The charge of *mala fides* was abandoned in the court below and cannot now be urged against us. Apart from any special agreement the directors had power under the articles to make calls from time to

time as they thought fit. Unless *mala fides* is proved their exercise of their discretion cannot be impeached.

J. W. Cohen in person.

*Rawlinson, Q.C.*, replied.

LINDLEY, M.R.—Subscribers to a memorandum of association of a company limited by shares are liable, and only liable, by virtue of their subscription to pay up the amount of their shares as and when called up. The times when payments are to be made and the amounts to be paid are not prescribed by statute, except by section 38 of the Companies Act, 1862, which only comes into operation when the company is being wound up. But until the commencement of the winding up of the company the times and amounts of payment depend, apart from express agreement between the company and the signatories, on the company's articles of association. In the absence of other articles, Table A will be applicable. That this is the true position of those who sign the memorandum of association is perfectly plain from the Companies Act, 1862, ss. 8, 11, 14, 15, 23, and 38, and Table A, articles 4-7. A subscriber of a memorandum becomes by section 23 a member in respect of the number of shares subscribed for by him, without any further application by him or allotment of shares to him. But as by section 22 all shares have to be numbered, and the numbers must be entered in the register (see section 25), there must be an appropriation to each subscriber of the proper number of shares properly numbered, not to constitute him a member, but to enable a proper register to be kept, and proper certificates to be given and transfers made: see sections 22, 25, and 31, and Table A, articles 2, 3, and 8-16. It follows from this that, in the absence of any special agreement or article requiring a subscriber of a memorandum of association to make some payment on subscription or allotment, nothing is payable by him as a subscriber in respect of his shares until calls are made upon them. This is the strength of the defendants' case. Further, if more shares than those taken by the subscribers of the memorandum are issued by the directors, there is nothing to prevent them from offering those shares on such terms as regards payment to the company on application and allotment as the directors may think expedient. Payments so required to be made are not calls, because the payments are to be made by persons who are not yet members; but, when made, those payments must be treated, unless otherwise agreed, as payments on account of the nominal capital of the company, and as reducing *pro tanto* the liability of those who pay. Such persons have nothing to complain of if they pay according to their bargain, and the subscribers of the memorandum pay according to theirs. This is the weakness of the plaintiffs' case. From this point of view the plaintiffs have no ground of complaint, and the decision appealed from is unimpeachable. But there is another point of view from which the case must be regarded. There are other elements in the case which have to be taken into consideration, and on which the plaintiffs strongly rely. The directors, who had subscribed the memorandum for an unusually large number of shares, issued shares to other persons on the terms that 6d. per share should be paid on application and 2s. 6d. per share on allotment—*i.e.*, 3s. per share had to be paid by the allottees, whilst the directors themselves paid nothing in respect of their own shares. The directors, in fact, so managed matters as to place themselves in a better position as regards payment than the other shareholders, and they did so without informing the other shareholders of the fact. This, the plaintiffs contend, was a breach of duty on the part of the directors to those who applied for and took shares upon the faith that the directors were not obtaining advantages at their expense. It is no answer to the plaintiffs' case so put to appeal to the contracts alone, for the charge is that the directors were guilty of a breach of duty in procuring those contracts, and in taking advantage of them so as to benefit themselves at the expense of the other shareholders. In the statement of claim and in the court below the defendants were charged with deliberate fraud; but this charge was ultimately abandoned in the court below, and having been abandoned, it cannot be brought forward again, or be listened to on appeal. But, apart from all fraud, and although the directors acted in the belief that they were doing nothing wrong, there may, nevertheless, have been a breach of duty such as is relied upon, and it is necessary to consider whether there was or was not. The company was registered on the 1st of July, 1897. On the 30th of June the memorandum of association was signed and the subscribers had a meeting at which, it is said, they agreed that the defendants should pay nothing in respect of their shares on allotment. Such an agreement, if come to, could not, of course, bind the company, which was not then formed. But the defendants say that the plaintiffs Alexander and Gibbs were then told that the defendants were not to pay up anything on their shares on allotment, and that the plaintiffs assented to this arrangement. The plaintiffs emphatically deny that they knew of or assented to any such arrangement. On the 5th of July the first meeting of the directors was held, and on that day two resolutions were passed. One was that the shares subscribed for by those who signed the memorandum of association should be allotted to them. The resolution treats them as applying for 26,440 shares of 5s. each, and having those shares allotted to them in the quantities applied for by each, "as per applications and allotment sheet marked A now signed by the chairman." This showed that three of those subscribers of ten shares each—viz., Alexander, Gibbs, and Baron Cohen, had paid up or were to pay up 3s. per share in respect of their 5s. shares. There was nothing to show that the other subscribers had paid or were to pay anything on their shares. There was a conflict of evidence at the trial as to whether the defendants did or did not explain to their co-directors that they did not intend to pay up 3s. on their shares. The plaintiffs Alexander and Gibbs distinctly deny that they were told anything of the sort. They deny that they saw the sheet A. The defendant Cohen and the secretary say that it was explained that the others did not intend to pay, and that the sheet A was produced. The learned judge finds that Alexander and Gibbs knew of the resolution and concurred in it, but he does not say that these gentlemen are not to be believed when they deny that they were informed that the other directors were not going to pay. So far as it is necessary for the defendants to rely on any agreement exempting them from liability to pay 3s. like other shareholders, I am of opinion that they fail in proving such an agreement. The resolution of the 5th of July to which I am referring did not by itself, and apart from the conduct of the defendants as directors, either increase or diminish the defendants' liability as subscribers of the memorandum of association. It simply carried out what their subscription involved. The other resolution passed at the same meeting was to allot 9,560 shares to persons who had applied for them on payment of 2s. 6d. per share. This was in addition to 6d. per share already paid on application. Other shares have been issued on similar terms. Both the plaintiffs Alexander and Gibbs are holders of

shares besides those for which they subscribed the memorandum of association; and they paid up 3s. per share for all of them on allotment. So far, therefore, they are in the same position as all the other shareholders except the defendants. The fact, however, that three subscribers of the memorandum paid 3s. on their shares whilst the defendants did not, is difficult to reconcile with the existence of any understanding that all the subscribers should stand on their strict legal rights. The defendants rely on article 5 as entitling the directors to issue shares on any terms they think expedient, and to make differences between some shareholders and others. But this, I am satisfied, is an afterthought. The defendants were not, in fact, acting on this article at all. But, even if they did, this article would not, in my opinion, justify them in making a difference in their own favour without disclosing the fact to the shareholders and obtaining their consent to the arrangement. The Court of Chancery has always exacted from directors the observance of good faith towards their shareholders and towards those who take shares from the company and become co-adventurers with themselves and others who may join them. The maxim *caveat emptor* has no application to such cases, and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits and must account for them to the company, so that all the shareholders may participate in them. *Gilbert's case* is only one of many instances illustrating this principle. In this case there is no question that, by obtaining 3s. a share from the other shareholders and paying nothing themselves, the defendants threw upon the other shareholders a burden which they did not share themselves. It is true that by article 121 dividends were only payable in proportion to the amounts paid up on the shares; and as regards dividends, had there been any, the defendants would have been at a disadvantage. But the advantage they obtained at the expense of the other shareholders was the advantage of deferring their own contributions to the funds of the company at the expense of the other shareholders. This, in my opinion, was a clear breach of duty, unless the other shareholders knew of it and sanctioned it. The defendants say that the memorandum and articles, which named the first directors, gave notice to all the shareholders that nothing was payable by the defendants except when calls were made on their shares. The defendants further say that, at all events, the plaintiffs Alexander and Gibbs knew and assented to what was done, and that this action, therefore, cannot be sustained by them. As regards the notice given by the memorandum and the articles to the shareholders generally, I am clearly of opinion that they give no notice of anything except what they expressly state; they give no notice at all that the directors would so exercise their powers, and so act towards their shareholders, as to benefit themselves at their expense. It is impossible to come to the conclusion that the applicants for shares knew of or sanctioned the conduct of which they now complain. The next question is, whether the plaintiffs Alexander and Gibbs knew of and assented to any arrangement to the effect that the defendants should be in a better position than themselves and other shareholders as regards payment on allotment. As already stated, the plaintiffs emphatically deny that they knew anything of the sort, and they say that they first discovered in July or August, 1898, that the defendants had not paid up 3s. on allotment like other shareholders. They say, that they were unable to see the books and ascertain the facts before that time. They say, and Rhodes, the solicitor, confirms them, that nothing was said when the memorandum of association was signed on the 30th of June, 1897, about not paying like other shareholders; and the plaintiffs say that nothing was said about it when the allotment was made on the 5th of July, 1897. Against this must be set the resolutions then passed, and the testimony of Mr. Cohen and Mendelson, the secretary of the company. I have already referred to the resolutions and the sheet A. Cozens-Hardy, J., was so struck by these that, before hearing Cohen's evidence, he intimated that he was in favour of the defendants. That would certainly not be my own view. But Cohen's evidence must be considered. [His lordship reviewed the evidence, and continued:] In this state of the evidence the only conclusion I can come to is that there was some understanding between some of the persons who signed the memorandum of association that Margowski and one or two of his friends should be treated differently from other shareholders as regards payment on allotment, but that neither the plaintiffs nor any of the shareholders, except Margowski and his friends, ever knew of or assented to the use they made of their powers to secure for themselves advantages as to payment at the expense of their co-adventurers. Having carefully read the shorthand notes of the proceedings of the court below, I cannot help thinking that Cozens-Hardy, J., placed too much stress on the resolutions, and treated them as conveying more information than they really were calculated to convey or did convey to the plaintiffs. If the learned judge had said that he did not believe the plaintiffs, and believed Cohen and Mendelson rather than the plaintiffs, I should feel more difficulty than I do. But the learned judge has not said that he disbelieved the plaintiffs, and I certainly see no reason for doing so. Upon the merits of the case I come to the conclusion that a breach of duty by the directors to the company and the other shareholders in it has been established. It is necessary, however, to consider the form of the action and the relief which can be given. The breach of duty to the company consists in depriving the company of the use of the money which the directors ought to have paid up sooner than they did. I cannot regard the case as one of mere internal management, which, according to *Foss* v. *Harbottle*, 2 Hare 461, and numerous other cases, the court leaves the shareholders to settle amongst themselves. It was ascertained and admitted at the trial that when this action was commenced the defendants held such a preponderance of shares that they could not be controlled by the other shareholders. In these circumstances, an action by some shareholders, on behalf of themselves and others, against the defendants is in accordance with the authorities, and is unobjectionable in form: see *Menier* v. *Hooper's Telegraph Co.*, 22 W. R. 396, L. R. 9 Ch. App. 350. An action in this form is far preferable to an action in the name of the company and then a fight as to the right to use the name. But this last mode of procedure is the only other open to a minority of shareholders in cases like the present. Apart, however, from the form of the action, the defendants contended that, having regard to the pleadings and to the calls made and paid since the action was brought, and to what took place at the trial, no relief could now be given to the plaintiffs. I have looked very carefully at the pleadings, and have observed that Cozens-Hardy, J., gave the plaintiffs leave to amend their claim by introducing into it the facts stated in their reply to the defence put in by the defendants Margowski and Cohen. Paragraph 6 of this reply raises the point proved at the trial—that the directors practically controlled the voting power of the company. Mr. Eve, who, in the court below, placed the plaintiffs'

case on its true equitable basis, gave up the charges of actual fraud, and, calls having been made and paid, he did not ask for an injunction or a receiver. But he pressed for a declaration to the effect that the defendants ought to have paid up 3s. per share on their shares on allotment. This was never abandoned. Having regard to the facts alleged in the plaintiffs' statement of claim and in their reply, and to the leave to amend, and to the mode in which the plaintiffs' counsel opened the plaintiffs' case, and urged the breach of duty of the defendants, I do not think that the defendants can successfully maintain that they have to meet on appeal a really different case from that which was made in the court below. The plaintiffs' case was obscured by charges of fraud, and by being based in their pleadings, and to some extent in argument, on legal rather than on equitable grounds. But the facts which constitute the plaintiffs' case are set out in the pleadings, and were fully investigated in the court below; and Mr. Eve more than once put the plaintiffs' case on its true basis. The plaintiffs' statement of claim is full of charges of fraud. These have been abandoned and the plaintiffs must pay all the costs occasioned by them. But it does not follow that their action ought to be wholly dismissed: see *Hilliard* v. *Eiffe*, L. R. 7 H. L. 39, 22 W. R. Dig. 194. The proper order will be: Allow the appeal and reverse the judgment appealed from. Declare that the three defendants—Margowski, Cohen, and Sworn—were guilty of a breach of their duty as directors in not paying to the company in respect of the shares allotted to them on the 5th of July, 1897, 3s. per share, being the amount which they obtained from the other members of the company in respect of shares allotted to them, and let the plaintiffs have liberty to apply for an order for payment if necessary. Order the three defendants to pay the costs of the appeal, and also the costs of the action, except such costs as have been occasioned by the charges of fraud, which costs are to be paid by the plaintiffs. The usual set-off as regards these costs.

RIGBY, L.J.—Two totally different lines of defence are set up by the respective counsel for the directors Margowski and Cohen, and for Sworn separately, on the hearing of this appeal, and the defences are not only different but irreconcilable, if not contradictory.

The first depends on an alleged agreement or understanding that Margowski, Cohen, and Sworn, and a certain company for which Margowski signed, should have time for paying up the money due on the shares taken by them. How much time was to be given is on the parol evidence not very clearly defined, but the time which actually elapsed before any call was made upon them exceeded one year and a-quarter (the 1st of July, 1897, to the 18th of October, 1898), and the call was made after the commencement of the action.

This agreement or understanding is said to have been arrived at on the 30th of June, 1897, or at any rate on the 5th of July, 1897, at the first meeting of the board of the company.

The second defence throws over altogether this alleged agreement, and depends simply upon the signature of the memorandum and articles of association.

On the 30th of June, there was what is called by the defendants a meeting of the signatories of the memorandum and articles of association.

This would be more properly called an appointment to obtain signatures, since it was not ascertained who were the signatories and for what number of shares, and in any event there could be no business transacted beyond the obtaining of the signatures, as the signatories had no business.

Mr. Rhodes, a solicitor, attended for the purpose of witnessing the signatures, and did witness each of them. The company was not incorporated until the 1st of July, 1897. As the company was not yet formed on the 30th of June, no agreement could possibly be then arrived at which would bind the company when formed, and no agreement for the benefit of three out of five directors could be arrived at by resolution of the board at the meeting of the 5th of July, *a fortiori*, when there was no trace on the minutes of the alleged agreement. At most the plaintiffs, who are two of the directors, might be held, if the evidence established such a case, to be personally barred from commencing an action and so from suing on behalf of themselves and other shareholders, and it is solely with the object of ascertaining whether they are so barred that it is worth while looking into the evidence at all.

But what actually took place at the so-called meeting of the 30th of June, or at the meeting of the 5th of July, is, independently of any contradiction, by no means clearly made out by the defendants, on whom is the onus of proving what, if anything, will be of advantage to them. There is no note in writing of what is alleged to have taken place of earlier date than the 18th of October, 1898, made more than a year and a-quarter after the event, and pending this action, and entered in a minute of the company of that date, the accuracy of which was challenged at the time. Indeed, I should infer that it was the deliberate intention of the defendants not to disclose the agreement or understanding by which, as they say, they were entitled to defer payment of calls.

As to what actually took place on the 30th of June, 1897, the nature of the evidence is remarkable. [His lordship then discussed the evidence, and continued:] I cannot arrive at the conclusion that it was established that the plaintiffs knew anything about any special understanding or agreement which would prevent them from bringing an action, even if knowledge of an understanding or agreement not binding on the company would have prevented them, which I think more than doubtful. That there was in fact no such understanding or agreement which could bind the company or absent shareholders is abundantly clear. The defendants acted throughout and the case was argued on their behalf as if directors were justified in exercising powers vested in them exactly as they pleased so long as they did not violate the express terms of the powers. The equitable doctrine, well established as it is, that they as fiduciary donees of the powers are bound to exercise them so as not to give themselves an advantage over other shareholders was practically ignored, though since the Judicature Act it is the paramount rule not only in courts of equity but in all courts, and though it was expressly invoked by Mr. Eve on behalf of the plaintiffs. Assuming for the moment that counsel for Dr. Sworn were justified in throwing over the agreement which had been relied upon as to a right on the part of the defendants Margowski, Cohen, and Sworn to postpone payment on the shares subscribed for by them, let us see how the matter stood on the articles of association alone. Under article 5 the directors had power to issue and allot shares for such consideration and upon such terms as the board might determine. The defendant directors became at once on the incorporation of the company by reason of their signature of the memorandum and articles members of the company for the full number of shares subscribed for by them respectively, including in the case of Margowski the shares subscribed on behalf of the Honduras Co. (Limited). It was perceived that they would not under the article literally applied become liable for any sums payable

on application or allotment, but only under article 13 upon calls made in accordance therewith. Accordingly, in addition to the 10 per cent., or 6d. per share, charged on application, the directors by the second resolution for allotment, passed on the 5th of July, made a further 50 per cent., or 2s. 6d. per share, payable on allotment, the three defendant directors hoping and expecting to escape liability for this 3s. altogether, and only to become liable as and when they made calls on shares. They did not extend this immunity to all the subscribers to the memorandum and articles, but put down on allotment sheet A in a column indicating what sums were payable on application and allotment against the shares subscribed for by all the signatories except the three defendants and the secretary the sum of 6d. on application and 2s. 6d. on allotment, leaving blanks against the shares taken by the three defendants and the secretary. In this manner the three defendants thought to escape liability in respect to the 3s. per share, while charging every shareholder other than themselves and the secretary with that amount, which was at once called up. Whether the secretary paid up the 3s. per share on the shares subscribed for by him does not plainly appear. It is true that the three directors remained liable to calls in respect of the whole 5s. per share in accordance with clause 13, but they did not exercise the power of making calls, and had not done so to any extent at the time of the commencement of the action. Now, doubtless, the shareholders having notice of the articles, might have known that it was quite possible that the powers of the directors might be manipulated after this fashion without violation of the express terms of the articles. But such manipulation gave a clear advantage to the three defendant directors over other shareholders, who, by virtue of the equitable rule, had a right to suppose that no such advantage would be taken. There would have been no more difficulty so far as the terms of the articles were concerned in enforcing payment of the 3s. per share from the three defendants than from the three other subscribers of the memorandum and articles, who were called upon to pay it. In fact they had only to renounce the benefit enabling them according to the letter of the articles to escape payment, and the conclusion would have followed. Counsel for the defendant Sworn argued vehemently that when once it came to a question of waiving right the defendants must succeed, as they could not be compelled to waive. If waiver were necessary to enable them to come on equal terms with the other shareholders they were bound to waive, otherwise by virtue of an immunity which they themselves had provided for by the terms of the articles which they introduced, they would evade the paramount duty of acting equally between themselves and other shareholders. Therefore, even without an agreement in their favour, the defendants would be liable for the 3s. per share. But the director defendants did not even profess to be acting on the articles alone. They set up throughout the action that they had a separate agreement for the benefit of three, and the three only, and the famous minute of the 18th of October, 1898, and the evidence put forward in support of it have no meaning on any other hypothesis. As hereinbefore pointed out, they represented on the 5th of July that they had made an offer to subscribe for shares which was still open and was accepted, and that shares were allotted to them accordingly. And although counsel for Dr. Sworn, after the evidence had all been read and the arguments based upon it had been concluded, tried to withdraw that suggested agreement, it was, in my judgment, altogether too late to do so. It is evident that with an agreement such as that suggested, the question whether the defendant directors had fairly and properly exercised their trust powers would have been very different from what it would have been in the absence of such an agreement. It would not have been possible for the defendant directors to say with any effect that they had altogether abandoned the agreement in their favour and acted independently of it, and on no other hypothesis could they have sustained the proposition that they had fairly and without leaning one way or another exercised the power of regulating the amounts payable respectively on application and allotment and by call. My conclusion is that there was a failure on the part of the three director defendants to exercise the powers as they ought to have been exercised, and that they ought to be held to the representations made by them on the 5th of July, and to be taken to have charged themselves with 3s. as they charged the other signatories of the memorandum and the applicants independently of the memorandum for shares. The learned judge seems to have thought that the acquiescence of the plaintiffs Alexander and Gibbs in the two resolutions for the allotment of shares was of itself sufficient to disentitle them to sue, but in this conclusion I am unable to concur. This exclusive reliance on the resolutions accounts, as it seems to me, for the failure to examine more carefully into the evidence as to separate understanding or agreement. I do not think that the learned judge gave sufficient weight to the equitable rule.

As to the pleadings and the point open to the defendants for argument on the appeal and the costs, I concur with the Master of the Rolls.

VAUGHAN WILLIAMS, L.J.—The material facts seem to be as follows: [His lordship stated the facts and discussed the evidence, and continued:] All this makes it extremely improbable that any such agreement was made as is recited in the resolution of the 18th of October, 1898.

But assume that it was. The agreement was without consideration, and was in fact no more than an exercise by the directors of the power vested in them by article 13 of making and abstaining to make calls on particular shareholders, and in my judgment the resolution, whether taken in conjunction with the allotment sheet or not, does not amount to an agreement for postponement of any part of the liability of the signatories in respect of the shares that they had taken by signature.

It amounts at the most to an abstinence by the directors from calling up on allotment the 3s. which the ordinary applicants were called on to pay.

If the resolution goes further, it was a resolution which the directors had no right to make in their own favour, and the mere fact that they purported so to do would, without further evidence of fraudulent or improper motive, be sufficient to negative any suggestion that such a resolution was passed in the honest exercise of their judgment by the directors, for a director cannot use his power of making calls for his own interests: see *Gilbert's case*.

It is impossible to read the evidence without seeing that the case really set up by the defendants was that they signed the memorandum on the express terms that their liability on the shares should be partially postponed, and that any "call" made which was inconsistent with that postponement would be a "call" which the directors, whoever they might be, ought not to make, because it would be a "call" inconsistent with an agreement between the company and the signatories binding on the company.

It is true that this is not the case pleaded, because the case pleaded is merely that the signatories took their shares on the terms that nothing should be

payable upon application or allotment, but that such shares should only be paid up on "calls" by the directors as and when such "calls" were required for the purposes of the company, but inasmuch as want of money by the company, and urgent want of money by the company, cannot in fact be denied, the directors were necessarily driven to justify not calling up the 3s. from themselves on the ground of the alleged agreement binding the company never to do so.

Doing so would have provided (having regard to the large number of shares taken by the signatories as such) a larger sum than the 1s. call made on the ordinary shareholders, and this even though the call on the signatory shareholders, had been limited to 1s. a share.

The outcome, in my judgment, is that there was no agreement binding on the company for postponement of the payment by the signatories of any part of the sums which they were bound to pay on their shares; and that any refraining of the directors from calling up the sums from the signatories necessary to put them on a level with the other shareholders on the alleged ground that there was in existence an agreement which entitled the signatories to postponement of liability was based on a misconception by the directors as to the existence of such an agreement binding the company and a breach of trust committed by them for their own interest.

If, on the other hand, the directors seek to justify their refusal to call up the 6d. and 2s. 6d. from the signatories as an exercise of their discretion, it seems to me that, having regard to the want of money by the company and the setting up by the directors of the alleged agreement to postpone as justification for not putting themselves as signatories on a level with the other shareholders, the action of the directors cannot be regarded as an exercise of discretion at all.

They considered that the so-called agreement precluded the exercise of any discretion in the matter. It is said that they could not have called up the 6d. and 2s. 6d. except by calls of 1s. made with proper intervals according to the articles. Well, even if this were so, they had ample opportunity in this manner to call up the 3s., and they have not done it.

The last point which I have to deal with is the suggestion that the plaintiffs, having been privy to the resolution of the 5th of July, cannot as plaintiffs, even though suing on behalf of themselves and others, impeach the resolutions to which they were privy. I say nothing about, the antecedent alleged agreement, for, as I have already said, I do not believe this was communicated to the plaintiffs. The answer, so far as the resolutions are concerned, is that the cause of action here does not impeach those resolutions properly construed, for those resolutions do not involve any agreement for postponement of any liability of the signatories on their shares.

I think, therefore, that the judgment of Cozens-Hardy, J., was wrong and that this appeal ought to be allowed with costs here and below.

As to the pleadings, whatever was originally prayed, ultimately all that was asked was a declaration, and Cozens-Hardy, J., as I understand, said he would make the necessary amendments. If they were not actually made, these amendments, looking to the issue really fought at the trial, ought, in my opinion, to be made.

Solicitors, *White & De Buriatte; Spyer & Sons; Haynes & Claremont.*

## High Court of Justice.

Chan. Div. Byrne, J. — March 20.

*In re* BEDDINGTON.
MICHOLLS *v.* SAMUEL. (*a.*)

*Will—Gift by testator within the period of twelve months prior to his death of property to legatee—Ademption—Advancement—Sum to be brought into account—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c); *s.* 9, *sub-section* 1.

*Where a gift* inter vivos *of property by a testator to a legatee constitutes an ademption* pro tanto *of the legacy to such legatee under the will, the sum to be brought into account by such legatee is the amount advanced less the estate duty charged on such gift.*

Summons.

This was a summons to determine several points arising on the construction of the will of Maurice Beddington, deceased, who died on the 9th of September, 1898, one of which points only calls for report.

By his will dated the 30th of March, 1896, the testator directed that his residuary estate should be divided into as many equal shares as there should be daughters of his living at his death, or who should have died in his lifetime leaving a child or children who should be living at his death. And as to every share so appropriated to any daughter he directed his trustees to pay the dividends and income to such daughter for life for her separate use and without power of anticipation, and after her decease he directed that the share should be held on trust for her children or child at the age of twenty-one or marriage in the usual form.

In July, 1898, and therefore within a period less than a year before his decease, testator contributed the sum of £4,320 towards the purchase of a residential house for one of his daughters, Mrs. A. R. Micholls.

In 1897, the testator had likewise expended the sum of £4,000 on the purchase of another dwelling-house, which by an indenture of settlement, dated the 20th of June, 1898, he settled on another daughter, Fanny Behrens, her husband and children, on the trusts herein mentioned.

The testator left him surviving seven daughters.

No daughter of the testator died in his lifetime leaving a child living at his death.

The question was raised on the summons, to which three of the executors and trustees of the will were plaintiffs, and certain of the beneficiaries were defendants, whether in ascertaining the share of the residuary estate to be appropriated to Mrs. Micholls and Mrs. Behrens the sums contributed to the purchase of the said houses ought to be brought into hotchpot and accounted for by them. Byrne, J., held that in estimating the shares of these ladies in the residuary estate the sums expended on the purchase of the houses ought to be accounted for. The question then arose whether the whole of the sum advanced, or such sum less estate duty, which was payable at eight per cent., ought to be brought into account.

*Norton, Q.C.,* and *Alexander,* for the trustees.

*Rowden, Q.C.,* and *Wood Hill,* for Mrs. Micholls and Mrs. Behrens.—The gifts of the houses were contingently charged with estate duty at the moment they were given, and Mrs. Behren's house, at the moment that the testator gave it, was contingently subject to

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

estate duty: Finance Act, 1894, s. 2, sub-section 1; s. 9, sub-section 1.

*Levett, Q.C.*, and *Fawcus*, for a daughter of the testator, who represented the class of unadvanced daughters.

BYRNE, J.—If I thought by reserving judgment I should be likely to come to a more accurate conclusion I should do so, but I have formed my view upon it, and I propose to give it.

In this case the question arises by reason of the death of the donor of a certain gift within the year, the consequence of which is that the gift is chargeable with duty under the Finance Act. Now, the question arises by reason of the doctrine of ademption. I have held that the child who is benefited by the gift is bound to bring into account before sharing in the residue, the value of the benefit received by reason of the gift. The question of ademption, of course, never arises until the death of the donor. Then if it be held that the gift is to be treated as an advance, you have to ascertain the amount or value of that advance which has to be brought in. When the gift was made there was a liability which would arise in the event of the donor dying within the year. When he did die within the year, you are not troubled with any question of actuarial valuation as to the probable amount of this contingent liability, but you say, what was the value of the gift which was given to the child? It appears to me that the advance was an advance of property which was subject to be charged with duty in a certain event; that event having happened, the value of the property so advanced was less the amount which became a charge upon it in the event which happened, and therefore, as it appears to me, the amount to be brought in, is the value after deducting this which did become a charge upon the property so first given.

Solicitors, *Montagu, Mileham, & Montagu.*

---

Chan. Div.
Byrne, J. } Feb. 7, 8; March 9.

COSTA RICA RAILWAY CO. (LIMITED) v. FORWOOD. (a.)

*Company—Director—Contracts—Interest of director in contracts—Disclosure—Profits—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Table A.*

*The articles of association of a railway company provided for the vacation of his office by a director concerned in the profits of any contract with the company unless he declared in writing the nature of his interest, but that "no director shall vacate his office by reason of his being a member of any corporation, company, or partnership which has entered into contracts with, or done any work for, the company, or by reason of his being interested, either in his individual capacity or as a member of any company, corporation, or partnership in any adventure or undertaking in which the company may also have an interest."*

*The railway company sought to make the estate of a director liable for profits received by him by reason of contracts made with the company by a company and firm in which he was interested, but which interest he had not disclosed.*

*Held, following* Imperial Mercantile Credit Association *v.* Coleman, 18 *W. R.* 570, *L. R.* 6 *Ch. App.* 558 (*not overruled on this point in* 21 *W. R.* 696, *L. R.* 6 *H. L. Cas.* 189), *that the exception in the article applied, and that the action must be dismissed, there being no liability to account for profits received by reason of contracts made with the railway company.*

(a.) Reported by R. A. DANIELL, Esq., Barrister-at-Law.

Action.

This action was originally commenced in 1897 by the plaintiff company against Sir Arthur Forwood, claiming a declaration that the defendant, as a director of the plaintiff company from April, 1886, to February, 1896, was liable to account for all profits made by the Atlas Steamship Co., and the firm of Leech, Harrison, & Forwood, and the firm of Pim, Forwood, & Kelloch; or, alternatively, for all profits received by defendant as a shareholder in the Atlas Co. and as a member of the said firms by means of the "banana" and "syndicate" contracts.

Sir A. Forwood having died before the action came on for trial, the action was revived against his executors, and the question arose how far the executors were liable for profits said to have been made by the deceased out of contracts entered into by the plaintiff company with the above-mentioned company and firms.

The following are the facts:

One Minor Cooper Keith had, previously to 1884, worked under a lease from the Costa Rica Government a railway running from Limon, a port on the Atlantic, inland to Carillo.

By a contract made in April, 1884, between the Republic of Costa Rica of the one part, and Keith of the other part, in consideration of the construction and fitting out by Keith of new railways, and of his repairing and altering the railways then in existence, the Republic conveyed to him the lines then in existence and the new lines for ninety-nine years, and granted him certain land.

The contract also contained a provision that upon the construction of the railways a company should be formed to take over the concession.

Keith grew bananas on a large scale. and exported large quantities of that fruit to the United States; the Carillo to Limon railway connecting the banana-growing districts with that port, whence they were shipped to New York and New Orleans. One line of steamers owned by the Atlas Steamship Co. ran between Limon and New York, and another line, owned by Phipps & Co., ran between that port and New Orleans.

Sir Arthur Forwood, the largest shareholder in the Atlas Steamship Co., was also a partner in Leech, Harrison, & Forwood, their managers, who were entitled to a percentage on the gross earnings, and was also a member of the firm of Pim, Forwood, & Kelloch, their agents in America, who were interested in the profits of the banana trade.

In April, 1886, an arrangement was made between Keith, the Atlas Co., and Phipps & Co. in reference to the railways and the carriage of bananas, which sufficiently appears by the three agreements hereafter referred to.

On 26th April, 1886, the plaintiff company was incorporated with a nominal capital of £1,800,000 in shares of £10 each.

No reference was made to the said agreements in either the memorandum or articles of association.

Article 81 provided for the vacation of office of director "if he is concerned in or participates in the profits of any contract with the company, or of any work done for the company without declaring and setting forth in writing the nature of his interest." Then follow rules as to when such declaration shall be made, and the article continues: "But the above rules shall be subject to the following exceptions:

"That no director shall vacate his office by reason of his being a member of any corporation, company,

or partnership which has entered into contracts with, or done any work for, the company: or by reason of his being interested, either in his individual capacity or as a member of any company, corporation, or partnership, in any adventure or undertaking in which the company may also have an interest."

Then follows a provision that in such a case any vote given by him shall not be counted.

By the first agreement, called the "construction agreement," dated the 19th of May, 1886, made between the plaintiff company of the one part, and Keith of the other part, Keith agreed to transfer to the company the concession to construct and equip the railways within a specified time, and to pay interest upon the first mortgage debentures of the company until the completion of the railways, and until they had been taken over by the company: And it was thereby agreed that Keith should be entitled to the whole of an intended issue of first and second debentures of the company, and also to such portion of the share capital as was therein mentioned, with the exceptions therein referred to, and the company was, as and when required by Keith, to issue the whole or part of the said debentures and share capital for public subscription.

A second agreement, called the "banana agreement," dated the 19th of May, 1886, was made between the plaintiff company of the first part, Keith of the second part, the Atlas Steamship Co. of the third part, and Phipps & Co. of the fourth part. After reciting the "construction" agreement, and that Keith was carrying bananas on the Carillo to Limon railway, which he was at the time working himself; that the parties of the third and fourth parts were owners of steamers engaged in the banana carrying trade, which were, according to arrangements made with Keith, being worked in conjunction with the said railway; that the plaintiff company had consented, at the request of the parties thereto of the second, third, and fourth parts, in view of the future transfer to the plaintiff company of the said railways, to grant facilities and make arrangements with reference to the carrying on of the banana trade upon the terms therein appearing; it was agreed that the plaintiff company should, after obtaining possession of the railway, and while the said agreement remained in force, as and when requested by Keith or his agents, carry to Limon and store on vessels to be provided by the parties of the third and fourth parts all bananas tendered by Keith.

The said agreement further contained provisions dealing with the supply of special trains, the provision of berths for the vessels, and the rates of carriage, which were guaranteed to reach a certain amount per annum.

And it was thereby agreed that the privileges thereby granted should be exclusively confined to the parties thereto, and that the plaintiff company should not, while the agreement continued, confer any privileges on anyone else.

By a third agreement, called the "syndicate agreement," dated the 21st of June, 1886, and made between Keith of the first part, the Atlas Co. of the second part, and Phipps & Co. of the third part (which was to be supplemental to the "banana" contract and to be of equal duration), Keith agreed to purchase and ship at Limon all bananas the subject of the contract, and to sell to the parties of the second and third parts as therein provided all bananas in any way under his contract.

The said agreement fixed a maximum number of bananas for shipment in each year; but Keith was precluded from entering into any other contract with any other firm as to the excess.

The Atlas Co. was to sell bananas in New York for the joint account of themselves and Keith; and Phipps & Co. were to sell bananas in New Orleans for the joint account of themselves and Keith.

Provision was also made by the said agreement whereby profits should be divided or losses paid, as therein mentioned, by Keith and the company whose steamer had carried the cargo disposed of.

Sir Arthur Forwood and a member of the firm of Phipps & Co. were directors of the plaintiff company at the time when these three contracts were entered into and Sir Arthur Forwood continued in the office of director until his resignation in February, 1896.

The prospectus of the plaintiff company did not disclose the fact that Sir Arthur Forwood and Mr. Phipps were interested in the contracts of the 19th of May, 1886; nor did Sir Arthur Forwood make any disclosure of interest under article 81.

Profits were earned under the "syndicate agreement."

*Neville, Q.C.*, and *Younger, Q.C.*, for the plaintiff company.

*Levett, Q.C.*, *Swinfen Eady, Q.C.*, and *Bremner*, for defendants.

The following cases were cited: *Imperial Mercantile Credit Association* v. *Coleman*, 18 W. R. 570, L. R. 6 Ch. App. 558, 21 W. R. 696, L. R. 6 H. L. 189; *Dunne* v. *English*, L. R. 18 Eq. 524; *Dean* v. *MacDowell*, 26 W. R. 486 8 Ch. D. 345; *Aas* v. *Benham*, [1891] 2 Ch. 244, 39 W. R. Dig. 146; *Cavendish Bentinck* v. *Fenn*, 36 W. R. 641, 12 App. Cas. 652; *Whitney* v. *Smith*, 17 W. R. 579. L. R. 4 Ch. App. 513; *Farrar* v. *Farrars (Limited)*, 37 W. R. 196. 40 Ch. D. 395; *Aberdeen Railway Co.* v. *Blaikie*, 1 Macq. 461; *White* v. *City of London Brewery Co.*, 38 W. R. 82, 42 Ch. D. 237.

March 9.—BYRNE, J., stated the facts and continued:—The plaintiff company do not say that the "banana" contract was an improper contract for the railway company, but they rely on the well-known rule of equity, that no trustee or person in a fiduciary position shall be allowed to retain a profit made by means of the use of any part of the trust estate; and they say that Sir A. Forwood's executors ought to account for all profits made by the Atlas Co. and by Leech, Harrison, & Forwood by means of the "banana" and "syndicate" contracts; or, alternatively, for all profits due to the said contracts received by him as a shareholder in the Atlas Co. and as a partner in the said firm.

The railway and the undertaking of the railway company were part of the property of the plaintiff company; Sir A. Forwood, as a director, being in a fiduciary relationship to it. The "banana" contract was specially advantageous to Keith and others interested in the banana trade, and made the earning of profits easier for them; and as the largest shareholder in the Atlas Co., and senior partner in the firm of Leech & Co., Sir A. Forwood was largely interested in the sale of bananas under that contract.

In my opinion, apart from the articles of association of the plaintiff company, Sir A. Forwood's estate would be liable to account to the plaintiff company for all profits made by him personally out of the banana contract as a shareholder in the Atlas Co. and as a partner in Leech & Co. which can be traced to the benefit conferred by the "banana" contract in reference to the user of the railway.

Taking, however, the view which I do of the articles of association, it is unnecessary for me to decide the question of further liability; but I must not be taken in omitting to deal with the matter, to endorse the view that Sir A. Forwood's estate could, in the absence of articles like the present, be made liable to

account for profits made by the Atlas Co. or by Leech & Co. by means of the contract. It is said that it would be hard to ascertain the amount of profit made by Sir A. Forwood owing to the benefit conferred by the "banana" contract. This might be so, but in *Docker* v. *Somes*, 2 Myl. & K. 655, at p. 667, the Lord Chancellor points out that the mere fact that it would be difficult to ascertain the amount will not prevent the court from doing so so far as it can.

The articles of association of the plaintiff company by article 81 provide for the vacation of the office of a director "if he is concerned in or participate in the profits of any contract with the company, or of any work done for the company, without declaring and setting forth the nature of his interest."

It is admitted that Sir A. Forwood's executors cannot rely on this clause, as no declaration was ever made; but they rely on the exception, "that no director shall vacate his office by reason of his being a member of any corporation, company, or partnership which has entered into contracts with or done work for the company, or by reason of his being interested either in his individual capacity or as a member of any company, corporation, or partnership in any adventure or undertaking in which the company may also have an interest," with a provision which prevents his vote being counted in such a case. I think this point is covered by the decision of Lord Hatherley, C., in *Imperial Mercantile Credit Association* v. *Coleman*. [His lordship read the article in that case and the judgment of the Lord Chancellor, and proceeded:] The Companies Act, 1862, and Table A. clearly recognize that this is a matter which may be regulated by the company's articles.

The present clause is differently worded from the clause in that case, but the reasoning of Lord Hatherley is applicable to the present case.

I had some doubt whether, owing to the use of the past tense, the present clause applied only to contracts which had been entered into prior to the appointment as a director, but I think that construction would be too narrow.

Although Lord Hatherley's decision was reversed in the House of Lords, it remains untouched as regards the present point.

Reliance was placed on what Lord Cairns then said, but Lord Cairns does not touch upon Lord Hatherley's reasoning in respect of a clause of this description, but reserves a right to reconsider the matter.

The plaintiff company therefore fail in their action, which must be dismissed.

Solicitors, *Norton, Rose, Norton, & Co.; Ashurst, Morris, Crisp, & Co.*

---

Chan. Div.
Cozens-Hardy, J. } March 23, 29.

*In re* CARTER.
DODDS *v.* PEARSON. (*a.*)

*Will—Mortgage—Mortgagee in possession—Devise by mortgagee of mortgaged property.*

*Where a mortgagee in possession devises the mortgaged estate as if he were absolute owner thereof, the mortgage debt passes to the devisee unless, on the facts, a contrary intention can be gathered.*

In re Clowes, 41 *W. R.* 69, [1893] 1 *Ch.* 214, *distinguished.*

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

Originating summons.

The testatrix Martha Carter by a codicil to her will devised her two houses and stable in George-street, Thornaby-on-Tees, to her friend James Dodds, of Stockton-on-Tees, in fee simple. The two houses and stable in question had been mortgaged to the husband of the testatrix, and the mortgagor having become bankrupt, the husband had entered into possession and was in possession at the time of his death.

By his will the husband devised and bequeathed all his real and personal property to the testatrix, and appointed her sole executrix. The testatrix had entered into possession of all her husband's property and at the time of her death she had no other property at Thornaby-on-Tees.

This was an originating summons to determine whether James Dodds was entitled to the mortgage debt secured on the property, or whether it formed part of the residuary estate.

*Eve, Q.C.*, and *St. John Clerke.*—The cases show that the question must be determined by what was the testatrix's intention. There is no absolute rule on the subject, and it is clear that here the testatrix must have intended to pass whatever interest she possessed: see Jarman on Wills, vol. 1., p. 643; *Woodhouse* v. *Meredith*, 1 Mer. 450; *Burdus* v. *Dixon*, 6 W. R. 427; *In re Lowman*, [1895] 2 Ch. 348, 43 W. R. Dig. 195. *In re Clowes*, 41 W. R. 69, [1893] 1 Ch. 214, has no application to this case, as there the mortgagee was not in possession.

*Micklem, Q.C.*, and *J. G. Wood.*—The rule is that the devise by the mortgagee of mortgaged property does not pass the mortgage debt. The testatrix was in possession merely as mortgagee; it was a mistake of the testatrix to assume that the property was hers, and there is nothing to show how the testatrix would have dealt with the matter if she had remembered her true position: *Strode* v. *Russell*, 2 Vern. 621, and *Casborne* v. *Scarfe*, 1 Atk. 603, illustrate the true rule and also *In re Clowes.*

COZENS-HARDY, J., stated the facts and the question to be determined, and said that the devise was intended to pass, and sufficed to pass, such interest as the testatrix had. This was consistent with the decisions of *Woodhouse* v. *Meredith*, and *Burdus* v. *Dixon*. In *In re Lowman* Lindley, L.J., said ([1895] 2 Ch. at p. 354): "What, after all, is a devise of land? It is only a devise of such estate or interest as the devisor has in the land, and *primâ facie* whatever estate or interest this testator has in land will pass under a devise of it by that name if it is specifically referred to so as to show that the testator had that particular land in his mind, and if there is nothing else to answer the description." *In re Clowes* is distinguishable, as there the mortgagee was never in possession as here; and the position of a mortgagee in possession is peculiar, as the tenants are his tenants and he is their landlord. A mortgagee in possession treats himself as owner and until redeemed he regards himself as such. There is no doubt that Mrs. Carter's intention was to give the applicant the interest in the property that she had, and there is no rule of law which prevents effect being given to her intention, and the mortgage debt goes to James Dodd.

Solicitors, *Warriner & Co.*, for *A. H. Sill*, Middlesborough; *Williamson, Hill, & Co.*

Chan. Div. } Jan. 18, 19, 26.
Cozens-Hardy, J. }

WOOLSTON v. ROSS. (a.)

*Mortgage—Distress—Receiver of mortgaged property—Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 19, *sub-section* 1 (*iii.*); *s.* 24, *sub-sections* 1, 2, 3.

*A mortgagee, under sub-section* 1 (*iii.*) *of section* 19 *of the Conveyancing Act,* 1881, *appointed a receiver of the rents of a mortgaged property. The rent of the property for one quarter was outstanding. The receiver declined to distrain, and thereupon the mortgagor put in a distress without the receiver's authority.*

*Held, that, after the appointment of the receiver, the mortgagor had no right to distrain, and that the distress was illegal.*

The plaintiff in this action was the assignee of the lease of a house in Porchester-terrace.

The original lease was granted to Kelly on the 24th of December, 1896, for a period of twenty-one years.

It appears that some dispute had arisen immediately after the grant of the lease to Kelly, as a part of the first quarter's rent had never been paid, but subsequently rent had been duly paid.

The defendant was the owner of the equity of redemption of the property under a mortgage made since 1881.

On the 12th of July, 1898, the mortgagee appointed a receiver under sub-section 1 (iii.) of section 19 of the Conveyancing Act (44 & 45 Vict. c. 41), and notice of this was served upon Kelly, who henceforward paid his rent directly to the receiver.

A question arose as to the paying of the first quarter's rent.

The receiver, after taking legal advice, declined to distrain, and informed the defendant that if he (the defendant) by any process obtained the money it would have to be paid into the account of the house in his (the receiver's) hand.

Proceedings were subsequently taken by the defendant in November, 1899, and a distress warrant was issued against the plaintiff as assignee of the lease, but was withdrawn on the payment of £80 into court.

The plaintiff claimed that distress by the mortgagor after the appointment of a receiver was illegal and asked for damages for an illegal distress.

*Eve, Q.C.*, and *Nepean*, for the plaintiff, said that the receiver was the proper person to distrain. After notice of the appointment of a receiver had been given the lessee was released from his liability to pay rent to the mortgagor: *Waddilove* v. *Barnett*, 2 Bing. N. C. 538; *Trent* v. *Hunt*, 1 W. R. 481, 9 Exch. 14; *Bayly* v. *Went*, 51 L. T. Rep. 764, 33 W. R. Dig. 106.

*Buckmaster*, for the defendant.—The mortgagor can distrain, even after the appointment of a receiver, if he procures the consent of the receiver before doing so. Though the receiver did not authorize the mortgagor to distrain, yet he allowed him to take action.

*Eve* replied.

COZENS-HARDY, J.—Up to the date of the appointment of the receiver the defendant had the right to distrain, but after that date the right was vested in the receiver. The receiver, although appointed by the mortgagee, is the agent of the mortgagor, but the mortgagor cannot exercise the statutory power of distress as principal. In my opinion the distress was illegal. The distress was withdrawn by mutual agreement on payment of £80 by the plaintiff. It is not therefore necessary for me to grant an injunction.

Solicitor for plaintiff, *J. G. Dalzell.*

Solicitors for defendant, *Downey & Linnell.*

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

---

Chan. Div. } May 11, 12, 14, 15.
Buckley, J. }

DAY v. RILEY & WHITTAKER. (a.)

*Trade-mark—Rectification of register—Mark registered under Patents, Designs, and Trade-Marks Act,* 1883 (46 & 47 *Vict. c.* 57)—*Order to expunge simply—Not subject to application to amend.*

Semble, *leave should not now be given to amend a bad trade-mark, which was originally registered under the Act of* 1883.

*The court rejected the owner's contention that an order to expunge his mark, which had been registered under the Act of* 1883, *should only be made subject to an application to amend being made by him within a reasonable time, but made an order to expunge the mark absolutely.*

In re Wills' Trade-Mark, [1893] 2 *Ch.* 262, 41 *W. R. Dig.* 252, *not followed.*

Motion.

This was an application by the defendants to rectify the register by striking out two registered trade-marks, No. 70,347 and another, belonging to the plaintiff, and was heard with the plaintiff's action, which was to restrain infringement of the marks, infringement of copyright in a certain label, and passing off by the defendants of their goods as the goods of the plaintiff.

The mark No. 70,347 was in respect of a medicine for horses, cattle, and sheep, called Day & Sons' Black Drink, made by the plaintiff, and the mark consisted of the whole of a label fixed upon every bottle sold by the plaintiff. The label contained on the left side at the head of the label a device with words upon it, with the word "registered" above, and the words "trade-mark" below the device in question. On the right of the device occurred the words "Day & Sons' Black Drink or Colic and Scour Mixture," and then followed directions as to how the mixture was to be used.

This label was composed by the plaintiff in 1887.

The application to register was made on the 6th of December, 1887, and the mark appeared in the *Trade-Marks Journal* under date the 18th of July, 1888, and was registered on the 19th of November, 1888.

It was now admitted that the mark could not be supported as it stood, but the plaintiff asked that the order to expunge should be made subject to an application to amend being made within a reasonable time, as was done in *In re Wills' Trade-Mark*, [1893] 2 Ch. 262, 41 W. R. Dig. 252.

*H. Terrell, Q.C.*, and *Austen Cartmell*, for the motion.

*Astbury, Q.C.*, and *Arnold Herbert, contra.*

BUCKLEY, J., after granting an injunction against the defendants on the passing off claim, and pointing out that the plaintiff had given up his other claims, continued as follows with regard to mark No. 70,347: The Act of 1888 only came into operation on the 1st of January, 1889, so that the application to register was made under the Act of 1883. Here the respondents on the motion admit that they cannot support the mark as a mark for reasons which I need not go into:

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

but they ask to put the order in the form that was used by Wright, J., in *In re Wills' Trade-Mark*, making an order expunging the mark unless an application to amend is made within a reasonable time. That is an order I could not make in the absence of the comptroller, because the usual undertaking has been taken; but what I have to consider is whether I ought to make that order at all. It is plain the respondents want the order in that form because they desire to preserve to themselves the benefit of the Act of 1883, and not to register anew under the Act of 1888. If I expunge the mark from the register of course it will be competent to them to make another application to register another mark which may be free from objection; but now that will have to be such a mark as will comply with the Act of 1888. It seems to me that the mark is wrong, and, if it is wrong, I ought not to give the respondent an opportunity of availing himself of the benefit of the Act of 1883, now that an Act which must be taken to be a wiser and more useful Act has passed which took effect in January, 1889. As regards this mark, therefore, I must simply make an order expunging it from the register.

*Judgment for the applicants.*

Solicitors for the plaintiff, *Woosnam & Smith*, for *C. H. Pedley*, Crewe.

Solicitors for the defendants, *Pritchard, Englefield, & Co.*, for *D. L. Sprake*, Accrington.

---

Q. B. Div.
(Darling and Bucknill, JJ.) May 30.

SHERRARD v. GASCOIGNE. (*a.*)

*Landlord and tenant—Ground game—Agreement divesting the right of the occupier to kill—Validity—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *s.* 3.

*An agreement by the owner of a farm, whereby he undertakes, in the event of his tenant forbearing to kill the ground game, to compensate him for loss or damage done to his crops by the ground game, is void by section* 3 *of the Ground Game Act*, 1880.

Point of law raised by the pleadings in an action, and set down to be disposed of before the trial.

The action was brought by a tenant to recover from his landlord the sum of £178 15s. alleged to be due under an agreement whereby the defendant agreed to compensate the plaintiff for damage done to the plaintiff's growing crops by ground game.

The statement of claim alleged as follows:

In January, 1895, the plaintiff became, and has since continued to be, the tenant to the defendant of Huddlestone Hall Farm and Newthorpe Farm, in the West Riding of Yorkshire; and during the negotiations for the tenancy the defendant's agent represented to the plaintiff that the defendant was devoted to shooting, and, with a view to induce the plaintiff to leave the ground game on the farms unshot and undisturbed for the defendant's benefit, the defendant's agent, on his behalf, promised that in the event of the plaintiff so doing the defendant would compensate the plaintiff for all damage done to the plaintiff's crops by the ground game. The plaintiff was induced by the said promise to accept the tenancy, and during the year 1898, in reliance upon and induced by the said promise, allowed the ground game on the farms to go unshot and undisturbed for the benefit of the defendant, who ultimately shot over the farms. The growing crops of the plaintiff were damaged by the ground game.

The defendant, among other defences, pleaded that the alleged agreement was void by section 3 of the Ground Game Act, 1880.

Section 1 of the Act declares that "every occupier of land shall have as incident to and inseparable from his occupation of the land the right to kill and take ground game thereon concurrently with any other person who may be entitled to kill and take ground game on the same land."

Section 3 provides that "every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given and reserved to him by this Act, or which gives such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void."

*Scott Fox, Q.C.* (*H. T. Kemp* with him), for the defendant, cited *Anderson* v. *Vicary*, [1899] 2 Q. B. 436.

*C. Walsh* (*Macaskie* with him), for the plaintiff.—It is true that the plaintiff's agreement to forbear from shooting the ground game is bad. But the defendant's promise to compensate the plaintiff for damage done by ground game is, nevertheless, good, because it was made not in consideration of the plaintiff's forbearance to shoot or disturb the ground game, but in consideration of the reservation to the defendant in the lease of the concurrent right to shoot the ground game.

DARLING, J.—It appears to me perfectly clear that the agreement alleged in the statement of claim is an agreement which purports to divest or alienate the right of the occupier as declared in the Act, and that it also purports to give him an advantage in consideration of his forbearing to exercise his right. I therefore think that the agreement was absolutely void, and the plaintiff's action must fail.

BUCKNILL, J., concurred.

*Action dismissed.*

Solicitors for the defendant, *Williamson & Son*, for *Perkin & Perkin*, York.

Solicitors for the plaintiff, *Vincent & Vincent*, for *North & Sons*, Leeds.

---

Q. B. Div.
(Ridley and Darling, JJ.) May 10.

BEAUMONT v. BOWERS (SURVEYOR OF TAXES). (*a.*)

*Inland revenue—Income tax—Deduction—Poor law officer—Contribution to superannuation fund—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146—*Poor Law Officers' Superannuation Act*, 1896 (59 & 60 *Vict. c.* 50), *s.* 12.

*An officer or servant in the employ of poor law guardians is entitled, by section* 146 *of the Income Tax Act*, 1842, *to deduct from the amount of his salary on which income tax is payable the amount deducted from his salary for the purpose of the superannuation fund under the powers conferred by the Poor Law Officers' Superannuation Act*, 1896.

Case stated by Commissioners of Inland Revenue.

The appellant was appointed clerk to the Guardians of the Poor of the Wakefield Union and the Assess-

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

ment Committee and School Attendance Committee of that Union on the 4th of March, 1884, a date prior to the commencement of the Poor Law Officers' Superannuation Act, 1896, which came into operation from and immediately after the 29th of September, 1896. The appellant did not exercise the option allowed to him as such officer or servant by signifying in writing to the aforesaid authorities within three months after the commencement of the Act, in pursuance of section 15 thereof, his intention not to avail himself of the provisions of the Act.

The appellant was assessed to the income tax under Schedule E for the year ended the 5th of April, 1899, in the sum of £510, the amount of his salaries as such clerk. From this sum was deducted £221 for expenses wholly necessary and exclusively borne by him in the performance of the duties of the appointments which he held, such deductions being claimed and made under section 53 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), leaving duty payable on the net sum of £289.

The appellant claimed that the assessment was excessive by the duty on a sum of £15 10s. deducted from or paid and borne by him for contributions made annually by him under the provisions of sections 12 and 13 of the Poor Law Officers' Superannuation Act of 1896, and it was admitted by the surveyor of taxes that no allowance or deduction for such contribution had been made in computing the assessment.

Section 12 of the Act makes an annual contribution, according to a scale fixed by section 13, compulsory on every officer to whom the Act applies.

Section 7 provides on certain conditions of resignation or misconduct for the forfeiture of all benefits, and of all contributions made for such benefits, while allowing the employing authority the discretion of returning in such case the whole or part of the contributions made.

Section 8 provides that if an officer who has not at the time become entitled to benefit loses his appointment through no fault or act of his own, the whole of his contributions shall be returned to him. In return for these contributions the Act provides for the superannuation of the officer after serving forty years, or on his attaining sixty-five years of age, and in other circumstances.

These contributions are not set aside to form a special fund out of which the superannuation allowances become payable, but they are paid into the common fund of the union or unions in whose service the officer is for the time being for the years in question, and practically go towards the relief of the rates, and when the superannuation allowance becomes payable it has to be paid out of the common fund of the union in whose service the officer then is at the time, and practically becomes a charge on the rates of that union.

The assessment to income tax in respect of a public office such as the appellant held is laid under the general charging rule of 16 & 17 Vict. c. 34, s. 2, Schedule E, into which has to be read the rules for charging the duties assessable under the now obsolete Schedule E of 5 & 6 Vict. c. 35, s. 146, the first of which rules charges all persons holding public offices with tax on all "salaries, wages, fees, perquisites, or profits, after deducting therefrom the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same have been really and *bonâ fide* paid and borne by the party to be charged."

The appellant based his claim on the words "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and *bonâ fide* paid and borne by the party to be charged" in section 146 of the Act of 1842.

The commissioners refused to allow the appellant's claim and confirmed the assessment, subject to this case, the question for the court being whether the amount paid by the appellant under the provisions of sections 12 and 13 of the Act of 1896 was a proper deduction to be made from his salary, fees, and emoluments as clerk to the guardians and of the other appointments held in connection therewith, in arriving at the profits upon which he was liable to be assessed for income tax purposes.

*Asquith, Q.C.* (*Roskill* with him), for the appellant.—The appellant is entitled to the deduction claimed, for the payments to the superannuation fund come within the words "duties or other sums payable or chargeable on the same by virtue of any Act of Parliament," in section 146 of the Act of 1842.

*Rowlatt* (*Sir R. B. Finlay, A.G.*, and *Danckwerts, Q.C.*, with him), for the respondent.—The decision of the commissioners was right. The payment is not within section 146. If it were, it would have been unnecessary to expressly authorize by section 54 of the Income Tax Act of 1853 a deduction similar to, but not including, that made from the appellant's salary. If the appellant's argument is right, the deduction authorized by section 54 of the Act of 1853 might have been equally made under section 146, and the former section would not have been required.

RIDLEY, J.—I am of opinion that the decision of the commissioners was wrong and that this appeal must be allowed. The Poor Law Officers' Superannuation Act, 1896, provides by section 12 that every officer and servant in the employment of the guardians of a union shall contribute annually for the purposes of the Act a percentage of his salary, according to the scale laid down by the Act, and such amount is to be from time to time deducted from the salary of such officer. *Primâ facie* it appears to me to be rightly contended on behalf of the appellant that the amount so deducted is a sum "payable or chargeable" by virtue of an Act of Parliament within the meaning of rule 1 of Schedule E of the Income Tax Act of 1842, s. 146, and therefore it is right that it should be deducted from the amount of the salary to be charged with income tax. An argument has been raised for the respondent, based on section 54 of the Income Tax Act, 1853, which provides that any person who shall under any Act of Parliament be liable for the payment of an annual sum or to have an annual sum deducted from his salary in order to secure a deferred annuity to his widow or a provision to his children after his death, shall be entitled to deduct the amount of the annual sum paid by him or deducted from his salary from the sum in respect of which he is liable to be assessed. It is argued that as it was necessary to make that express enactment, which does not apply to cases like the present, because the only payments referred to are payments to widows and children after death, therefore payments of this description are not covered by the Act of 1842. The answer to this argument is that a certain portion of the ground is twice covered, but section 54 of the Act of 1853 is only dealing with questions of insurance—that is to say, benefits arising after death. That is the primary object of the section, but, in order that the whole ground may be covered, the section goes on to say that even when the payment for insurance is not voluntary, but is deducted from the salary under some statutory authority, it shall also come within the section and be deducted from the sum on which income tax is payable. That provision is only in-

serted, in my view, because it is a matter analogous to that which is dealt with by the earlier part of the section. In order to hold that the sum deducted in the present case is not a sum within the words "payable or chargeable" by virtue of an Act of Parliament, one would have to give a very limited meaning to the language of the Act of 1842. In my opinion the argument for the respondent fails, and this appeal must be allowed.

DARLING, J.—I am of the same opinion. The deduction is claimed by the appellant on the ground that he is entitled to deduct from the amount of his salary chargeable with income tax "the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament." This sum, the deduction of which is claimed, is a sum which the appellant has contributed to the superannuation fund by virtue of an Act of Parliament—namely, the Act of 1896. It is perfectly plain from the provisions of that Act that the appellant might have the deduction made from his salary and yet never receive any benefit from it by reason of his death or other circumstances. It would therefore be working a very great injustice if income tax were to be charged on something which the appellant might never receive. The main argument on behalf of the respondent is derived from section 54 of the Income Tax Act, 1853, which section, it is said, would be wholly unnecessary if the appellant's contention is correct. I was at first somewhat impressed with this argument, but in fact section 54 does not cover all the ground of section 146. To some extent, no doubt, the two sections do deal with similar matters, but I am unable to deduce from that fact alone that the language of section 146 is not to be construed in its natural meaning. If so construed, the appellant's case clearly comes within the language of the section.

*Appeal allowed.*

Solicitors for appellant, *Bridges, Sawtell, & Co.*, for *Fulliamy & Son*, Ipswich.

Solicitor for respondent, *Solicitor of Inland Revenue.*

---

Q. B. Div.
(Ridley and Darling, JJ.) April 9.

GUARDIANS OF THE CAMBRIDGE UNION (*Appellants*) *v.* GUARDIANS OF THE EDMONTON UNION (*Respondents*). (*a.*)

*Poor law—Settlement—Removal of pauper—Irremovability—Break of residence.*

*A., a pauper, having an original settlement in the Union, had by residence become irremovable in the Union, and was sent to the E. Workhouse. Her son was in the C. Workhouse, and, in order to be with him, she obtained her discharge from the E. Workhouse and went to reside for a week with a relative in another union in order to break her status of irremovability in the Union, after which she returned to the E. Workhouse, in order to be sent to the C. Union.*

*Held, that an order for her removal to the C. Union was rightly made.*

Case stated by the court of quarter sessions for the county of Middlesex upon the hearing of an appeal against an order made by two justices of the peace for the county, for the removal from the Edmonton Union to the Cambridge Union of Rebecca Watson, aged 72, an inmate of the Edmonton Union Workhouse.

The court of quarter sessions dismissed the appeal with costs, subject to this case.

The following facts were admitted at the hearing of the appeal: That at the time the said Rebecca Watson left Cambridge, as hereinafter mentioned, the place of her last legal settlement was the parish of St. Mary-the-Less, in the Cambridge Union, and that she had since acquired no other settlement.

That on the 7th of December, 1891, she went from Cambridge to reside with her sister, at 29, Milton-road, in the Edmonton Union, where she lived continuously up to the 11th of September, 1893, when she went into the Edmonton Workhouse, and that by such residence she had, at the time she went into the said workhouse, acquired a status of irremovability from the Edmonton Union.

That the only question for the quarter sessions to decide was, whether she retained the status of irremovability so acquired by her in the Edmonton Union up to the time of making the order of removal on the 26th of January, 1899.

The following facts were proved by the evidence of the pauper and her niece:

That the pauper's son had resided with his mother up to the time of her going into the Edmonton Workhouse and that he went there with his mother.

That on the 8th of September, 1898, he took his discharge from the said workhouse and went to reside with his cousin in the parish of West Ham, in the West Ham Union.

That he subsequently returned to the parish of Edmonton and was re-admitted into the Edmonton Workhouse.

That on or about the 7th of December, 1898, he was removed to the Cambridge Union, where his settlement was.

That Rebecca Watson took her discharge from the Edmonton Workhouse on the 9th of January, 1899, as she wanted to be passed on to the union workhouse at Cambridge where she belonged, as her son had been, who was still there; and went without any warning to the residence of her niece in the parish of West Ham, and asked if she could stay there.

That she stayed with her niece in the West Ham Union until the 16th of January, 1899, when she left with the intention of returning to the Edmonton Union Workhouse, in order to be passed on to the Cambridge Union Workhouse, and went to her sister's house in the parish of Edmonton and stayed until the following day, when she was re-admitted into the Edmonton Workhouse.

The court of quarter sessions found that when Rebecca Watson left the Edmonton Union on the 9th of January, 1899, she left it with the intention of residing with her son in the Cambridge Union Workhouse and with the intention of not returning to the Edmonton Union to live there; and that when she did return to the Edmonton Union it was not with the intention of permanently residing within it, and on these findings they held that Rebecca Watson had, when she left the Edmonton Union on the 9th of January, 1899, broken her residence therein, and lost the status of irremovability therefrom previously acquired by her, and that she was therefore properly removable from the Edmonton Union to the Cambridge Union when the order of the 29th of January, 1899, was obtained.

*R. D. Muir*, for the appellants (the Guardians of the Cambridge Union).—The question is, did the pauper's visit to West Ham constitute a break in her residence within the respondent union? She had no

(a.) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

intention of making a new home at West Ham, and that being so a mere intention to break her residence in the respondent union was not sufficient. A residence in one parish coupled with an intention to reside permanently in another parish is not sufficient to break the residence. The pauper in the present case had no intention of permanently residing at West Ham, she only wished to break her residence in the Edmonton Union in order that she might be sent to the workhouse in the Cambridge Union, where she intended to reside permanently.

He cited *Reg.* v. *St. Ives*, 20 W. R. 657, L. R. 7 Q. B. 467, at p. 470.

*R. Cunningham Glen*, for the respondents.—It is immaterial whether the pauper's residence in West Ham was intended to be permanent or not. In order to break a residence there need be no intention to reside permanently in the parish to which the pauper removes. Any break in the residence, made intentionally, and with the object of breaking the residence, is sufficient to destroy the status of irremovability.

He cited *Reg.* v. *Worcester Union*, 22 W. R. 572, L. R. 9 Q. B. 340; *Newark Union* v. *Glanford Brigg Union*, 26 W. R. 42, 2 Q. B. D. 522.

RIDLEY, J.—In this case we have come to the conclusion that the order should not be interfered with. The facts are rather peculiar, and do not seem likely to occur again, or to form a precedent for other cases; but I do not think that a pauper who wishes to be removed from the union in which he is situated can be transferred to another simply by stopping a week on the way, and then saying that by so doing there has been a break, in the residence which is required in order to give him the status of irremovability.

If that were so, it seems to me that it would be very inconvenient, and I do not find it laid down in any of the authorities, all of which turn upon the question of the period of time necessary to give the status, and whether that period has been broken. In the case of *Reg.* v. *St. Ives* the pauper left the parish with the intention of returning to it. In the case of *Reg.* v. *Glossop Union*, 14 W. R. 329, L. R. 1 Q. B. 227, there was no intention of returning. In the present case the pauper left with the intention of being sent to the Cambridge Union, and of never returning to Edmonton to reside, but without the intention of residing permanently in the union to which she first went. There is this saving fact which enables us to say that the order is right—that the pauper did in point of fact leave the Edmonton Union for the purpose of being passed on to Cambridge, and that I think enables us to affirm this order. I am anxious to do so, because I think it was the pauper's wish to be sent to the Cambridge Union, and I should have thought it a hardship if she had been prevented from being sent to the union where her son was.

DARLING, J.—I confess that I have less doubt in this case than my learned brother. The facts are that this old woman had a settlement in the Cambridge Union, and she had an invalid son who also had the same settlement. By residing in the union of Edmonton she became irremovable there, and ultimately both she and her son went into the Edmonton Workhouse, and in the end her son was removed to the Cambridge Workhouse as being his place of settlement. His mother being anxious to join him got discharged from the Edmonton Workhouse, and went to a relative at West Ham for a week for the purpose of breaking her irremovability in the Edmonton Union, and then returned to Edmonton Workhouse for the purpose of being sent to join her son in the Cambridge Workhouse. By virtue of 9 & 10 Vict. c. 66, and the subsequent Acts amending it, she had become irremovable in the parish of Edmonton by having resided there more for than a year. I think that that statute was passed, not to make it more inconvenient for a pauper, but for his benefit, to prevent him from being hustled about from one place to another. I do not think that the statute intended to deprive a pauper of his original settlement if he wished to retain it and took the proper steps to do so. Now, in this case the pauper left the Edmonton Union meaning never to come back as a resident there. That is clear from the case, for it is found that she left the Edmonton Union with the intention of residing with her son in the Cambridge Workhouse. She left, therefore, with the intention of leaving the union for good and of getting to Cambridge and staying there. She could not have been removed because she had acquired a status of irremovability, but she was at liberty to go away if she liked. She did not go direct to Cambridge because she was a pauper, and, I suppose, had not the means, but she went to some friends in another union, meaning to return to the Edmonton Workhouse, not in order to stay there, but in order to be sent by the authorities to her original settlement—that is to say, to Cambridge. Accordingly, after a short visit she returned to the Edmonton Workhouse, and she was sent on to Cambridge, and the question we have to decide is whether the order sending her on is right or not. Now, what is the test? In *Reg.* v. *St. Ives* Quain, J., who does not differ from what the other judges decided, expresses it very clearly. "The point," he says, "is not only whether a person has left one parish, but whether he intended to reside permanently in another." Applying that to this case, it is clear that the pauper when she left Edmonton did intend to reside permanently in another—that is to say, in Cambridge. She returned to Edmonton, it is true, but only in order to be sent to Cambridge, just as she might go to a railway station to take a ticket. I do not think that any of the authorities prevent us from saying that she had broken her status of irremovability in Edmonton, and that the quarter sessions were right in affirming the order sending her back to her original settlement in Cambridge.

*Appeal dismissed.*

Solicitor for the appellants, *Congreve*, Cambridge.

Solicitor for the respondents, *F. Shelton*, Lower Tottenham.

## Court of Appeal.

App. Bankruptcy.
(Webster, M.R., and Rigby and Collins, L.JJ.) May 25.

*In re* BEBRO.
*Ex parte* G. GIBBONS. (*a.*)

*Bankruptcy — Petition — Withdrawal of petition on undertaking by debtor to pay sum larger than original debt, interest, and costs—Second petition based on substituted debt—Refusal to make receiving order—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-sections* 3, 7.

*Although it is true that in bankruptcy the court is entitled, under section* 7, *sub-section* 3, *of the Bankruptcy Act,* 1883, *to look behind the judgment on which a petition is based, and, in cases where it appears that the judgment was obtained under circumstances which constitute* de facto *extortion, to refuse to make any receiving order; yet the mere fact that a petitioning creditor has withdrawn some previous petition on the terms that he was to receive from the debtor a sum larger than his principal, interest, and costs does not in itself amount to any such* de facto *extortion.*

Per Webster, M.R.—*The court ought not to give its leave, under section* 7, *sub-section* 7, *of the Bankruptcy Act,* 1883, *to the withdrawal of a creditor's petition by consent until it has first been thoroughly satisfied as to the facts under, and the conditions on, which such petition is being withdrawn.*

Appeal from a decision of Mr. Registrar Giffard made on the 14th of May, 1900.

On the 30th of September, 1899, the petitioning creditor, George Gibbons, issued a writ against the debtor, Marcus Bebro, to recover the sum of £115 10s. due to him on a bill of exchange for £115 which had been accepted by the debtor. On the 7th of October judgment was obtained against Bebro for the sum of £115 15s. 4d. and £9 1s. 4d. costs; and on the 26th of October a bankruptcy petition was filed against the debtor in respect of these two sums. The hearing of this petition was fixed for the 14th of November, but prior to that date the creditor agreed with the debtor, at the request of the latter, that on the debtor paying the said sum of £9 1s. 4d. for costs and the costs of the bankruptcy proceedings, and on his giving the creditor a fresh bill for £130 payable at two months, the petition should be dismissed, on its being withdrawn by consent, with the leave of the court, under section 7, sub-section 7, of the Bankruptcy Act, 1883. A bill for £130 payable at two months was accordingly drawn, and was accepted by Bebro on the 14th of November; and the petition was dismissed on the 28th of November, the registrar being ignorant, at the time of its dismissal, of the terms upon which it was withdrawn.

On the 29th of January, 1900, Gibbons recovered judgment against the debtor for the said sum of £130 and costs; and on the 1st of February a bankruptcy petition was filed by him in respect of the said judgment.

This petition came on for hearing before Mr. Registrar Giffard on the 14th of May, and a receiving order was made against Bebro.

From this decision Bebro now appealed.

*Herbert Reed, Q.C.*, and *Muir Mackenzie.*—Whenever a petitioner withdraws his petition on the terms that he is to receive more from the debtor than his principal, interest, and costs, that fact in itself amounts to extortion in the eyes of the law: *Re G., Ex parte B.*, 44 SOLICITORS' JOURNAL 345. We admit that in the present case there has been no extortion except in this legal sense. But that is immaterial. We rely also on *In re Atkinson*, 9 Marr. 193; *In re Otway*, [1895] 1 Q. B. 812, 43 W. R. Dig. 17; *In re Betts*, 45 W. R. 98, [1897] 1 Q. B. 50; and *Smith* v. *Bromley*, 2 Doug. 695.

*Rufus Isaacs, Q.C.*, and *Harold S. Simmons.*—The principle laid down by the appellant is unsupported by authority; for *In re G., Ex parte B.*, was decided on the point that there existed in that case actual *de facto* extortion. Unless there is also such *de facto* extortion in the present case, the mere fact that the petition was withdrawn on the terms that the petitioner was to receive more than his principal, interest, and costs does not now disentitle him to get his receiving order. If it were so to disentitle him, the door would be opened to serious fraud. A debtor might persuade his creditors to withdraw a petition on the promise of paying higher interest, and might then proceed to repudiate his promise in bankruptcy. In the question of what amounts to *de facto* extortion, it is important to ascertain which side made the first move. Here the first move was made by the debtor.

*Herbert Reed, Q.C.*, replied.

WEBSTER, M.R.—In this case the learned registrar is of opinion that there has been no extortion in fact. But the case has been put on higher ground; and it has been argued that, if a petitioning creditor withdraws his petition, even upon the express and earnest solicitation of his debtor, on the understanding that the latter is to pay him a sum greater than the original debt, interest, and costs, that fact in itself, apart from all actual extortion or harshness, amounts to extortion in law. Now, I think that the true view is that laid down by Fry, L.J., in *Re Atkinson*, 9 Morr. 193, at p. 196: "In my opinion, the moment the court sees the petition is made a means of extorting money, a petitioner should not be able to get a receiving order." I think, again—though it is, of course, perfectly true that there might still be extortion even in a case where the request to withdraw the petition came in the first place from the debtor himself—that the court must be satisfied, before it will refuse a receiving order, that the petition and proceedings have been utilized in order to get from the debtor a larger amount than would otherwise have been possible. It is said that the court meant to decide more than this in *In re G., Ex parte B.* As I read that case—and I am subject to the correction of my brother Rigby, who was one of the Lord Justices who decided it—the registrar was there of opinion that there had been actual extortion, and there is nothing in the short report of the judgment to justify the construction that the debtor now seeks to put on it. It is possible, however, that the practice of the court has drifted into too lax an attitude on the matter of consenting to the withdrawal of bankruptcy petitions. I think that section 7 of the Bankruptcy Act, 1883, should be the real criterion, and that the court should not give its consent without being put into full possession of all the facts and terms.

RIGBY, L.J.—I have arrived at the same conclusion. I agree also with what the Master of the Rolls has said about *In re G., Ex parte B.* In that case the learned registrar had come to the conclusion that there had been *de facto* extortion, and when such is the case it matters nothing whether the proposal to withdraw the petition came originally from the creditor or the debtor.

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

COLLINS, L.J.—The law has not yet gone far enough to support Mr. Reed's suggestion. I think, indeed, that in *In re G., Ex parte B.*, the learned registrar invited the Court of Appeal to take the wider view, but that the court declined to take the point, and decided purely on the facts of that particular case. It may be that the Legislature would be justified in going a step further, and in making it impossible for a petitioner to withdraw his petition on his own motion. But it certainly has not gone so far at present. Hitherto the courts have shrunk from allowing the larger principle.

*Appeal dismissed.*

Solicitors, *Braham Barnett; J. J. Hands.*

---

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — May 3.

ROWLLS *v.* BEBB. (*a.*)

*Will—Tenant for life and remainderman—Power for trustees to postpone conversion—Power of management—Direction as to income of unconverted property—Property not yielding income.*

*If a discretionary power to trustees to postpone conversion is coupled with a direction that the tenant for life is to have the income of unconverted property, the rule in* Howe *v.* Lord Dartmouth, 7 *Ves.* 137, *is excluded by virtue of such direction, and the trustees can, in exercise of their discretion, postpone the conversion even of property that does not yield any income, so that the remaindermen are benefited at the expense of the tenant for life.*

*The discretionary power of the trustees is, however, only a power of management, and cannot be exercised so as to affect the rights of beneficiaries, except in the course of the management of the estate as a whole.*

*Where, therefore, the only item of outstanding estate consisted of a reversion to a sum of Consols set apart under a previous will to answer an annuity to the tenant for life,*

*Held, that the representatives of the tenant for life were entitled to be recouped the income which the tenant for life would have enjoyed if such reversion had been sold in her lifetime, inasmuch as the trustees had not in fact exercised their discretion, and could not properly—having regard to the state of the testator's property—have exercised their discretion, by postponing the conversion if their attention had been directed to the matter.*

This was an appeal from a decision of Stirling, J. The facts were as follow:

Alfred Rowlls Rowlls by his will devised and bequeathed his real and personal estate to two trustees upon trust for conversion and investment, with a power for the trustees to vary investments at their discretion; then to pay to or permit the testator's sister, Alice Rowlls Rowlls, to receive the income of the investments during her life, and after her death to stand possessed of the trust funds upon trusts for her children. But if no child of Alice Rowlls Rowlls should attain a vested interest in the trust funds, then they were to go to the trustees beneficially in moieties.

Then came the following clause: "And I declare that no sale of my real or leasehold estate shall be made in the lifetime of my said sister Alice Rowlls Rowlls, without her previous consent in writing, and that my trustees shall have a discretionary power to postpone for such period as to them shall seem expedient the conversion or getting in of any part of my residuary personal estate which shall at my decease consist of stocks, funds, shares, and securities of any description whatever, but the unsold real estate and outstanding personal estate shall be subject to the trusts hereinbefore contained concerning the moneys, stocks, funds, and securities aforesaid, and the rents and yearly produce thereof shall be deemed annual income for the purposes of such trusts, and such real estate shall be transmissible as personal estate under and for the purposes of the ultimate trusts hereinbefore contained."

The testator died in 1887. Part of his residuary personal estate consisted of a reversionary interest in a sum of Consols which had been set apart under the will of his father to answer an annuity in favour of his sister Alice Rowlls Rowlls, the tenant for life under his will. Under the testator's will Alice Rowlls Rowlls became entitled to a life interest in a very considerable property. At the time of the testator's death she was aged thirty-five. She subsequently became a lunatic, and died in 1899 a spinster. As she died intestate and without relations, her estate passed to the Crown. The reversionary interest in Consols fell in on her death, and it was contended on behalf of the Crown that this reversionary interest ought to have been realized in her lifetime, and that this not having been done her estate was entitled to be recouped to the extent of the income which she would have enjoyed if the conversion had been made.

Stirling, J., held, on the construction of the will and the authority of *Mackie* v. *Mackie*, 5 Hare 70, that this contention was inadmissible.

The Crown appealed

Before Stirling, J., the question whether the trustees had acted wrongly in postponing the conversion was not raised, and his decision was without prejudice to any claim which the Crown might have by reason of the delay in conversion. It was agreed that the Court of Appeal should decide the question left open by Stirling, J., and evidence was adduced on this point. Upon this evidence the court, as appears from the judgments, came to the conclusion that the trustees had in fact exercised no discretion at all in postponing the conversion of the reversionary interest, but had simply omitted to convert it without considering the question whether it ought to have been converted and the proceeds of conversion invested so as to produce income for the tenant for life.

By their notice of appeal the appellants claimed that interest ought to be allowed at the rate of 4 per cent.

*Sir R. E. Webster, A.G.*, and *Joyce*, for the appeal.

*Butcher, Q.C.*, and *Hon. F. Russell, contra.*

*Joyce* replied.

The following cases were referred to: *Mackie* v. *Mackie*, 5 Hare 70; *Johnston* v. *Moore*, 6 W. R. 490; *In re Pitcairn*, 44 W. R. 200, [1896] 2 Ch. 199; *In re Goodenough*, 44 W. R. 44, [1895] 2 Ch. 537.

LINDLEY, M.R.—In this case we have to consider a question of some difficulty both on the construction of the will and also upon what has been done under the will since the death of the testator. [His lordship stated the facts and read the clause in the will set out above, and continued:] Here we have not only a discretionary power to postpone for such period as to the trustees shall seem expedient the conversion of the testator's residuary personal estate, but a direction which applies to the income, if any, of the unsold real estate and outstanding personal estate—in other words, if the conversion of any of the testator's residuary personal estate should be postponed, then

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the rule in *Howe* v. *Lord Dartmouth*, 7 Ves. 137, as I understand it, is excluded by the words which I have just read. Now, pausing there for a moment and assuming this discretionary power to have been properly exercised and that the conversion of the residuary personal estate was postponed in the exercise of that power, it appears to me, on the authority of *Mackie* v. *Mackie*, that the decision of Stirling, J., is right. *Mackie* v. *Mackie* covers and decides a point which but for that would be a little difficult—that is to say, whether this clause relating to the produce of the unsold real estate and outstanding personal estate can apply to property which does not yield income. That is a little nut which was cracked in *Mackie* v. *Mackie* by the Vice-Chancellor of England holding that it did, and Stirling, J., has taken the same view. It is upon this principle that if you look at the will as a whole the tenant for life is to take the income of the residuary personal estate for better or for worse. *Howe* v. *Lord Dartmouth* does not apply against the tenant for life or in her favour. In other words, if the property is yielding more income than she is entitled to, if you apply that principle she is to have it, and if less she is to go without it. Upon that authority (which settles a point of some little difficulty) I have come to the conclusion that upon the true construction of the will the view of Stirling, J., was correct.

But another point, a totally different one, has been raised before us, and that is as to what has been done since the testator's death. Stirling, J., assumed that the discretionary power had been exercised by the trustees, but it has been by consent agreed that we should investigate that question ourselves upon such evidence as counsel have thought right to lay before us, and they have laid before us some affidavits and exhibits and a letter and an affidavit by the trustees in reply. Now, although it is quite true that these trustees were trustees and executors and residuary legatees, and although it is quite true that it was to their advantage that the reversionary interest which formed a portion of the testator's trust estate should not be converted, yet I am satisfied from the evidence which is against them as well as from the evidence which is for them that they never exercised this power with a view to benefit themselves. I am perfectly satisfied that this point about converting under the rule of *Howe* v. *Lord Dartmouth* a reversionary interest to the income of which the tenant for life was entitled under another will never crossed their minds at all, and it requires the keen eyes of an extremely good equity lawyer to see that there is such a point. However, there it is. They did not see it and they never thought of it. I do not mean they did not think of the reversionary interest. They knew that the testator had the reversionary interest and they knew that the sister was receiving the income of it, but they never dreamt that she was also entitled to have the reversion of that sum of which she was already in the receipt of the income turned into money. It never occurred to them at all, and I am satisfied from their own evidence that although they knew they had this discretionary power, and although they knew there was a reversion, they never dreamt that the tenant for life was entitled to have that reversion sold, and the proceeds invested so as to increase her income. It would not occur to ninety-nine men out of a hundred. It was an oversight. Now, before I go further, I will consider what is the scope of this discretionary power. Suupposing they had thought of it, what does it mean? It strikes me, and it follows from what I have already said about *Mackie* v. *Mackie*, that if this power had been exercised and the reversionary interest which ought to have been sold had not been sold it would have altered the relative positions of the tenant for life and the remaindermen. I do not doubt that, but it does not at all follow that this discretionary power is anything more than a power of management. What I mean is this, there is nothing in these words, to my mind, which would give the trustees a right to say, apart from managing the estate, "We will postpone selling the reversion in the interest of the children at the expense of the tenant for life." I do not think that would be within the power at all. That means this: "We will, under the power of management which if exercised might and will to a certain extent vary the rights of the tenant for life and of the remaindermen, do more than that, we will make the tenant for life benefit the remaindermen whether she likes it or not." I do not think that is the scope of it, and the method of treating it is this. Supposing the tenant for life had insisted upon the conversion of this reversionary interest, could the trustees have possibly refused? I think not. The position of the property is important. There was no wasting property here. I am not speaking of the leaseholds, because that is another matter; but apart from those, amongst the residuary personal estate there was no property yielding more income to the benefit of the tenant for life than she would be entitled to. There was nothing, therefore, which as a matter of management would justify the trustees in saying "There is some property which might have been converted and that would reduce the income of the tenant for life, but there is a reversionary interest which ought to be sold and which will increase the income, and as a matter of management we will not convert either." They might have done that, but there was no such property. There was nothing to be gained by anybody by preserving this reversionary interest as unsold, except, of course, what would accrue to the remaindermen. I throw this out because I am perfectly satisfied that these gentlemen were not intending to benefit themselves. They never thought of it. If I am right that they never did think about this power, and that they could not if they had thought of it in this particular instance have properly refused to convert this reversionary interest, what follows? It follows that the tenant for life's executors or administrators (now represented by the Crown, she having died intestate and without any relatives) are entitled to have that income which she has lost during her life made good out of the capital of the estate. I think there is no answer to that view unless we take another view of the case altogether to which I will allude now, and which I think is admissible. It has been suggested to us that this lady when her brother died was 35 years of age, and that she thought of marrying and she might have had children, and although the trustees did not think about converting the testator's residuary reversionary estate, still, in point of fact, what they had done was the right thing to do. I cannot come to that conclusion. That conclusion first of all involves the assumption that their discretionary power was a great deal more than a power of management, which I do not think it was. And apart from that I am not at all satisfied that even if they had that power the circumstances which did exist would have justified them in exercising their discretion to the extent of saying this reversionary interest shall not be sold during the life of the tenant for life. If that power had been more extensive than I think it was it would have justified them in postponing the sale to see whether she got married or not, but not in making up their minds that it should not be sold whether she got married or not. When this poor lady became lunatic it was obviously wrong in any

method of looking at it at all to keep this reversionary interest unsold. She became lunatic while she was a spinster and before she had any children, and after that it was too obviously wrong however widely you construe this power. But I fall back upon the narrower construction of the power as far as giving them discretion is concerned. I do not think the discretion went so far as to alter the rights of the tenant for life, except that they postponed the conversion of the one portion of the estate rather than another, in the management of it. Therefore I think upon the circumstances as they stand, and without imputing anything whatever against these gentlemen except an oversight, which, as I have said, ninety-nine people out of a hundred, and even ninety-nine solicitors out of a hundred, would very likely have made, the appellants here are in the right and the account must be rectified accordingly. The only other point is as to whether interest should be at 3 per cent. or 4 per cent. I have not looked it up, but I think I am right in saying that the judgment statute says that judgments shall bear interest at 4 per cent. Of course we cannot alter that here. And I think the rules say that legacies are to bear interest at 4 per cent. I think that is so. But there is no rule that I know of, and I do not speak of it without having had occasion to look at it before, which applies in terms to any question such as this or even to making good breaches of trust, and having regard to the rate of interest now, it appears to me, in a case of this kind, even quite apart from the view taken by Kekewich, J., in the case of *In re Goodenough*, that 3 per cent. ought to be the rate of interest and not 4 per cent. You cannot get 4 per cent. now upon any securities in which trustees have any business to deal. With that limitation I think the appeal must succeed.

RIGBY, L.J.—In this case two gentlemen—solicitors, I think—who are trustees of the will by the appointment of the testator himself for the estate, and in the events which have happened are also the beneficial residuary legatees, claim to hold the residuary estate free from any claim on the part of the representative of the tenant for life in respect of the interest which would have been produced from the sale and investment of the proceeds of a sum of £5,666 Consols. I mention these circumstances particularly, because I think they have some bearing upon the construction of what has been done under the will, but I want to make it plain that to my mind these gentlemen have not been swayed in their exercise of the power that has been given them by the will by any notions of self-interest, and in fact that they have not, except technically, done any wrong whatsoever throughout the whole administration of the estate, nor has any wrong been called to our attention, or suggested in any way. Now what in fact took place with reference to the £5,666 which is the subject of the question that is now raised—raised before Stirling, J., on the construction of the will, but raised here upon such evidence as is forthcoming—which, of course, is very slight—of what has actually been done. In the first place the £5,666 never was realized during the life of the tenant for life. I beg particularly to repeat what I have said, that I do not think anything wrong was done. If the question had been raised (I am only going on an hypothesis which I do not believe in) and clearly brought to the attention of the trustees at the time when, on their petition, the tenant for life was made a lunatic, it would have been obviously their duty, from that time forward at any rate, whatever was true of the preceding time, to provide for her estate an allowance upon the assumption that the £5,666 reversion was sold. It would have been a very grave malversation on their part if they had not made such an arrangement. The chances were enormous at that time that they would gain pecuniarily themselves by continuing to postpone the sale, and I do not hesitate to say that if we had reasons to suppose that they did it deliberately, then we should look upon their conduct in a very unfavourable view; but I am satisfied, from the affidavits which they filed at the time of the lunacy proceedings and from the affidavit which they have now filed, that the whole thing was absent from their minds, and that then and before that time, they never dreamt at all that they had any duty about selling the £5,666 reversion. I should assume that from the letter which they wrote. No doubt that letter could be explained upon production of proper evidence in the way in which it was argued by counsel that it ought to be explained. It may mean that they did not know whether upon the construction of the postponement clause they were or were not entitled to have it sold, but that is not the *primâ facie* meaning. The *primâ facie* meaning is that the question altogether—not one aspect of it, but the whole question—was brought before them for the first time, and I believe that was the fact. Then when I come to read this affidavit, I do not suggest that the affidavit was otherwise than a candid and fair affidavit, they are not able to say with truth that they exercised their discretion for one moment upon this question. I do not think they did. I do not think it ever occurred to them. I have pointed out that at the time of the lunacy it was imperative upon them, if they thought of it, to decide in a different way. It so happens—and it entirely depends upon the facts of the case—that there were no wasting stocks—leaseholds I leave out of consideration, as they are not important—but there was no wasting property that could be affected by this power of postponement, and, so far as has been brought to our attention, only one case of a reversion not producing interest. Therefore, not only is it plain that they never did exercise their discretionary power to postpone, but, in my judgment, it is plain also that they never ought to have done so. Doing so would, in effect, be a decision that they would take from the tenant for life the proportion of income to which she was entitled and present it to the remaindermen, either her children or themselves. I do not see any justification for that. I do not say that under the peculiar circumstances of this case they were bound to sell the £5,666 reversion. One knows that the court looks upon that to be as safe as possible; but I think they were bound not to exercise the power to postpone so as to produce an unequal effect between the tenant for life and the remaindermen. I say nothing as to what might have taken place if there had been wasting property that they kept on foot. There was no such thing. The exercise of their discretion must necessarily have had one result and one only, and that was to charge the tenant for life for the benefit of the remaindermen. Probably they thought that the remaindermen would be the children. When a lady has attained the age of thirty-five years, the chance of her not marrying is, well, pretty large, but that is not conclusive, of course, and, therefore, they may have thought probably that the children might be the remaindermen; but they must have known perfectly well that there was a very fair chance of their being the remaindermen themselves, and, as I say, they ought not to have gone upon the hypothesis that the children were sure to be the remaindermen. But even if the children had been the remaindermen, supposing it were quite clear that the children would take vested interests excluding the two trustees, I do not think it would have been justifiable. They have no power to take from the mother what has been mentioned as the £100 a year (I only state that as a possible sum) and give it

to the children—none whatever; and their power to postpone was not, to my mind, couched in such terms as to give them that right. *De facto* there never was a time when they professed or thought that they would exercise their power to postpone. *De jure*, it cannot be assumed that they did exercise their power in this unequal manner, because unequal it would be, between the tenant for life and the remaindermen. In the case referred to of *Johnstone* v. *Moore*, Wood, V.C., came to a conclusion which was inevitable from the will. There I think the portion of the personal estate outstanding consisted of an interest in a business. There had been a partnership and the trustees *de facto* allowed that portion to remain outstanding. Now, unless they were grossly ignorant of the law (and we must attribute to them knowledge of it) they must have known that they had no power *primâ facie* to leave it outstanding; but in the will is contained a power to postpone the realization, and it was assumed, and as I think rightly and necessarily assumed, that they had done so in the exercise of their power, and the rights of the tenant for life and remaindermen were adjusted upon that basis. I have no doubt of that. But it does not prove (and I do not think it is the law) that if it turns out in a matter in which the trustees were really ignorant that what has been done might have been done under a power in the will it should be deemed to have been so done. I think great injustice would often be done by that result, and although I have already explained my opinion that it could not properly have been done at all, yet I do not think it ought to be assumed that that did take place which we know on the evidence did not take place. I will not say more about the case. I think I have dealt with all the points that are really of importance. I will only say this, that if I had to deal simply with the question of construction I should have hesitated a good deal before I came to the conclusion that Stirling, J., was wrong in treating *Mackie* v. *Mackie* as a decision covering this case. It is not necessary to say anything from my point of view about that, and I must be held not to express any opinion about it. But upon the facts which are before us, and which were not before Stirling, J., I have no hesitation in saying that I cannot consider there was any thing which would entitle the residuary legatees to say, "Oh, we must be deemed to have exercised our power and to have exercised it equitably, and the result follows that we have not got to pay anything out of the proceeds in court of the £5,666." On all the facts of the case I think that such a conclusion would be absolutely wrong. However, again the trustees have behaved very properly and fairly. They say: "We will put the facts before you." I do not mean to say they would have done anything else, but they have acted in a very fair spirit. They say: "We will put before you such statements as may be in our favour, but the court will judge of them"; and as far as I can see, they have done that very fairly. In an ingenious argument it was suggested that upon the state of facts so appearing they were entitled to hold this money. I have said nothing about what would really be the case if they were actually asserting a right adversely. I do not consider it to be an adverse assertion. They very fairly have told us what has taken place; but from their position as trustees and solicitors I think they would have many difficulties to get over, which at present do not seem to arise.

COLLINS, L.J.—I agree, and I have nothing to add to the reasons already given by the other members of the court.

Solicitors, *Hare & Co.; Walters, Deverell, & Co.*

## High Court of Justice.

Chan. Div. }
Kekewich, J. } June 13, 14.

HALL v. DUKE OF NORFOLK AND OTHERS. (*a*.)

*Mine — Subsidence — Damage — Liability for acts of predecessor in title.*

*An action for damages done by subsidence caused by working a mine is a personal action, which determines on the death of the owner, and cannot be brought against a trustee or lessee who has not actively caused the subsidence.*

This was an action brought by Mr. John Hall, the owner in fee of the Manor House, Overseal, Ashby-de-la-Zouch, against the Duke of Norfolk, as executor and trustee of the late Lord Donington, Messrs. Wilkinson, Newton, & Spalding, and the Moira Colliery Co. (Limited), claiming (1) to have it ascertained what damage the plaintiff's house had suffered by reason of the working out of the main coal seam in the adjoining Moira Colliery of the defendants; (2) a declaration that the defendants were liable to make good such damage; and (3) payment accordingly.

It appeared that in the years 1889, 1890, and 1891 the late Lord Donington worked the seam. On the 2nd of April, 1892, Lord Donington made his will appointing the Duke of Norfolk, Mr. George Edward Lake, and the Hon. G. T. C. Rawdon Hastings executors and trustees thereof.

On the 24th of July, 1895, Lord Donington died, and his will was proved by the Duke of Norfolk and G. E. Lake, the other executor renouncing probate.

The Duke of Norfolk and G. E. Lake carried on the business of the colliery until the 1st of October, 1895, and afterwards as agents for the defendants Wilkinson, Newton, & Spalding, the lessees of the colliery under a lease of the 16th of November, 1895, for twenty-one years, and on the 20th of November, 1895, the Moira Colliery Co. (Limited) was formed, and the lease and the interests under it, were assigned to the defendant company.

There was no covenant on the part of the lessees to prevent damage by subsidence.

In November, 1895, a subsidence occurred, and the plaintiff brought this action, Mr. Lake having in the meantime died.

The defence was that the defendants had not actively caused the damage, and were not therefore liable.

*P. O. Lawrence, Q.C.*, and *MacSwinney*, for the plaintiff, contended that the decision of Bruce, J., in *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q. B. 165, 45 W. R. Dig. 82, was inconsistent with the decision of the House of Lords in *Darley Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127, 34 W. R. Dig. 108, and referred to *Rex* v. *Pedly*, 1 A. & E. 822; *Todd* v. *Flight*, 9 W. R. 145, 9 C. B. N. S. 377; *Gandy* v. *Jubber*, 13 W. R. 1022, 9 B. & S. 15; *Pretty* v. *Bickmore*, 21 W. R. 733, L. R. 8 C. P. 401; *Attorney-General* v. *Tod-Heatley*, 45 W. R. 394, [1897] 1 Ch. 560.

*Warrington, Q.C.*, and *Kenyon Parker*, for the trustees, argued that *Darley Main Colliery* v. *Mitchell* was only a decision as to the Statute of Limitations, and not as to who was a wrong-doer, and referred to *Jordeson* v. *Sutton, &c., Gas Co.*, 47 W. R. 222, [1899] 2 Ch. 217.

(*a*.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

*Renshaw, Q.C.*, and *Ashton Cross*, for the lessees, contended that there was no negligence or omission of duty on the part of the lessees which could render them liable.

*Lawrence, Q.C.*, replied.

KEKEWICH, J., said that some years ago, in 1889-1891, Lord Donington worked the coal, which he had a perfect right to do. Some years after, towards the end of 1895, the working of the coal caused a subsidence which injured the plaintiff's house, in respect of which injury he was entitled to recover damages if he could find the person who according to law was liable. It was not proved exactly when the damage first accrued, but it appeared on the evidence that it did not occur until after November, 1895, when the colliery was demised by the Duke of Norfolk and his co-trustee to the other defendants. The plaintiff endeavoured to recover damages against Lord Donington's estate, but that action failed on the ground that it was a personal action which determined with the death of Lord Donington. He now seeks to recover against the trustees and the lessees. The executors and trustees worked the coal themselves for a few months under a power in the will and must for that purpose as between them and the plaintiff be treated as owners. They then demised the colliery to the defendants Wilkinson, Newton, & Spalding. It was not suggested that anything done by the trustees or by the lessees caused the subsidence. That was traceable, though not perhaps by very direct steps, to the working of the seam by Lord Donington himself during the years 1889-1891. The damage did not occur till towards the end of 1895, and according to settled law the right of action did not accrue till then; there was therefore no question of the Statute of Limitations. If the plaintiff had sued the right defendants he was entitled to recover. The question was whether the defendants were liable for allowing the nuisance to continue on their land which had caused damage to the plaintiff. In the case of *Greenwell* v. *Low Beechburn Coal Co.* Bruce, J., considered the question which I have here to decide and decided against the plaintiff and in favour of the defendants. It was said that the decision of Bruce, J., was not consistent with that in *Darley Main Colliery Co.* v. *Mitchell*, and therefore I think that it is my duty not to treat the point as concluded by authority, but to examine the question for myself. Unless controlled by the decision in *Darley Main Colliery Co.* v. *Mitchell*, or by the opinion of Lord Blackburn, I am not at liberty to create a new right of action—that is to say, a right of action which has never yet been recognized in a court of law. Having read the judgment of Bruce, J., I entirely agree with it. Bruce, J., pointed out that there was no reported case bearing upon the point, and, therefore, to allow the plaintiff's claim would be to create a new cause of action. He said ([1897] 2 Q. B., at p. 177): "Unless they are under an obligation to prevent the consequences of an act done by their predecessor in title, they have not been guilty of any omission of duty for which they can be rendered liable. It is suggested that the excavated strata left without artificial support amounted to a nuisance, but I do not think it did. Until the actual subsidence happened there was nothing unlawful in the state in which the land was left. At no moment prior to the subsidence can it be said that there was any duty upon anyone to provide artificial support; and therefore it seems to me that it cannot be said that the defendants are guilty of a default of duty in allowing a state of things to continue which was a perfectly lawful state of things." That passage is fully borne out by the opinion of Lord Bramwell in *Darley Main Colliery Co.* v. *Mitchell*, and those were the lines upon which he was bound to decide this case. Bruce, J., was not without authority on the question of duty. [His lordship then referred to *Todd* v. *Flight*, *Rex* v. *Pedly*, *Pretty* v. *Bickmore*, and *Rich* v. *Basterfield*, 4 C. B. 783, and said that unless some distinction could be made through *Darley Main Colliery Co.* v. *Mitchell*, and it could be shown that Bruce, J., misunderstood that case, this action must fail. In that case the House of Lords decided that there was a new cause of action with each new subsidence. That was the whole of the decision in that case. His lordship then considered the judgment of Lord Blackburn, and came to the conclusion that it was an expression of opinion directly contrary to the present plaintiff and not in his favour.] On the point of law, therefore, I am of opinion that the plaintiff's case fails. That being so, I need not distinguish between the defendants nor go into the question whether they might have done something to prevent the mischief. There was no evidence to show that if the cavity had been filled up the subsidence would not have happened, and therefore I would have decided against the plaintiff on that point also.

*Judgment for defendants with costs.*

Solicitors, *Woodcock, Ryland, & Parker*, for *Woodcock & Sons*, Haslingden; *Wordsworth, Blake, & Co.*; *Kingsford, Dorman, & Co.*, for *Smith, Mammatt, Hale, & Quarrell*, Ashby-de-la-Zouch.

---

Chan. Div.
Byrne, J. } March 20.

*In re* BOOTH.
PICKARD *v.* BOOTH. (*a.*)

*Will—Construction—Gift of real estate to A., but, should she die without child or children, gift over—Executory limitation—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 10.

*A gift of real estate to A. for her absolute use—but, should she die without child or children, then over—vests in A. an absolute interest subject to an executory limitation over in the event of her not having any child who survives her or attains twenty-one years during her life.*

Summons.

This was an originating summons to determine a point of construction in the will of William Booth, of Sheffield, who died on the 21st of November, 1897.

The facts were as follows:

By his will testator devised and bequeathed his estate, which was principally freehold, to be divided into three parts, and continued as follows: "One half of the whole estate to Helena Swain for her own absolute use, subject to no control of any husband, but should she die without child or children, then her share to be divided equally between S. H. Booth and W. B. Stather, and should W. B. Stather die without coming into possession, his share shall be equally divided amongst William Booth, Ebenezer Booth, and Lily Owen, my nephews and niece, or their representatives. The remaining half of the estate to be equally divided between S. H. Booth (my brother) and William Booth Stather. Should my brother S. H. Booth die, his share to be divided equally between or amongst his three children, W. Booth,

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Ebenezer Booth, and Lily Owen, or their representatives."

On the 2nd of August, 1898, the court held on an originating summons that Helena Pickard (formerly Helena Swain) was entitled absolutely to one moiety of the testator's estate, subject to the said gift over in the said will contained in the event of her death without child or children. At that time Mrs. Pickard had no child.

On the 23rd of April she had a child born called Leonard Swain Pickard.

This summons, in which Mrs. Pickard was plaintiff and S. H. Booth and W. B. Stather were defendants, asked for the determination of the question: Whether the plaintiff upon the birth of her child became absolutely entitled to one moiety of the testator's residuary real and personal estate?

*Rowden, Q.C.*, and *Hatfield Green*, for the plaintiff.—The case is not exactly covered by any authority, but it is clear that since a child has been born that the plaintiff will not die without a child. It is indifferent for this purpose whether or not the child survives her. In case of doubt the court always leans to vesting an interest as soon as possible: *Bacon* v. *Cosby*, 4 De. G. & Sm. 261.

*O. Leigh Clare* and *G. B. Freeman*, for the defendants.—According to the Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 29, the expression die without issue means die without issue living at the death, and by analogy this would mean die without having had a child. [They referred to *Jeffreys* v. *Connor*, 8 W. R. 572, 28 Beav. 328; *In re Hambleton*, [1884] W. N. 157; *Thicknesse* v. *Liege*, 3 Bro. Parl. Cas. 365; *Hughes* v. *Sayer*, 1 P. Wms. 534.] We ask for a declaration under the Conveyancing Act, 1882, s. 10.

*Rowden, Q.C.*, replied.

BYRNE, J.—The question is whether the words "should she die without child or children" mean should she die without having had a child or children, or should she die without a child or children living at death. The words used are ambiguous, and it is said on the one side that the authorities are in favour of construing the words so as to mean without a child or children living at the death. On the other hand it is submitted that the general rule in favour of making estates vest as soon as possible should be followed. The authorities are not of very much use. *Jeffreys* v. *Connor*, which is the nearest, is open to the criticism that there occurred in the same will an expression which showed that the testator meant "die without ever having had children." I am therefore thrown back on the words of the will, and I think that the true meaning of the words "die without child or children" is "die without child or children then living," that is, living at the date of death. The words are not free from difficulty, but this seems to be the best construction that I can put on them.

Declare that the plaintiff is now absolutely entitled to one-half of the estate, subject to an executory gift over in favour of the defendants, in the event of her not having any child who shall survive her or attain twenty-one years in her lifetime.

Solicitors. *Peacock & Goddard*, for *Younge, Wilson, & Co.*, Sheffield.

---

Chan. Div.
Cozens-Hardy, J. } March 16.

*In re* QUEEN'S HOTEL CO., CARDIFF (LIMITED).
*In re* VERNON TIN PLATE CO. (LIMITED). (*a.*)

*Practice—Costs—Debenture-holder's action—Insufficient assets.*

*Where the assets in a debenture-holder's action were sufficient to pay off the first debenture-holders in full, but not sufficient to pay the second and third debenture-holders in full,*

*Held, that the plaintiff in the action was only entitled to party and party costs.*

These two actions were brought by certain debenture-holders, on behalf of all the holders of debentures of the same class, in order to realize their security.

Both the defendant companies were in liquidation, and the only available assets were the properties comprised in the debentures.

The greater portion of these properties had been already sold, and the money paid into court.

There were two series of debentures in the *Queen's Hotel Co.'s case*, both secured by covering and trust deeds. The first series was held by the plaintiffs, and the second series by another firm. The greater part of the property had been realized in the action, and the proceeds were more than sufficient to cover the principal, interest, and costs in the first series of debentures, and the principal and interest had been paid.

There was some doubt whether the property not realized would cover the principal and interest of the second series of debentures.

A summons had been taken out by the plaintiffs for the taxation of their costs and the costs of the trustees of the covering deed as between solicitor and client. In the plaintiffs' costs there was also included the charges and expenses properly incurred as mortgagees, and in the trustees' costs any charges properly incurred.

There were three series of debentures in the *Vernon Tin Plate Co.'s case*, but no covering deed. The property had been realized, and the proceeds were sufficient to cover the principal, interest, and costs in the first series of debentures, but not enough to pay the principal and interest in the second series.

The plaintiffs claimed solicitor and client costs. The two cases came on for hearing together on the summons.

*Stewart Smith*, for the plaintiffs in the first action.—The position of a debenture-holder suing on behalf of himself and others is analagous with that of a creditor suing on behalf of himself and others in an administration action. In the latter case it is the settled practice that where the estate is deficient the plaintiff gets his costs as between solicitor and client: *In re McRea, Norden* v. *McRea*, 32 Ch. D. 613, 34 W. R. Dig. 47.

Counsel also referred to the cases of *Thomas* v. *Jones*, 8 W. R. 328, 1 Dr. & Sm. 134, and *Wade* v. *Ward*, 7 W. R. 542, 4 Drew. 602.

*J. G. Wood*, for the plaintiffs in the second action.—In the second action there was no trust deed and the security could only be realized by one debenture-holder bringing an action on the part of all. A foreclosure action could not be brought unless every single debenture-holder was a party: *In re Continental Oxygen Co.*, 45 W. R. 313, [1897] 1 Ch. 511. The analogy was therefore to be drawn with administration proceedings and not with proceedings for foreclosure.

---

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

*Eustace Smith*, for the second debenture-holders in the first action.

*G. S. Alexander*, for second and third debenture-holders in the second action.

*J. S. Green*, for trustees.

COZENS-HARDY, J., said that the question really was, what were the rights of a mortgagee plaintiff in dealing with the mortgaged property in a suit. A mortgagee plaintiff was only entitled to party and party costs of action; though he asked for sale and not for foreclosure. Although the mortgaged property would be realized by sale, the plaintiff would only be entitled to principal and interest and party and party costs. It makes no difference that the plaintiff was suing on behalf of all the others of the same rank as himself. In the unreported case of *Industrial and General Trust (Limited)* v. *South American and Mexican Co.*, which came before Romer, J., in chambers, the same point was discussed. An application was there made for solicitor and client costs, and also for taxation on the higher scale. The following note of the decision was supplied by the master: "I will not depart from the usual practice, which it is admitted before me is this, tax the costs between party and party; and I see no reason for taxing costs on the higher scale. If I made any exception in this case, and gave solicitor and client costs and costs on a higher scale, I should have to do so in every case." This decision was exactly in point. There was said to be an analogy between this action and an action for the administration of the estate of a deceased person, where a plaintiff creditor might be entitled to solicitor and client costs. But the analogy did not apply, and no exception could be made in the present case; therefore, the plaintiffs would only be entitled to party and party costs of action.

Solicitors for the plaintiffs in the first action, *Munns & Longden; Bell, Brodrick, & Gray*, for *Cousins, Botsford, & Phœnix*, Cardiff, for the trustees.

Solicitors for defendants, *Smiles & Co.*

Solicitors in second action, *Munns & Longden*, for *H. P. Charles*, Neath, for plaintiffs; *Tamplin, Tayler, & Joseph*, for defendants.

---

Chan. Div.
Cozens-Hardy, J. } Feb. 15, 16, 24.

*In re* MAUDSLAY, SONS, & FIELD.
MAUDSLAY *v.* MAUDSLAY, SONS, & FIELD. (a.)

*Company—Debenture-holders—Receiver—Debt due from French company—Unsecured creditor—Attachment of French debt—Contempt of court.*

*Receivers were appointed in three actions by debenture-holders of all the property of an English company, the defendants in the action. Among the assets of the company was a debt due from a French firm. After the date of the appointment of receivers, another English company, P. & Co., holding a dishonoured acceptance of the defendant company, took proceedings in France and according to French law to attach the debt due from the French firm. The plaintiffs in the debenture-holders' action moved to restrain P. & Co. from obtaining payment of this debt.*

*Held, that, although the debenture-holders had, according to English law, a charge upon all the assets of the company, including the French debt, yet there was no equity in favour of the debenture-holders as against P. & Co., and the debenture-holders could not restrain P. & Co. from asserting and enforcing their rights according to French law.*

*Held, further, that, though receivers had been appointed, the mere order of the court did not put the receivers in possession of the foreign property; something else had to be done, and until that had been done in accordance with foreign law, any person not a party to the suit who took proceedings in a foreign country was not guilty of contempt.*

This was a motion for an order to restrain an English firm, Thomas Piggott & Co., from obtaining payment of a debt due to Maudslay, Sons, & Field (also an English firm) from a French firm, Delaunay, Belleville, & Cie.

The facts were as follows:

By an order made by the Vacation Judge on the 11th of October, 1899, in three actions by debenture-holders, receivers were appointed of the undertaking and of the property whatsoever and wheresoever, both present and future, of the defendant company, comprised in certain securities therein mentioned. The company had not been wound up.

The claimants, Thomas Piggott & Co., were the holders of a dishonoured acceptance of the company. Among the assets of the company was a debt due from a French firm, Delaunay & Cie.

The claimants registered in Paris the dishonoured bill of exchange, and served on Delaunay & Cie., on the 25th of November, 1899, a certain document, the effect of which and of a subsequent document was fully explained by the affidavit of the French advocates, which all parties agreed to accept, in the following terms:

"According to French law a debt can be assigned or charged, but in order to be operative as against third parties (which denomination includes the creditors' own creditors) it is imperative (1) that the assignment or charge should be by instrument in writing; (2) that the *ad valorem* registration duty should have been paid thereon; and (3) that formal notice in writing of the assignment or charge should after such registration be served upon the debtor by an officer of the French court called or named a *huissier*. This formal notice can be replaced by the debtor's formal acknowledgment of the assignment or charge in a notarial French deed; when these requirements have been complied with and not before, the transferee acquires a legal title to the debt as against third parties, as from the date of the formal notice. An assignment or charge of a debt not perfected by registration and subsequent notice to the debtor passes no title whatever to the debt, as against third parties, including the assignors' own creditors.

"We are informed that the above-named plaintiffs claim to hold debentures or debenture stock issued by the defendant company in a form purporting to charge all the property of the defendant company whatsoever and wheresoever, present and future, which by English law comprises the money payable or to become payable to the defendant company by Messrs. Delaunay, Belleville, & Cie. under their agreement with the defendant company.

"We say that, in the absence of registration and notice as aforesaid, any debentures or debenture stock have not according to French law passed to the holders thereof, the moneys payable or to become payable to the defendant company from Messrs. Delaunay, Belleville, & Cie. under the agreement, or given to them any charge upon or interest in the same as against third parties as aforesaid.

"We are further informed that receivers or sequestrators of all the property comprised in the said debentures or debenture stock have been appointed

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

by this court on behalf of the said debenture or debenture stock holders. We say that according to French law the said receivers or sequestrators as such have no right whatever to receive the above-mentioned moneys, and could not recover the same, and would receive no recognition whatever in the French court as against attaching creditors. According to French law, any creditor, whether French or foreign, who seeks to enforce his claim on a debt owing in France can only do so in accordance with French law, irrespective of the cause of action and of the place where it arose. According to French law any creditor, whether French or foreign, can, if he holds an acknowledgment of debt signed by his debtor, such as a bill or acceptance, attach in the hands of a third party the sum or bills which may belong to his debtor, and thus prevent the same from being handed over to him. No judge's authority is required, nor is it necessary that the creditor, if foreign, should be entitled to follow the same course in his own country, French law disregarding entirely foreign laws in matters of procedure, which are exclusively governed by the *lex fori*.

"We have perused the document now produced to us and marked 'B,' which is a copy certified by the process server of the proceedings taken at the request of Thomas Piggott & Co. (Limited). These proceedings comprise the attachment (*opposition*), notice of attachment (*dénonciation d'opposition*), and counter notice of attachment (*contre-dénonciation d'opposition*), and have been taken in accordance with French law and constitute an attachment in due form upon which Messrs. Thomas Piggott & Co. (Limited) are entitled to rely to force their claims against the moneys payable or to become payable to the defendant company by Messrs. Delaunay, Belleville, & Cie. The notice of attachment contains a citation for the defendant company to appear before the Tribunal Civil of the Seine, who has alone jurisdiction to declare the attachment valid and order the funds attached to be paid over to the attaching creditors. According to French law when the judgment declaring an attachment valid has become final it operates as an assignment of the funds attached to the attaching creditor, who is entitled to recover the same from the party owing the same, notwithstanding any subsequent attachments. As long as the judgment declaring the attachment valid has not become final any other creditor could follow the same course as the one followed by Messrs. Thomas Piggott & Co. (Limited), if they have an acknowledgment of debt as aforesaid, and in this case all attachments would rank *pari passu*, the date of the respective attachments giving no cause of preference. When several attachments are notified it is often the practice of the person receiving the attachments to pay the funds he holds into the Caisse des Depots et Consignations subject to the attachments, so as to assure a legal distribution of the same."

The motion now came on for argument on the question whether the claimants were or were not entitled to payment out of the fund in court (the receivers pursuant to an order made by North, J., on the 21st of December, 1899, having paid the sum of £530 into court). It was arranged that, if necessary, the claimants should be treated as applying for liberty to proceed, notwithstanding the appointment of receivers.

*Vernon Smith, Q.C.*, and *Romer*, for the plaintiffs.—The receiver is the receiver of all the property charged in favour of the debenture-holders, inclusive of this French debt. It is an interference with the receiver if an English creditor goes to France and attempts to get hold of property which the receiver would have in England. The court will not allow it. The charge must be governed by the law of this country: Story on Conflict of Laws (8th ed.), p. 559. A *chose in action* has no locality: *Lee* v. *Abdy*, 34 W. R. 653, 17 Q. B. D. 309. Having a good charge under English law the court will prevent any other creditor interfering with the rights of the plaintiff: *In re Queensland Mercantile and Agency Co.*, 39 W. R. 447, [1891] 1 Ch. 536, [1892] 1 Ch. 219, 40 W. R. Dig. 55; *Alcock* v. *Smith*, [1892] 1 Ch. 238, 40 W. R. Dig. 25.

The following cases were also referred to: *Liverpool Marine Credit Co.* v. *Hunter*, 15 W. R. 758, L. R. 4 Eq. 62; *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan, and Agency Co.*, [1892] 2 Ch. 303, 40 W. R. Dig. 105; *In re Alabama, New Orleans, Texas, and Pacific Junction Railway Co.*, [1891] 1 Ch. 213, 39 W. R. Dig. 49.

*Theobold, Q.C.*, and *Dunham*, for Thomas Piggott & Co. (Limited).—The receiver, though appointed receiver of all the assets of the company, is not appointed receiver of the assets in France, which is outside the jurisdiction of the court. There has been no contempt of court, but if there has been a technical contempt we ought to have leave to continue the action in France: *Lane* v. *Capsey*, 40 W. R. 87, [1891] 3 Ch. 411.

Counsel also referred to the following cases: *Cook* v. *Gregson*, 2 W. R. 401, 2 Drew. 286; *Pardo* v. *Bingham*, 17 W. R. 419, L. R. 4 Ch. App. 735; *In re Klœbe*, 33 W. R. 391, 28 Ch. D. 175; *In re Doetsch*, 45 W. R. 57, [1896] 2 Ch. 836.

*Vernon Smith, Q.C.*, replied.

COZENS-HARDY, J., stated the facts and said: I must decide this case on the footing that the parties now occupy the same position as they did on the 21st of December. At that date Thomas Piggott & Co. (Limited), whom I will call the claimants, had acquired an inchoate and imperfect title which would undoubtedly have been in due course made absolute by the court in Paris, unless this court thought fit to intervene. It will be convenient to consider the case first without reference to the appointment of receivers, and on the assumption that the debenture-holders have a security which is no longer a floating security but has become enforceable. It is plain that, according to English law, the debenture-holders have by contract with the company a charge upon all the assets of the company, including this French debt, and the first question which arises for consideration is this: Does the existence of this charge, which is undoubtedly valid according to English law, entitle the debenture-holders to prevent the claimants, who are unsecured creditors and not debenture-holders, from asserting and enforcing the rights that are given to them by French law against this French debt? In other words, is there any equity in favour of the debenture-holders as against the claimants? I think this question must be answered in the negative. The very point seems to have been decided by Wood, V.C., and Lord Chelmsford in *Liverpool Marine Credit Co.* v. *Hunter*. It was urged before me that this doctrine applies only to immovable property or to movable property having actual locality, and that a *chose in action* has no locality. But for many purposes a debt is deemed to have a locality: see *Commissioner of Stamps* v. *Hope*, [1891] A. C. 476, 40 W. R. Dig. 162, or as it is sometimes stated, a *quasi* locality. It seems to me that I must treat the debt due from Delaunay & Cie. as being situate in France, and subject to the French law, and I cannot therefore prevent the claimants, at the suit of the debenture-holders, from taking any proceedings the law of France allows for recovering their debt out of this

French asset. The next question, or rather the same question in a different aspect, is this: The debenture-holders having according to English law a good assignment of the French debt, but having according to French law no such assignment, and the claimants having according to French law a good inchoate charge or assignment, which ought to prevail? It seems to me that I am bound to hold that that assignment which alone is recognized by the law of France ought to prevail, and that the claimants have a better title than the debenture-holders: see Dicey's Conflict of Laws, r. 141. Apart, therefore, from the appointment of the receivers, I think the claimants ought to succeed.

It remains to consider whether the appointment of receivers makes any difference. It was argued with great force that the receivers were appointed over all the property comprised in the debentures, and that it was contempt of court to intercept the property which ought to come into the hands of the receivers.

On the other hand, it was argued that the order appointing receivers in this general form did not extend to property abroad, and that in any view there had been no interference with the possession of the receivers sufficient to constitute a contempt. It is not altogether easy to ascertain the origin, nature, and extent of the powers of a receiver. A receiver is an officer of the court, and the court does not allow the possession of its officer to be interfered with without its leave. Where the court appoints a receiver it requires the parties to the action to give up possession to the receiver of all property comprised in the order, and treats them as guilty of contempt if they refuse to do so. The court will grant a receiver a writ of possession (ord. 47, r. 2) or a writ of assistance (*Wyman* v. *Knight*, 37 W. R. 76, 39 Ch. D. 165) to enable him to recover possession, and it will order tenants to attorn to the receiver. So long as the property is within the territorial jurisdiction of the court there is no difficulty, at least in theory, in putting the receiver in actual possession. And when the receiver is in possession the court does not allow his possession to be interfered with without leave. For example, no judgment creditor of the company would be allowed to levy execution upon the property of the company in England now in the possession of the receivers. It is well settled that the court can appoint receivers over property out of the jurisdiction. This power, I apprehend, is based upon the doctrine that the court acts *in personam*. The court does not and cannot attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign country: *Keys* v. *Keys*, 1 Beav. 425; *Smith* v. *Smith*, 10 Hare, app. lxxi.; *Houlditch* v. *Marquis of Donegal*, 8 Bli. N. S. 301. In other words, the receiver is not put in possession of foreign property by the mere order of the court. Something else has to be done, and until that has been done in accordance with the foreign law, any person not a party to the suit who takes proceedings in the foreign country is not guilty of a contempt either on the ground of interfering with the receiver's possession or otherwise. For this purpose no distinction can be drawn between a foreigner and a British subject. I have not been able to find any authority in which this precise point has been discussed; but on general principles I think I should not be justified in holding that the claimants by taking proceedings in Paris were in any way guilty of a contempt of court. If, however, I am wrong in this view, and there has been a contempt, it seems to me that I ought to allow the claimants to proceed, notwithstanding the appointment of a receiver. It cannot be reasonable that I should deprive English creditors of a right against French assets which French creditors undoubtedly enjoy.

Upon the whole I think the application fails, and I must order payment of the dishonoured bill and the costs of the French proceeding and the costs of this application out of the fund in court, and the plaintiff must also pay the amount, if any, by which the fund in court is insufficient to answer these costs.

Solicitors for the plaintiff, *Nicholson, Graham, & Graham.*

Solicitors for the claimants, *Tarry, Sherlock, & King.*

---

Chan. Div. } Buckley, J. } May 29, 30.

SANDERS-CLARK *v.* GROSVENOR MANSIONS CO. AND D'ALESSANDRI. (*a.*)

*Nuisance — Reasonable use of property — Occupiers of flats in one building — Residential occupier and restaurant keeper.*

*It is relevant in nuisance cases to inquire whether the defendant was making a reasonable use of his premises in doing the acts complained of.*

Dictum *of* Kekewich, J., *in* Reinhardt *v.* Mentasti, 38 *W. R.* 10, 42 *Ch. D.* 685, *at p.* 690, *dissented from.*

*Different flats in one building were let to the plaintiff for residential purposes and to A., a restaurant keeper, for the purpose of his business. When the plaintiff took her flat there were only private residences in the building. The plaintiff brought an action against the common landlord and A. to restrain nuisance by heat, smell, and noise arising from A.'s use of his premises. The action was discontinued as against the landlord on his making certain structural alterations to abate the nuisance by heat, but A. denied liability, and contested the whole action.*

*Held, that the defendant A. was entitled to make a reasonable use of his premises for the purpose of his business, but not to make an unreasonable use of them, and, on the facts, that he had made an unreasonable use of his premises, which substantially interfered with the plaintiff's enjoyment of her flat; and therefore that the plaintiff was entitled to an injunction.*

*Rule in* Ball *v.* Ray, 21 *W. R.* 282, *L. R.* 8 *Ch. App.* 467, *at p.* 469, *applied.*

Action.

The plaintiff was the tenant of a flat on the first floor of a building which was erected for the purpose of private residential flats some time ago. She held under a lease from the defendant company for fourteen years from 1892, and when she took the flat there were only private residences in the building.

The defendant D'Alessandri occupied premises in the same building which were used until 1898 as a private residence, when they were altered for and let to him by the defendant company as a restaurant. They consisted of a kitchen in the basement, restaurant on the ground-floor, and dining-room on the mezzanine floor immediately beneath the plaintiff's flat. The kitchen was at the back, immediately under the plaintiff's bedroom, and faced a closed courtyard or well.

The action was to restrain D'Alessandri from using his premises so as to cause a nuisance to the plaintiff, and on motion for an interlocutory injunction, he

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

undertaking to do his best to prevent any nuisance from smell or noise, a person was appointed by the court to report how the nuisance by heat could be abated. He made his report, and his suggestions were carried out at the expense of the landlords, the defendant company, as against whom the plaintiff subsequently discontinued the action. The alleged nuisance from smell and noise remaining unabated, the plaintiff suggested how it might be remedied at an expense of £10 to £20, and offered to discontinue the action against D'Alessandri if he did this at his own expense and paid her costs, but he replied that he did not consider himself in any way liable for the heat, and declined to make any attempt to diminish the noise and smell, or to pay such costs.

It appeared that the heat complained of was in effect due to the large cooking range used by D'Alessandri for his business opening into a flue built to carry the heat of a range of smaller size, and the smell made its escape from the kitchen through an open grating which filled the window space and could not be closed.

It was not contended that the plaintiff was entitled to any injunction against the carrying on of a business as such, in the building.

*Astbury, Q.C.*, and *Bryan Farrer*, for plaintiff.—The defendant's user of his premises causes a nuisance to the plaintiff, and it is no defence to say that the user is reasonable: *Reinhardt* v. *Mentasti*, 38 W. R. 10, 42 Ch. D. 685, at p. 690.

They also cited *Robinson* v. *Kilvert*, 37 W. R. 545, 41 Ch. D. 88, at p. 94; and *Broder* v. *Saillard*, 24 W. R. 1011, 2 Ch. D. 692. [BUCKLEY, J., referred to Garrett on Nuisances (2nd ed.), p. 161, and *Gaunt* v. *Fynney*, 21 W. R. 129, L. R. 8 Ch. App. 8, at p. 12.]

*Ingpen, Q.C.*, and *Atlwater*, for the defendant D'Alessandri.—The construction of the building is responsible for the heat, and it is not this defendant, but the defendant company, on whom any liability for the heat must fall. The smell and noise do not amount to a nuisance: *Ball* v. *Ray*, 21 W. R. 282, L. R. 8 Ch. App. 467. The question is, Are this defendant's premises being applied to a proper purpose? *Christie* v. *Davey*, [1893] 1 Ch. 316, 41 W. R. Dig. 153.

They also cited *Sanderson* v. *Berwick-upon-Tweed Corporation*, 33 W. R. 67, 13 Q. B. D. 547, and *Blake* v. *Woolf*, 47 W. R. 8, [1898] 2 Q. B. 426.

*Astbury* replied.

BUCKLEY, J.—The plaintiff complains of three things—first, heat; secondly, smell; and thirdly, noise. Now there is some evidence of noise made by clattering of plates and by the saucepans being taken off and put on the hotplate, and I apply Lord Selborne's test in *Gaunt* v. *Fynney*, 21 W. R. 129, L. R. 8 Ch. App. 3, at p. 12—viz.: "A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbour builds a house against a party-wall, next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music-room, it does not follow (even if I am nervously sensitive or in infirm health) that I can . . . obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable." That the noise here is not. It may be an annoyance but it is not a legal nuisance. The defendant is entitled to carry on the business of a restaurant on his premises, and the evidence is that it is carried on in a quiet and orderly manner. The plaintiff's case, therefore, fails as to noise.

Then as to heat the defendant D'Alessandri says this has nothing to do with him. But this defendant obtained the alterations of the premises which led to his neighbour being exposed to excessive heat. There was evidence of danger of fire, and there was the interference with the plaintiff's enjoyable occupation of her premises. The defendant was entitled to carry on his business, but were the alterations made by him in the premises such as to expose the plaintiff to annoyance that she ought not to bear? The law is laid down by Lord Selborne in *Ball* v. *Ray*, 21 W. R. 282, L. R. 8 Ch. App. 467, at p. 469—viz.: "If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance. . . . But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according to principle or authority a reasonable use of his own property; and his neighbour, showing substantial injury, is entitled to protection," and Mellish, L.J., "entirely agreed with what had been said by the Lord Chancellor." I prefer this case to *Reinhardt* v. *Mentasti*, 38 W. R. 10, 42 Ch. D. 685, at p. 690, where Kekewich, J., said that the principle did not depend on the question whether the defendant's user was reasonable or otherwise. Here a restaurant keeper goes into the premises where the flue is not big enough, and exposes it to undue use. That is not reasonable. It is an unreasonable use of his premises, and he is liable.

As to smell, has the plaintiff been caused discomfort, and if so, has it been by the defendant's act? I think there has been a sensible and substantial interference with the plaintiff's enjoyment due to the defendant's unreasonable use of his premises. The plaintiff therefore succeeds in the action. The defendant was wrong in regard to the heat and smell, and I cannot discriminate as to the costs of the noise part of the case, which depends on the same evidence.

*Judgment for plaintiff.*

Solicitors, *Nicholson, Graham, & Graham; J. Rawes Baron.*

---

Q. B. Div.
(Ridley and Darling, JJ.) April 10.

ROBERTSON (*Appellant*) v. HARRIS AND ANOTHER (*Respondents*). (*a*.)

*Adulteration — Food — Warranty — Contract to supply milk over an extended period—Necessity of written warranty with each particular delivery—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 25.

*On informations by a medical officer of health, H., a dairyman, and his servant were respectively charged with unlawfully causing to be sold and selling milk as "new milk" which was not new milk, contrary to section 6 of the Sale of Food and Drugs Act*, 1875. *At the hearing an agreement in writing was put in as an answer to the complaints under section 25 of the Sale of Food and Drugs Act*, 1875, *and section* 20 (4) *of the Sale of Food and Drugs Act*, 1899, *and it was proved that the milk had been purchased as new milk, and that it was sold in the same state as when it was purchased; and*

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

is what the statute means; and if it were necessary to decide it I might very possibly decide it in that sense. Before I leave this point I should like to call attention to one other case—the case of *Beattie* v. *Lord Ebury*, 20 W. R. 994, L. R. 7 Ch. App. 777, at p. 804, where Mellish, L.J., says that: "There is a clear difference between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation if it is anything, it is a contract or promise." Here, as Mellish, L.J., says, one may call this contract that the milk shall be pure a representation in one sense; one may, if he pleases, call it a warranty, and if one likes to rely on what Lord Mansfield says, that a warranty may be of a future event and still be a warranty, he is justified; but as Mellish, L.J., says, although one may call it a representation, yet if it is anything it is a contract or promise. I should myself have great hesitation in holding, if it were absolutely necessary to the decision of this case, that this contract dealing with what shall be the case in the future with regard to milk not in existence at the time the contract was made was a warranty at all within the meaning of section 25 of the Sale of Food and Drugs Act, 1875. It is not, however, necessary to give any definite opinion upon the point. It would be merely an *obiter dictum*. I might decide the case on that ground, and on that ground alone, but it is not necessary to do so, as I agree with the judgment given, that this decision must be reversed on other grounds.

*Appeal allowed. Case remitted to the magistrate.*

Solicitors for the appellant, *Richard Smith & Sons*, for *Sayer*, Sheffield.

Solicitors for the respondents, *Geare & Pease*, for *Robert Fairburn*, Sheffield.

---

Q. B. Div.
(Ridley and Darling, JJ.) April 9.

SIMMONDS BROTHERS (LIMITED) v. FULHAM VESTRY. (*a*.)

*Metropolis management—Street—New street—Buildings on one side only—Vacant land opposite—Repairs to road—Right of authority to claim apportionment—Lapse of reasonable time—Metropolis Management Act,* 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Act,* 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

*The appellants were the owners of certain houses in the Fulham Palace-road, which, on the expiration of a Turnpike Act, became a highway repairable by the inhabitants at large, and was repaired from time to time by the respondents' predecessors. In* 1864 *it was not a street, but by* 1883 *it was built with houses along one side, the other side remaining vacant building land. Between* 1879 *and* 1898 *it was altered and repaired at various times by the respondents and others. In* 1897 *the respondents resolved that the road was not paved to their satisfaction, and that it should be accordingly paved, and the expenses apportioned upon the owners.*

*Held, that the magistrate was justified in holding that the Fulham Palace-road became a new street in* 1883.

*Held, further, that where, in the metropolis, a highway repairable by the inhabitants at large becomes a new street by reason of the erection of houses along it, a vestry is not precluded from causing it to be paved at the cost of the frontagers by lapse of time, however long, after it became a new street, even though it was in fact already paved at the time it became a new street.*

Case stated by a metropolitan police magistrate on a complaint to recover apportioned expenses of paving.

The appellants were the owners, within the meaning of the Metropolis Management Acts, of twenty-two houses in the Fulham Palace-road in the respondent's parish. Two of these houses, Nos. 79 and 81, Fulham Palace-road were erected before the passing of the Metropolis Management Act, 1855, and originally formed part of a mansion called Claybrook House.

The Fulham Palace-road was, at the date of the passing of the Metropolis Management Act, 1855, a turnpike road. On the expiration of the Turnpike Act in the year 1864 it became a highway repairable by the inhabitants at large, and was repaired as such from time to time by the Fulham District Board, in whose district it then was, and by the respondents after the dissolution of the board.

One section of the road was not, at the time of the expiration of the Turnpike Act, sufficiently built upon to be a street in the ordinary sense of the term, the only building standing thereon being the above-mentioned Claybrook House, with the exception of which the road ran entirely between market gardens. The width of that section at that time varied from 20 to 28 feet.

By the end of 1883 the east side of the section had been covered with houses along its entire length, which, with a few exceptions, were all erected about the same time. The whole of the land adjoining the west side of the section is vacant building land without any building thereon except a temporary iron Board school.

In 1879 a portion of the footpath on the east side of the section was paved by the Fulham District Board at the cost of their district.

In or about the year 1880 another portion of the east side of the section was widened to the extent of 20ft. from the centre by the setting back, on rebuilding, of the Greyhound public-house, which fronted the section, and the footpath was paved and kerbed by the owners.

In or before the year 1883 the remainder of the section, to the south of the appellants' houses was widened on the east side to 20ft. from the centre, and the footpath was kerbed and paved by the owners, except for a distance of about 110 yards from the southern end, where it was partly paved with a narrow strip of flagstones, and partly gravelled by the adjoining owners, and about the same time the northern end of the section for a distance of about 44 yards was widened on the east side to the same extent, and the paving and kerbing of the footpath was relaid by the Fulham District Board at the cost of their district. The evidence showed that with the exception of the work referred to above as done by the board at the expense of the ratepayers, and of the portion referred to as having been partially paved, the whole east side of the footpath was paved by the adjoining owners not later than the year 1883. The footpath has ever since been kept up by the board and vestry respectively in the same condition as put by the owners. The whole of the footpath on the west side of the section was gravelled and stone-dotted by the Fulham District Board at the cost of the district.

From and after the 25th of March, 1886, the Fulham District Board was dissolved by virtue of the

(*a*.) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

merely to show that a general agreement like the one now in question has been arrived at, unless it can be shown further that the particular article in question has been bought with it. For that purpose it is necessary to produce some further evidence. There was no such evidence in this case as there was in *Harris* v. *May*, which otherwise was very like this case; for the agreement there did not contain the words "the milk to be pure new milk," which are the words in this case, but simply the description—that is to say, "pure milk," "eighty-six gallons of good and pure milk." Although these words which are present in this case were not present in the case of *Harris* v. *May*, I think it is clear that the court in that case found that the words in the contract itself did amount to a warranty. Lord Coleridge, C.J., there says: "It is true that an action for breach of warranty could be brought upon that contract." That means that it was a warranty, and the observations made upon those words by Charles, J., in the subsequent case of *Laidlaw* v. *Wilson*, show clearly what he understood was intended by the court in *Harris* v. *May*. Charles, J., speaking of *Harris* v. *May*, says ([1894] 1 Q. B., at p. 78): "There, no doubt, Lord Coleridge, at the commencement of his judgment, said that, in his opinion, the contract relied on by the defendant was not a written warranty within the meaning of the Act. But, on looking on his judgment as a whole, I think that what he really meant was that it was not such a warranty as would cover the specific delivery of milk on the 12th of April, in the absence of some written evidence that that specific delivery was made under the contract." That is to say, that there may be a warranty under the general agreement to deliver the milk, but there must be something more. It must be shown that the purchase of this particular article was made with that warranty. There ought to be something in writing to show that the warranty which is contained in the general agreement is extended to and includes this specific article. I can imagine, if this point had been free from decisions, that that was well capable of argument, but it is certainly too late for us, even if we felt any doubt in the matter, to say the contrary to this; and therefore in a case like the present there must be some evidence to show that that particular article has been bought with that warranty. In the case of *Laidlaw* v. *Wilson*, which is a fair instance of this particular subject, there was some written evidence to show that the specific delivery was made under the contract, thus connecting the written warranty with the article which was the subject of the purchase. It is quite true that it was more easily done in that case because there was not the difficulty that arises as to the date, as in the present case. The purchase was made, and the sale was completed at or about the same time; but if there had been something in this case to show that the written warranty contained in the general agreement for the delivery of the milk, extended to and dated to the article in question—that is to say, the daily delivery or supply of milk, then there would have been enough to satisfy the statute. In the absence of that evidence it appears to me that the magistrate came to the wrong conclusion when he said that the defendant, who was charged with the offence under this statute, had brought himself under the provisions of section 25. For these reasons I think that the conclusion arrived at was not a correct one, and that the case should be sent back with direction that the defendant ought to be convicted.

DARLING, J.—This case raises questions of some difficulty, and, speaking for myself, I do not think that all the cases can be entirely reconciled. In fact I find it difficult to come to the conclusion that there is not a difference of opinion between the judges who decided *Laidlaw* v. *Wilson* and the judges who decided the case of *Harris* v. *May*. What happened in the present case was this: A retailer sold milk which was not pure milk, and he was summoned for that. Then he sought to show that he was excused—and the magistrates held that he was—by virtue of section 25 of the Sale of Food and Drugs Act, 1875. In this case what the defendant had done was that long before the time in question he had entered into a contract for the supply of milk. He was supplied with this milk in small quantities, but he had entered into a contract for the supply of milk for a considerable period, and the contract was this: "I, Sarah Sheldon, agree to sell to William Harris 1,000 gallons of milk weekly in such quantities as arranged, the milk to be pure new milk, delivered, &c." He had entered into a contract to buy in future 1,000 gallons of milk a week, the milk to be pure. That is the same as if the person contracting to supply the milk had said the milk is to be "pure new milk," but there is no statement that it is pure milk; it does not exist at the time. To my mind this statute, as Lord Coleridge has said, has to be construed strictly, especially as it relates to the food of the people, and I have very great doubt, although it is said for the first time, as to whether such a contract, which says what is to be the state of things in future, can be called a warranty at all—a written warranty within this section 25 of the Sale of Food and Drugs Act, 1875. I have great doubt about that and when the question is distinctly raised in some future case I think it will be interesting to have it decided. It might have been raised in *Harris* v. *May*, but there counsel on one side only was called upon, and the question was not raised. Blackstone in his Commentaries (3rd vol., p. 180, 20th edition) says: "Also if he that selleth any thing doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so he shall make compensation to the buyer; else it is an injury to good faith, for which an action on the case will lie to recover damages. The warranty must be upon the sale; for if it be made after, and not at the time of the sale, it is a void warranty; for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. Also the warranty can only reach to things in being at the time of the warranty made, and not to things in future; as, that a horse is sound at the buying of him, not that he will be sound two years hence." I know it has been said by Lord Mansfield in a later case in which that same passage was cited to him, namely—the case of *Eden* v. *Parkinson*, 2 Doug. 732: "Many points have been gone into on both sides which are not necessary for the decision of this case. For instance, there is no doubt but you may warrant a future event." It is perfectly clear from Lord Mansfield's own statement in that case that it was not necessary for the decision of the case that the point should be considered, and his own observation upon the point therefore is only an *obiter dictum*; but at all events take it to be good law that you may warrant a future event, yet I do not think it is at all clear that this statute, which Lord Coleridge, C.J., has said in *Harris* v. *May* is to be construed strictly for the benefit of the health of the people, did not mean a warranty in the strict sense in which warranty of goods was used by Blackstone—a warranty that a thing in being was of a certain quality. I do not affect to decide that it is so; I only say that it seems to me there is the gravest reason to suppose that that

The question for the opinion of the court was whether this determination was right in law: (*a*) Whether the erection of buildings on one side only of a road is, when the land on the other side consists of vacant land, sufficient to render such road a new street within the meaning of section 105 of the Metropolis Management Act, 1855, and section 77 of the Metropolis Management Act, 1862; (*b*) whether a vestry or district board can put in force the powers of those enactments with respect to a new street which has been, previously to its becoming a new street, paved to their satisfaction; and if not (*c*) whether the lapse of more than a reasonable time since the street became a new street, subsequently to its having been so paved, is conclusive evidence that they were satisfied with such paving?

*A. Glen*, for the appellants.

*Asquith, Q.C.*, and *Macaskie*, for the respondents.

The following cases were referred to in the course of the arguments: *Robinson* v. *Barton Local Board*, 32 W. R. 249, 8 App. Cas. 798; *St. Giles, Camberwell*, v. *Crystal Palace Co.*, 40 W. R. 648, [1892] 2 Q. B. 33; *Richards* v. *Kessick*, 59 L. T. Rep. 318, 37 W. R. Dig. 113; *St. Mary, Battersea* v. *Palmer*, 45 W. R. 110, [1897] 1 Q. B. 220; *Arter* v. *Vestry of Hammersmith*, 45 W. R. 398, [1897] 1 Q. B. 646; *St. Giles, Camberwell* v. *Hunt*. 56 L. J. M. C. 65; *Bonella* v. *Twickenham Local Board*, 36 W. R. 50, 20 Q. B. D. 63; *White* v. *Fulham Vestry*, 74 L. T. Rep. 425, 44 W. R. Dig. 108; *Chelsea Vestry* v. *Evans*, 35 J. P. 23.

RIDLEY, J.—We have neither of us any doubt upon this case. With regard to the first point raised, perhaps it is sufficient to say that the magistrate having found as a fact in a case like the present that this became a new street in 1883, it should not be interfered with. However, I think it was a new street within the ordinary acceptation of the term, and I do not accept the idea, speaking personally, that because the houses which have become continuous are on one side of the road, and one side only, that therefore in such a case as the present it is not a street. I think the argument of Mr. Glen is sound so far, that there is a difference between a place like Hyde Park, or the Green Park, or public grounds of that kind, which cannot be built upon, and ground which might be built upon because it is in the hands of private owners; but, although that is true, I do not think his argument goes so far as to prove, and it does not convince me, that a road may not become a street although it has houses on one side only. I think it may. In a district like the present it is certainly far more convenient to hold it does, because at one end of the road there is a street, and at the other end there is a street, and it is a street which is being built upon, unevenly, no doubt, more, on this occasion, on one side of the road than on the other, yet I think it is a new street and properly so found by the magistrate.

As to the second point, which is much more arguable, I think the case is distinguishable from the case of *Bonella* v. *Twickenham Local Board of Health*, which has been quoted in order to show that because the local authority in this case did not act within a reasonable time after they got power to do so under section 105, therefore when they now wish to act and get the street paved, this paving and this repair must be done at the cost of the district and not at the cost of the owners under section 105. In the *Bonella case*, which was decided under the Public Health Act, 1875, s. 150, the state of things was very different from what it is here. There is a resemblance of course between the two sections, between section 150 of the Public Health Act and section 105 of the Metropolis Management Act, 1855. There is this, that the new street has been vested by virtue of the provisions of section 96 of the Metropolis Management Act of 1855 in the authority in a similar way to that in which the sewers were vested by the Public Health Act in the authority which has to deal with them in that case. There are resemblances so far, no doubt, and then there is the power given in each Act under which the vestry or local authority may act, either in the case of the sewers or in the case of the new street, if they do not find it to their satisfaction, but the resemblance seems to stop there. In the *Bonella case* the owners in point of fact had made the sewer which had been found to be satisfactory and sufficient for that street until the general system of sewerage was altered, and it became necessary to make a new one, which really was laid with its levels the other way, and was part of the new system of sewerage. Upon that the authority took proceedings against the owners and called on them under section 150 of the Public Health Act, 1875, to pay the expenses of the new sewer upon the ground that that street was not sewered to their satisfaction. The court decided that it could not be done. Why? Because the local authority had accepted the sewer as satisfactory to them at the time when it in fact vested in them, and had dealt with it as satisfactory for what the court held to have been more than a reasonable time after it had so vested. Therefore the court said, "You can do no more. You have lost your power to proceed under this section, and you cannot call upon the owners to pay again." That is a decision which one would be very loth to quarrel with, even if one had the power to do so. It is almost precisely the same reasoning which governed the decision of the court in the case of the *Fulham District Board* v. *Godwin* which is in 1 Ex. D. 400, 25 W. R. Dig. 156. In that case also the sewer had been made by the owners, and the court held that they could not be called on to make another one, and a different one, because other circumstances had arisen since which made the first sewer unsatisfactory. But here the owners have done nothing. The facts as found by the magistrate show that he finds in the 23rd paragraph of the case "that all the works done to the carriage-way of the said section by the respondents, previous to the paving thereof in 1899, and also all the works done on the west side footway by the respondents up to the present time, were temporary repairs done by them from time to time as surveyors of highways." True, that is a power which is quite different from the exercise of this power, which is now called in question, under the 105th section. Then he finds "that with the exception of the above-mentioned 250 yards of paving, all the works done by the respondents up to the present time (other than those done by them on behalf of the adjoining owners as aforesaid) on the east side footway were temporary repairs done by them as surveyors of highways." He further finds that none of the works so done were intended by them as an exercise of, nor did they thereby exercise, their powers under the 105th section of the Metropolis Management Act. Under those findings it is clear that they have done nothing, nor did they receive anything from the owners. They received the roadway as it was before, and they did not deal with it. Now, are we to say, under those circumstances, which are quite different from the ones which arose in the *Bonella case*, that by reason of the fact that sixteen years have elapsed after the street became vested in them, they have lost the right to call upon the owners to make the street and to do the paving

under section 105? The street is still a new street under the meaning of that word as used in the Act of Parliament. Why should sixteen years' lapse or the lapse of any time in such an instance, have the same effect which it does when the sewer actually made by the owners has been accepted and held satisfactory for a space of time like that? I cannot see how the argument applies. If we were to say that it did, it would come to this—that because there was no traffic there at one time so that the road was found satisfactory, the increase of traffic is not to make any difference. The provisions of the Act were intended for this: that if at any time, as I read it, they should find that this new street which has become vested in them, which has never been paved or made by the owners at all, is not sufficient for the traffic, they are to have the power to call upon the owners to make it so once and for all. I do not for a moment suggest that they can do it twice, but they have the power to do it once. To hold otherwise would be to say that the man who holds back and will not have anything done to the road will escape having it done at his expense. The result is that those who live in a district which is becoming populous, and calling traffic into the district, ought to pay in the first instance for the necessary making of the road which will be sufficient; after that they cannot be called upon to pay again. If we held otherwise I think it would be a mischievous reading of the Act of Parliament, and I am quite clear in my own opinion that the case is outside the decision in *Bonella* v. *The Twickenham Local Board of Health*. I accept the reasoning of the learned magistrate and I think his conclusion is a correct one.

DARLING, J.—I am of the same opinion.

*Appeal dismissed.*

Solicitors for the appellants, *Watson, Sons, & Room.*

Solicitors for the respondents, *T. Blanco White.*

---

## Court of Appeal.

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) May 30.

EVANS *v.* JUSTICES OF CONWAY. (*a.*)

*Licensing law—Licence—Refusal to renew—Appeal to quarter sessions—Power of quarter sessions to refuse renewal in absence of evidence—Alehouse Act,* 1828 (9 *Geo.* 4, *c.* 61), *s.* 27—*Licensing Act,* 1872 (35 *&* 36 *Vict. c.* 94), *s.* 42.

*Where the holder of a licence appeals to quarter sessions from the refusal of a general annual licensing meeting to renew his licence, the quarter sessions have no power to refuse to grant a renewal in the absence of evidence in opposition to the renewal.*

Appeal from the judgment of a Divisional Court (Channell and Bucknill, JJ.) on a special case stated for the opinion of the High Court by the justices of Carnarvonshire.

The appellant, William Evans, appealed to the Carnarvonshire Quarter Sessions against a decision of licensing justices, sitting at the general annual licensing meeting held at Conway, in the county of Carnarvon, on the 25th of September, 1899, refusing to renew the licence of the Royal Oak Inn, Conway.

The appellant appeared by counsel in support of the appeal and to apply for the renewal of the licence. It was admitted that the appellant was the holder of a licence for the sale of intoxicating liquors in respect of a house known as the Royal Oak Inn, Conway. No one appeared on behalf of the justices who sat at the general annual licensing meeting. A solicitor appeared for the Rev. T. Gwynedd-Roberts, who had objected to the renewal of the licence at the general annual licensing meeting.

It was contended on behalf of the appellant that the solicitor for the Rev. T. Gwynedd-Roberts had no *locus standi* and that, as no one appeared on behalf of the justices, the appellant was entitled to have his appeal allowed and his licence renewed.

The court of quarter sessions overruled these contentions, and decided to hear the appeal. Thereupon counsel for the appellant, having formally proved that due notice of the appeal had been served upon all the justices who sat at the general annual licensing meeting, and that the appellant, together with two sureties, had duly entered into the required recognizances, applied for the renewal of the licence. The court of quarter sessions, without hearing any evidence on behalf of the respondents or in opposition to the renewal of the said licence, dismissed the appeal and refused to renew the said licence.

The question for the opinion of the High Court was whether the court of quarter sessions were right.

The Divisional Court were of opinion that the court of quarter sessions had dealt with the matter rightly, and affirmed their decision.

The appellant appealed to the Court of Appeal.

*Foote, Q.C.,* and *Trevor Lloyd,* for the appellant.—The quarter sessions ought to have granted a renewal. They had no power to refuse in the absence of evidence in opposition to the renewal. An appeal to licensing justices to quarter sessions is in the nature of a rehearing: *Whiffen* v. *Justices of Malling,* 40 W. R. 293, [1892] 1 Q. B. 362; *Ruddick* v. *Justices of Liverpool,* 42 J. P. 406.

*Asquith, Q.C.,* and *Ellis Griffith,* for the justices.—The quarter sessions had an absolute discretion as to whether they would grant a renewal or not, and they were not bound by the rules as to evidence and onus of proof which are ordinarily binding on courts of law: *Sharp* v. *Wakefield,* 39 W. R. 561, [1891] A. C. 173; *Boulter* v. *Justices of Kent,* 46 W. R. 114, [1897] A. C. 556; *Tynemouth Corporation* v. *Attorney-General,* [1899] A. C. 293, 47 W. R. Dig. 43; *Reg.* v. *Justices of Staffordshire,* [1898] 2 Q. B. 231, 46 W. R. Dig. 84.

*Cur. adv. vult.*

May 30.—A. L. SMITH, L.J., read the following judgment of the court: The Queen's Bench Division in this case has held, with very great doubt and inviting an appeal to this court, that when a publican appeals to a court of quarter sessions, which he is clearly entitled to do under section 27 of the Alehouse Act of 1828, against the refusal of a licensing meeting to grant him a renewal of his licence, the court of quarter sessions can refuse to grant him such renewal without any evidence whatever being given as to why such renewal should not be granted. It was argued by counsel on behalf of the justices that the cases of *Sharp* v. *Wakefield, Boulter* v. *Justices of Kent,* and *Tynemouth Corporation* v. *Attorney-General* show that the court of quarter sessions can do so. We will deal with these cases hereafter. It seems to us that, apart from these cases, a court of quarter sessions cannot do so. The facts are these: Evans,

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the publican, applied to the general annual licensing meeting for the renewal of the licence which he then held for the sale of intoxicating liquors in respect of a house known as the Royal Oak Inn, Conway, and the Rev. Mr. Roberts then appeared and objected to the renewal of the licence. It is not stated in the case submitted to the court upon what grounds he objected, but the justices at the licensing meeting refused to grant the renewal; nor is it stated upon what ground the licensing justices refused. But it was said at the bar that he objected upon the ground, first, that the house was not necessary for the requirements of the neighbourhood; and, secondly, upon the ground that the premises were incapable of effective police supervision; and it was also stated that it was thought that it was upon the latter ground that the licensing justices refused the renewal. The publican then appealed to quarter sessions against this refusal. It was there proved on his behalf that due notice of appeal had been given and that he had entered into the required recognizances. The licensing justices did not appear at quarter sessions to oppose, nor was any evidence given in support of any objection to the renewal, and thereupon the court of quarter sessions, without hearing any evidence, refused to renew the licence. Now, unless the provisions of section 42 of the Licensing Act, 1872, both as to the notice of objection which must be given and as to evidence which must be forthcoming, are complied with, it cannot, we think, be doubted that a renewal of a licence cannot be refused by licensing justices at a licensing meeting (see the observations upon this section by Blackburn, J., in *Reg.* v. *Farquhar*, L. R. 9 Q. B. 258, 22 W. R. Dig. 38); and it has been held by Hannen and Quain, JJ., that the requirements of this section apply equally to the court of quarter sessions when a publican appeals thereto against the refusal of the licensing justices to renew his license as to a licensing meeting: *Ruddick* v. *Justices of Liverpool*. Apart, therefore, from the cases cited by counsel for the justices, the court of quarter sessions could not, in our judgment, without hearing some evidence, have done what they have done and refused offhand the renewal of the publican's licence. It was held in the case of *Whiffen* v. *Justices of Malling* that an appeal to the court of quarter sessions against the refusal of licensing justices to renew a licence amounts to a rehearing, and not to a simple appeal; and, as was stated by Lord Bramwell in *Sharp* v. *Wakefield*, "when there is an appeal againt a refusal of a first licence, the appellant (at quarter sessions) begins, the burden of proof is on him, he has to make out that he ought to have a licence. Where, on the other hand, the appeal is against a refusal to renew a licence, the respondents begin, the burden of proof is on them, they have to make out that he ought not to have a licence; practically that his licence should be taken from him." And it is admitted that it is the practice of the Carnarvonshire quarter sessions, in an appeal against the refusal of the licensing justices to renew a licence, for respondents to begin. If no one is at quarter sessions to give evidence upon an appeal against the refusal of the licensing justices to renew a licence, how is the burden of proof satisfied? It appears to us that it is not. My brother Channell says that a man who has a licence has a *primâ facie* right to have it renewed. In this we agree. But he says that the court of quarter sessions may take away this right if they know that the licensing justices have refused to renew the licence. In this we cannot agree, for, if so, what is the use of the appeal which is clearly given to the publican by section 27 of the Act of 1828? Apart from the cases relied on by the justices, in our judgment some evidence must be forthcoming to justify the court of quarter sessions in refusing the appellant a renewal of his licence. Now *Sharp* v. *Wakefield*, the first case relied upon by the justices, no doubt decided that justices had a discretion to refuse the renewal of a licence, though that discretion was to be exercised judicially (not according to private opinion); and Lord Herschell points out that the procedure provided by section 42 of the Licensing Act, 1872, is still in force, and, subject to its provisions being complied with, the justices may exercise the discretion which the House of Lords held that they had. When the case of *Boulter* v. *Justices of Kent* is carefully read it will be seen that it decided two things, and two things only—first, that a licensing meeting was not a court of summary jurisdiction, so that a court of quarter sessions, upon appeal by a publican thereto against the refusal of a licensing meeting to grant him a renewal of his licence, could not mulct an objector in costs, because it was only in cases of appeals from a court of "summary jurisdiction" that the court of quarter sessions had this jurisdiction, and a licensing meeting was not such a court; and, secondly, that an objector to the renewal of a licence was not a party to the proceedings. It is a mistake to say that this decision in any way decided that a court of quarter sessions was not a court with all the incidents of a court both as regards evidence and onus of proof. It did not touch this question at all; it left it just where it was before. What it did decide, as before stated, was that a licensing meeting was not a court of summary jurisdiction, and therefore the court of quarter sessions could not condemn an objector in costs, and that an objector was not a party to the proceedings. The third case cited by counsel for the justices was that of *Tynemouth Corporation* v. *Attorney-General*, which decided that a borough fund with no surplus could not be charged with the costs incurred by the chief constable in opposing an appeal to quarter sessions by a publican against the refusal of licensing justices to renew his licence. The decision, in our judgment, has no application to the present case; but there are two passages, one in the judgment of Lord Morris, and the other in Lord Davey's judgment, which are pointed to by counsel for the justices. Lord Morris says that *Boulter's case* decided that the chief constable had no right to appear as a party, and Lord Davey says that an objector does not become a party to the proceedings, and has no right to appear and be heard on the appeal to quarter sessions; the only proper respondents are the licensing justices themselves, and if the objector be heard it is as *amicus curiæ*. How does this show that a court of quarter sessions can refuse the renewal of a licence, or, as Lord Bramwell puts it, that the publican's licence could be taken from him, except upon evidence? In our judgment neither *Sharp* v. *Wakefield* nor *Boulter's case* nor the *Tynemouth case* applies to the present case; and Lord Davey in the *Tynemouth case* certainly was not dealing with the question we have now to decide—viz., whether the court of quarter sessions can refuse the renewal of a licence without hearing any evidence at all. In our opinion it cannot do so. It follows, therefore, that the question which is left to us must be answered thus—that the court of quarter sessions was wrong, and that the licence must be renewed. For the reasons above given this appeal must be allowed.

*Appeal allowed.*

Solicitors for the appellant, *Belfrage & Co.*, for *Chamberlain & Johnson*, Llandudno.

Solicitors for the respondents, *Edwards & Cohen*, for *D. Owen & Griffith*, Bangor.

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) May 3, 4, 7, 8, 9.

BARRON v. WILLIS. (a.)

*Solicitor and client—Confidential relation—Benefit to solicitor's son—Independent advice—Confirmation.*

*A person who enters into a transaction which has the effect of benefiting the solicitor employed or members of his family cannot be bound by such transaction unless he or she has had independent advice.*

*By a deed executed in* 1890 *property was settled on trusts in favour of a husband for life, then for his wife for life, then as the husband and wife should jointly appoint, and, in default of such joint appointment, as the survivor should appoint, with an ultimate remainder as to one moiety for one of the trustees of the deed, and as to the other moiety for the son of another trustee.*

*In* 1891, *by a subsequent deed, the wife's life interest was cut down to an interest during widowhood, and the funds were settled to go on trust as the husband alone should appoint, and in default (excluding the power of appointment in the wife if she survived her husband) upon the trusts of the deed of* 1890.

*By a third deed in* 1894 *(made after the death of the husband, who never exercised his power of appointment) the wife's life interest was restored to her, and in all other respects the deed of* 1891 *was confirmed.*

*All three deeds were prepared by the solicitor of the husband, who was one of the trustees of the deed of* 1890, *and whose son benefited under that deed. He explained the effect of the deeds to the wife, but she had no independent advice, and it was never pointed out to her, either by the solicitor or by anyone else, that she ought to have independent advice.*

*Held, that, under the circumstances, the rule of law laid down in* Huguenin *v.* Baseley, 14 *Ves.* 273, *applied, and the transaction must be set aside.*

*Decision of* Cozens-Hardy, J. (ante, *p.* 26, [1899] 2 *Ch.* 578), *reversed.*

This was an appeal from a decision of Cozens-Hardy, J. (reported *ante*, p. 26, [1899] 2 Ch. 578).

For the purposes of the present report the facts may be shortly stated as follow:

The plaintiff Mrs. Annie Butler Barron, the wife of William Barron, and formerly the wife of Joseph Willis, sought to set aside a deed executed in 1891 to which she was a party, and also to obtain a declaration that the defendant Frederick Herbert Skinner could not take any benefit under the said deed inasmuch as his father, the defendant William Moore Skinner, had acted as her solicitor in the preparation of the deed.

The defendant was married to Joseph Willis in October, 1889.

On the 29th of December, 1890, a deed was executed, which was made between Ann Willis, the mother of Joseph Willis, of the first part, Joseph Willis of the second part, the plaintiff of the third part, and the defendants Nicholas Willis, Isaac Dunn, and William Moore Skinner of the fourth part. By this deed certain property was settled by way of family arrangement. The trusts were during the joint lives of Ann Willis and Joseph Willis to pay him £100 a year, and subject thereto to pay the income to Ann Willis during her life, and subject thereto a protected life interest was given to Joseph Willis, and after his death a life interest was given to the widow of Joseph Willis, with subsequent trusts in favour of the children or issue of Joseph Willis, and in default of issue a general power of appointment by deed was given to Joseph Willis and the plaintiff jointly, and subject thereto a general power of appointment by deed was given to the survivor, and subject thereto the property was settled in trust as to one-half for the defendant Nicholas Willis, and as to the other half for the defendant Frederick Herbert Skinner, the son of William Moore Skinner, absolutely.

Differences arose between Joseph Willis and the plaintiff mainly by reason of his intemperate habits.

On the 3rd of October, 1891, a deed was executed by Joseph Willis, the plaintiff, and Ann Willis, which, after reciting that the present deed had been executed to vary the trusts of the deed of 1890, provided that the provision for the widow of Joseph Willis during her life should be read and construed as a provision for the benefit of such widow only so long as she should remain the widow of the said Joseph Willis, and that the words "after the decease of the survivor" should be read and construed as "after the decease of the survivor or the marriage of the widow"; and by the same deed Joseph Willis and the plaintiff, in exercise of the joint power of appointment vested in them in case of failure of issue, appointed that the trust funds should be held in trust for such person and in such manner as Joseph Willis alone should by deed appoint, and in default of appointment and so far as no such appointment should extend then (excluding the power of appointment by a widow of Joseph Willis) upon the trusts declared by the principal deed of 1890.

Joseph Willis died intestate and without issue in September, 1893.

By a deed dated the 2nd of August, 1894, and made between the plaintiff of the first part, Ann Willis of the second part, Frederick Herbert Skinner of the third part, and Nicholas Willis, Isaac Dunn, and William Moore Skinner of the fourth part, after reciting accurately the effect of the deeds of 1890 and 1891, and that it had been agreed by way of family arrangement that such further modification of the trusts as was thereinafter contained should be executed, it was provided that the direction contained in the settlement of 1890 for payment or application of the income of the trust funds to or for the benefit of the widow of Joseph Willis during her life should have full force and effect, and that such income should be paid to the plaintiff during her life in the same manner as if clause 1 of the modification deed of 1891 had not been inserted therein, and in all other respects the deeds of 1890 and 1891 should be and were thereby confirmed.

All the three deeds of 1890, 1891, and 1894 were prepared by William Moore Skinner as solicitor, with the assistance of counsel. William Moore Skinner was the solicitor of Joseph Willis and he admittedly acted as solicitor for the plaintiff in the deed of 1894. The other deeds were read over and explained by him to the plaintiff, but she had no independent legal advice on these deeds, and William Moore Skinner did not point out to her that she ought to have such separate legal advice.

As will be seen by the judgments of the Court of Appeal, the court were of opinion that William Moore Skinner, though he was not solicitor for the plaintiff in the earlier deeds, was in a confidential relation towards the plaintiff, and that it was his duty to point out to her the necessity of having independent advice.

Mrs. Ann Willis died in April, 1897.

In November, 1897, the plaintiff married again, and this action was commenced in February, 1898.

William Moore Skinner had purchased the reversionary interest of his son in one moiety, but, as was pointed out, he had full notice of all the facts

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

and could not be in any better position than his son.

Cozens-Hardy, J., dismissed the action. His lordship held that the deed of 1891 was a good deed so far as it gave effect to the arrangement between husband and wife. It was prepared by the husband's solicitor and could only be impeached on the ground of William Moore Skinner's relationship towards the plaintiff. In his lordship's view this was not material, the transaction being between the husband and wife. He was, however, of opinion that the relationship of solicitor and client did not exist between William Moore Skinner and the plaintiff.

The plaintiff appealed.

*Hughes, Q.C.*, and *Ashton Cross*, for the appeal.—Even though the plaintiff did not actually employ William M. Skinner as her solicitor, a highly confidential relationship existed between them. Whether William M. Skinner explained the deeds to the plaintiff or not, he never advised her on them, and she was entitled not only to advice, but to independent advice. There is no question here of retainer, or of the authority of a solicitor. It is a case of personal relationships. William Moore Skinner was a trustee of the deed of 1890, and he was also solicitor for the trustees and for the family. The case, therefore, is within the rule in *Huguenin* v. *Baseley*, 14 Ves. 273, that the court will not allow a person standing in a fiduciary relation to another to take a benefit from that other person unless the other has independent advice.

They also referred to *Nedby* v. *Nedby*, 5 De G. & Sm. 377; *Liles* v. *Terry*, 44 W. R. 116, [1895] 2 Q. B. 679; *Proctor* v. *Robinson*, 14 W. R. 381, 35 Beav. 329; *Moxon* v. *Payne*, L. R. 8 Ch. App. 881, 22 W. R. Dig. 110; *Kempson* v. *Ashbee*, 23 W. R. 38, L. R. 10 Ch. App. 15; *Allcard* v. *Skinner*, 36 W. R. 251, 36 Ch. D. 145.

*Astbury, Q.C.*, and *Stokes*, for N. Willis.—The plaintiff had no *animus donandi* towards N. Willis. The only question is whether in 1891 the plaintiff knew that the effect of what she was doing was to deprive her of her rights in her husband's property. There was no reason why Skinner should prevent her exercising the joint power of appointment given to her and her husband. There is no case which makes a trustee's like a solicitor's position in the case of a relative taking a benefit.

*Eve, Q.C.*, and *Austen Cartmell*, for the defendants W. M. Skinner and F. H. Skinner.

*F. A. Milne*, for the defendant Dunn.

*Hughes, Q.C.*, in reply, referred to *Goddard* v. *Carlisle*, 9 Price 169.

LINDLEY, M.R.—This case is an important one and a difficult one, and although it has taken a considerable time, I do not think we can say the time has been unnecessarily consumed. It is a very important case, because it is very near the line, and although the principles applicable to the case are fixed and well settled, their application, I think, to this particular case is unquestionably difficult. The difficulty turns upon this, whether it was Mr. Skinner's duty to take care that this lady, the plaintiff, had independent advice in the transactions which are impeached? That depends mainly upon whether he was in such a confidential position towards her as to render it his duty to do so. I do not propose to make any reflection upon Mr. Skinner beyond this, that he certainly did not consider it his duty to do that, and if he failed in that respect then the observations made by Turner, L.J., in *Rhodes* v. *Bate*, 14 W. R. 292, L. R. 1 Ch. App. 252, would apply to him although he may have acted with perfect honesty, and that if he did disregard his duty the consequence must follow. Now, it appears to me that when the facts of the case are grasped it is impossible to deny the existence of a confidential relation between Mr. Skinner and the plaintiff in 1891 and 1894. Let us consider his position in 1891, when that first supplemental deed was executed. [His lordship stated the effect of the deed of 1890, and continued:] So that Mr. Skinner's position under the deed of 1890 was that he and Mr. Nicholas Willis and Mr. Dunn were trustees as well for the plaintiff as for anybody else; they had a discretion as to the application of Mr. Joseph Willis's income during his life, and the reversion of the beneficial interest in the settled property was half in one trustee and half in the son of another. That is a position of difficulty and delicacy for Mr. William Moore Skinner, who was the friend of the Willis family, and unquestionably a very intimate friend, and their legal adviser. He was trusted by them all, and he was in a position of delicacy because not only was he the trustee under the deed, but his son took a beneficial interest under it. Now that was his position under the deed of 1890, and under that deed alone. In consequence of the intemperate habits of Mr. Joseph Willis unhappy differences arose between him and his wife, and before the deed of 1891 was executed the plaintiff consulted Mr. Skinner, sen., as solicitor—that is, she went to him for advice. It was quite natural that she should, and I allude to it for the purpose of explaining the fact that in October, 1891, when this first supplemental deed was executed, she had been consulting Mr. Skinner about her position with reference to her settled property and her husband, and about a possible separation. There is some allusion in the deed of 1890 to a possible separation which looks as if even at that time it was considered quite possible that owing to her husband's habits of drink difficulties might arise, and difficulties unfortunately did arise. That was her position in 1891. In the late summer of 1891 there seems to have been unpleasantness between herself and her husband, and there was a family dispute. Mrs. Willis, the mother, and her son appear to have desired to have the deed of 1890 altered. I will not go through the details of the arrangement or the negotiations which led up to it; but the husband and mother naturally went to Mr. Skinner in regard to it. The wife was told that there was a mistake, and that the mother and the husband desired to have it put right or rectified. I do not attach much importance to the word "rectified," but they desired to have alterations made, and I am satisfied now, after the examination and cross-examination of the plaintiff Mrs. Barron, that she did know a great deal more than she at first admitted when she was examined. She knew, I think, that it was intended to cut down her life interest to an interest for the duration of her widowhood only, and she knew—though here, perhaps, there is a little obscurity—that the power of disposition was to be materially altered. The exact method of doing it the evidence shows, I think, that she did not know, but she certainly knew and understood that her husband was to have some power of disposition which he had not got before. That is obvious and certain. Whether she also realized that she was to have no power of disposition is a little more obscure, but Mr. Skinner says she understood that. Perhaps she did. Now, what was done? Mr. Skinner was instructed to carry out this alteration.

He did not like it; he did not like the way in which it was put before him, because it was put before him by the mother and the husband in the shape of a blunder of his own, that he had failed to carry out his instructions. They talked about

rectifying a mistake, but he did not admit that there was any mistake at all. However, it was left to him to prepare a deed to carry into effect the wishes of the parties. That is all common ground. There were various modes of doing it, and he laid instructions before counsel to prepare the deed, and counsel did prepare a draft deed, but in consequence of the obscurity of the instructions counsel suggested two modes of doing it, one of which was a good deal more beneficial to the plaintiff than the other, and the other of which was less beneficial to the plaintiff, and was also most beneficial to the reversioners. Now the question, I think, arises, what was his duty to Mrs. Joseph Willis with reference to that matter? She says that she trusted him. She looked upon him as her confidential adviser and her solicitor. She did not employ him; of course she did not. He was employed by the other members of the family, but she did look to him to carry that matter out in a proper way and give her such assistance as occasion might require. He does to a certain extent. He suggests that she should go to some other solicitor, but he does not point out to her her real position. He said he explained the deed to her. I assume that he did to the full extent to which he says, but unquestionably he never gave her any advice showing that this alteration could not be made either without a lawsuit or without her consent. He never explained to her that it was so adverse to her interests that it would be inadvisable for her to execute it or concur in it without further consideration. He did not consider it his duty to do that. He said he did not consider that, and he thought all his duty was to explain the deed to her. There, it appears to me, he formed too low an opinion, too low a standard of his duty in the position in which he was placed, and considering the extent to which he knew he was trusted by all parties in the preparation of that deed. We are invited to take the view adopted by the learned judge, that he was a man of indifference, a solicitor merely carrying out a bargain already made between the parties, and it was no particular business of his to consider that bargain or to consider the interests of those who made it. Considering his relation to this lady it is impossible to accept that view of his position, and that is the key to the whole of this case. I cannot think that he performed his duty to her in merely explaining to her the effect of the deed without pointing out to her the various modes by which the desire of the parties could be carried out, and the extreme importance to her of the method of doing it in one way rather than another. In that sense it was not necessary that she should have independent advice, but it was necessary that she should have a fuller explanation than she had, and if she was entitled to receive that fuller explanation she did not get it, not because Mr. Skinner was scheming for personal advantages for himself or his son—I exonerate him from any feeling of that kind—but because he did not rise to the occasion, he did not see the delicacy of the position he was in, and he did not advise that lady to get independent advice so that she could realize what she was doing.

I cannot bring myself to think that if shortly after that deed had been executed Mrs. Joseph Willis had obtained independent advice and had sought to have it set aside she would have failed. I am convinced that she would have succeeded. Now, if that is so the rest of the case is really comparatively easy. I do not think it necessary to refer to the authorities to show that up to that point the principles to which I have been referring would carry the plaintiff all the way—viz., the doctrines with which we are familiar, and which were laid down in *Huguenin* v. *Baseley*, *Rhodes* v. *Bate*, and *Liles* v. *Terry*, they are all mere illustrations of the great principle which Lord Eldon laid down in *Huguenin* v. *Baseley*, which Turner, L.J., and Knight-Bruce, L.J., acted upon in the very difficult case of *Rhodes* v. *Bate*, and which we act upon here. But the principle is most important, and I am not the least disposed to adopt the view which is attributed to my learned predecessor, that it is bad. On the contrary, it is a rule based upon a knowledge of human nature, and it is laid down in order to prevent the very mischief that arises in a case like this, in a case on the line, where people may have acted fairly but without advice. Then, again, I accept what Mr. Skinner says when he differs from what the lady says. He says she was told in 1894 that she was in a position to attack that deed in 1891; she says no such thing was brought to her attention at all. On the contrary it was supposed that she could not. She rather got a benefit by the deed of 1894, which was in her favour, and Mr. Skinner is entitled to the merit of having obtained a larger measure of justice than perhaps she would have got without his assistance. It does restore to her a life interest, but he put in a clause at the end confirming the deed of 1891 without any further independent advice or any further illustration of what she was about, and to tell me she understood the effect of that is telling me what I do not believe for a moment. She did not understand it at all. She understood what she was told. She understood it was a confirming deed, but as to whether she understood what her rights and position were it gives us no useful information. It appears again upon principles which have been acted upon and illustrated in *Moxon* v. *Payne* amongst other cases that this confirmation cannot assist the defendant. Neither can I adopt the view that by the realeasing of her power which was conferred upon her in the deed of 1890 she was giving up a mere trifling benefit so as to entitle the defendant to an advantage, as Turner, L.J., said in *Rhodes* v. *Bate* about small gifts and things of that kind. I followed Mr. Astbury's observation that if you took the reversion into the market and were to calculate her chance of selling it, probably nobody would give her anything for it, but it does not follow at all that the power of appointment which was vested in her in the deed of 1890 was not of the greatest possible value to her. It may have been or may not. It depended on whether the husband exercised his power of appointment. I don't know whether he would or would not, but in the events which have happened I see the enormous importance of the plaintiff not beng deprived of that which she was deprived of without knowing what she was about. Now, the only other point worth mentioning is the position of Mr. Nicholas Willis. Mr. Astbury has argued his case with his usual skill, and he says what is true enough: Mr. Nicholas Willis does not claim under the deed of 1891. He claims under the deed of 1890. So he does. He claims the reversion. But if he claims the benefit of the deed of 1891, what does he claim? He claims the extinction of the plaintiff's power, but so far as he relies upon that, he relies upon those who obtained it, and must take it with its defects. That a volunteer has no equity in setting aside a deed of this kind has been settled again and again, not only in *Huguenin* v. *Baseley*, but it was mentioned and discussed by my late brother Fry in *Bainbrigge* v. *Browne*, 29 W. R. 782, 18 Ch. D. 188, and it is quite obvious that unless Mr. Nicholas Willis was in possession of some equity of his own to set this deed aside it does not avail him. It appears to me on the whole the learned judge has not attributed importance to the confidential relation which existed certainly between this lady and Mr. Skinner in 1891, that he has rather overrated her admission that she did not

employ Mr. Skinner—which I admit to the full, and where we part is that he did not consider it Mr. Skinner's duty to do more than he did. There I cannot agree with him. Therefore I am of opinion that the appeal must be allowed and that a declaration must be made in accordance with the first two paragraphs of the prayer of the claim, and that the defendant must pay the costs both here and below, including the costs of Mr. John Dunn, who has taken no part in the controversy.

RIGBY, L.J.—In my opinion the real relevant question in this case is, was there a confidential relation between Mr. Skinner and the plaintiff at the time of the execution of the deeds of 1891 and 1894, and had the plaintiff independent advice? Certainly she had not independent advice, and I do not think that any advice from Mr. Skinner could avail him in the way of defence. Once or twice he suggested that her husband and herself, and afterwards her mother-in-law and herself, should go to an independent solicitor. For what? There was never a hint that they should get advice as to their rights and so on, but as to the contents of the deed they were to go to the solicitor as a dictionary. Having absolute confidence in Mr. Skinner they did not think fit to do so. The fact is, that is the only advice that Mrs. Joseph Willis got throughout the whole affair. The more difficult question perhaps is as to the nature of the relation between the parties, but I am of opinion that undoubtedly, whether in his own mind he chose to act as though he were not acting as solicitor, the important matter is as to whether the plaintiff did right to place confidence in him as her solicitor. I think the case is proven. She employed him *de facto* as her solicitor in reference to the trouble that arose between her husband and herself, but even in the matter of the settlement he undertook on the 30th of September to act towards her in a way in which I think is conclusive against him that he was her solicitor. To be sure in his own mind he draws the line. "I went to tell her, to give her information, but not advice." Can a man split his duty in that way and say, "I abstained altogether from advising her, and therefore I was not her solicitor"? I think not, and I think that would be conclusive against him. Now what ought he to have done—for I want to be understood—when this deed of 1891 was agitated or first spoken of? He ought to have said to Mrs. Willis (I do not say that he would not have said so if he had appreciated his position), "Now this is a case in which your interests are very closely and in a very important degree concerned. I am acting for your husband, it is not right that I should act for you; therefore, before I take a step in the matter I insist—not only I recommend, but I insist—upon your going to an independent solicitor." That independent solicitor I cannot think would have had any doubt as to what advice he should give her. He would say, "You have got an important right under the deed of 1891 which must not lightly be given up; you have got a joint power of appointment with your husband, you have got power in the event of your being survivor to appoint the whole of the fund." "Very well," she might have said "I do not care for that at all. I shall do as I please, and what I please is to give up those powers." If that had taken place it might have been quite right that they should be given up; but it cannot be, and in my judgment it is not right at all that the husband's solicitor should act in the matter as if she had no rights of her own and without telling her of what she was doing. However fully he might have explained the deeds, if he did not bring home to her mind the rights which could not be taken away from her—because on this evidence I think it is idle to suppose that the deed could be rectified.—I say nothing about Mrs. Ann Willis, she had strong views, as ladies sometimes will have, about what ought to be done; but the misfortune is that she never at the proper time communicated those views to Mr. Skinner. Now it is suggested that the learned judge appears to a considerable extent to have accepted that suggestion that this was a bargain between husband and wife. I never saw a case which was to my mind more hopeless than that. [His lordship discussed the relations between the parties, and continued:] In my opinion there is no evidence at all of any bargain between the husband and wife. Where is the bargain? The husband sent the plaintiff to Mr. Skinner, and she had to go to Mr. Skinner, in whom she had implicit confidence, and get from him the proposal. [His lordship commented on Mr. Skinner's evidence, and continued:] I will accept his evidence as far as it goes, and I will assume that on the 30th of September, and again on the 3rd of October, he explained to her so that she might fully understand them the terms of the deed. But that is not enough. Mr. Skinner was acting as the solicitor for the husband, and he never pointed out to the plaintiff, as was his duty under the circumstances, that he was acting on behalf of parties whose interests were opposed to hers. But I will assume she knew what she was doing well enough, and that she executed the deeds with the full knowledge of their contents. That is just the case that raises the question on the rule of law. The law is that a person who enters into a transaction which has the result of benefiting the solicitor employed, or members of his family, cannot be bound unless he or she has had independent advice. As to the confirmation, there can be no confirmation as long as the confidential relation continues to exist which is alleged, and in this case proved, to have existed at the time of the transaction of 1891. Then as to the deed of 1894 it is said that was a deed of confirmation, but it would not matter if she confirmed every day or executed a deed of confirmation, because that would only prove the absolute influence that the solicitor had over her in the matter. After the husband's death she escaped from those influences, and only a few months intervened before the action was brought. The question is when did she get information, and it is not until she had consulted an independent solicitor that she got that.

COLLINS, L.J.—I am of the same opinion, but as we are differing from the learned judge below, I will add a few words. It seems to me that when the facts of this case are analyzed the point resolves itself into a small and comparatively simple one. I take the crucial fact to be this: Was there or was there not such a relation between the plaintiff and Mr. Skinner as to place the obligation upon him not only to explain to her but to advise her? Now, if that relation subsisted between them, he does not himself contend that he ever advised. His case is that he had no duty beyond explaining, and that he explained. Well, now, did the relation that I have suggested subsist? It is common ground that this lady had, within a short time before the deed of 1891 was contemplated, consulted Mr. Skinner upon a matter of the most extreme delicacy. She had consulted him upon the relations between herself and her husband with a view to a possible separation. In the words of Lord Eldon in *Huguenin* v. *Baseley*, it was a demonstration, he says, to Baseley in that case, and to Mr. Skinner it would be here, that she placed confidence in him as high as one individual ever placed in another. That was the relation subsisting

between them at the time when she came to him for that advice. That relation must be presumed on the authority of *Rhodes* v. *Bate* to have continued up to the time when this deed of 1891 came into contemplation, but it appears to me obvious that he was specially consulted by her with reference to that deed. He had been the family solicitor, he had been not only the family solicitor, but he had been in this exceedingly confidential relation with her, and his own case is that he did communicate with her about this deed, and did in a sense advise her. That is, in a sense to which he thought his obligation was limited —viz., the explaining to her what the effect of the deed was. The situation is complicated further by this, that in this arrangement as to which he has taken up the *rôle* of a mutual expert explaining the situation he takes for his son a possible benefit. Now how does that affect the relation? Why, it introduces this difficulty into the matter, that being the person bound by virtue of his relation which I have described to advise this lady, he, by so doing, incapacitated himself from doing it, and he was no longer in a position to give her that advice she was entitled to have; and, further, he debarred himself from accepting benefit from her without showing—the burden was upon him of showing—that she got independent advice. He does not suggest on his own evidence that she ever did have independent advice. He does not suggest that he took any steps to procure it for her. He does, as has been pointed out by my learned brother Rigby, suggest that she should get somebody else to explain what in fact the meaning of the deed was—that is, an explanation of her true position in reference to all the circumstances, what she has a right to keep, what she is to give up. That obligation is not satisfied by merely measuring what she has given away or what she has a right to keep. That had to be clearly brought before her, and it never was brought before her at all. Now under those circumstances this deed was executed, and it seems to me by its execution a slight advantage was secured for the younger Skinner, a barrier which might have been insuperable while the old arrangement existed—viz., her joint right of appointment during her husband's lifetime, and her absolute right if she had survived him in herself alone. Those elements were removed out of the way to a possible succession under this reversion deed, and in my judgment that was a slight advantage secured to the son of Skinner, the solicitor, who, on the observations I have already made, was the solicitor placed in a position in which it was obligatory upon him to give her full and impartial advice as to all the circumstances attending the execution of the deed. He had incapacitated himself from giving it, and he finds himself there receiving a benefit which he is incapable of accepting unless she had that independent advice. Therefore, accepting as I do with perfect frankness all the conclusions of the learned judge below on the question of fact, it seems to me on the admitted facts of this case up to this point the plaintiff has an unanswerable claim. Then it is said that by the transaction of 1894 she confirmed this voidable settlement of 1891, but when you look at the facts it is perfectly obvious, whatever that deed is, it cannot be confirmation. Confirmation when she did not know her rights! Confirmation when she accepted a situation which in her judgment she had no power to control, and she accepted it because it was the most she could get, and all that Frank Skinner and Nicholas Willis could be compelled to give her? Is that confirmation? There can be no confirmation unless she knows of her rights and has independent advice upon them. The same observation applies in answer to the suggestion that she slept upon her rights. She slept upon them when she did not know what her rights were? Impossible. She never did know what her rights were, and never got independent advice upon them until after she got married again.

Solicitors, *Wynne-Baxter & Keeble*, for *Beldon & Ackroyd*, Bradford; *Sismey & Sismey*, for *Skinner, Son, & Church*, Sunderland; *Patersons, Snow, Bloxam, & Kinder*, for *Ransen, Nelson, & Maling*, Sunderland.

---

From Q. B. Div.
(A. L. Smith, Collins, and Romer, L.JJ.) — Feb. 16.

SMITH v. BUTLER. (a.)

*Vendor and purchaser—Contract for sale of lease of public-house — Date of completion — Deposit—Forfeiture—Conditions of sale—Time during which condition imposed on vendor may be performed.*

*When a lessee of a house, upon which there is a subsisting mortgage, agrees to assign the residue of his lease, and the purchaser agrees to buy it on the condition that the whole of the mortgage loan is transferred to him, and a deposit is paid by him and a time fixed for the completion of the contract, he is not justified in treating a refusal of the mortgagee, prior to the date fixed for completion, to transfer the whole, but only a part, of the loan as entitling him, the purchaser, to at once treat the contract as at an end, for the vendor has until the date fixed for the completion of the contract in which to obtain the consent of the mortgagee.*

This was an appeal by the defendant from the judgment of Bucknill, J., at the trial of the cause without a jury.

The action was brought to recover a deposit of £100 paid by the plaintiff to the defendant upon a contract for the purchase of a lease of a public-house.

The house was the property of one Kidd, a brewer, who had advanced the sum of £900, upon mortgage of the house, to the defendant, who was lessee thereof for a term of years.

The money was payable on demand, and it was arranged between the owner and lessee that the latter should repay the loan by an annual payment of £50; only one sum of £50, however, was repaid.

On the 10th of September, 1898, the plaintiff entered into a contract with the defendant whereby the defendant, in consideration of the sum of £100 then paid to him by the plaintiff by way of deposit, and of the further sum of £1,700 to be paid on completion, agreed to assign to the plaintiff the lease of the said house and all his interest therein for the residue of the unexpired term, and the 10th of November, 1898, was fixed as the date for the completion of the purchase. It was further provided that in case of default by the purchaser the deposit of £100 was to be forfeited; and it was stated that the agreement was entered into conditionally that the said Kidd would transfer his then present loan of £850 to the plaintiff.

On the 4th of October the plaintiff, the defendant, and a broker who acted for both parties, had an interview with Kidd, who refused to allow more than £700 to remain on mortgage, this to be repaid by instalments of £50 per annum. The plaintiff thereupon decided to treat his contract with the defendant as at an end. Later on the same day, however, the broker had another interview with Kidd, though not with the authority of the plaintiff, when Kidd agreed to transfer the whole loan of £850 on condition that

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

it was paid off by instalments of £50 per annum. The plaintiff was informed of this fact, but he continued to treat the contract as determined, and on the 11th of November he brought an action to recover the deposit of £100 paid by him to the defendant.

Bucknill, J., before whom the case was tried, gave judgment for the plaintiff.

The defendant now appealed.

*Bray, Q.C.* (*C. L. Attenborough* with him), for the appellant.—The plaintiff was not entitled to repudiate the contract when he did, as the defendant had until the date fixed for completion in which to obtain Kidd's consent for the transfer of the whole of the loan. The sale, therefore, went off by the plaintiff's default, and he could not recover the deposit: *Day* v. *Singleton*, *ante*, p. 18, [1899] 2 Ch. 320.

*Blake Odgers, Q.C.* (*F. O. Robinson* with him), for the respondent.—The time during which the consent of the mortgagee was to be obtained did not extend to the date fixed for completion; such consent must be obtained within a reasonable time, and the refusal of the mortgagee on the 4th of October was such as to justify the purchaser in treating the contract as at an end: *Davis* v. *Nisbett*, 9 W. R. 840, 10 C. B. N. S. 752. It would be unreasonable to expect the purchaser to wait to see if the vendor could later on perform the condition and to incur further expenses when he had good reason to believe the condition would never be performed. The vendor never performed the condition because the mortgagee never consented to transfer the mortgage, except on condition that it was repaid by annual instalments, therefore the vendor could not say that the purchaser was not ready and willing to complete: *Weston* v. *Savage*, 27 W. R. 654, 10 Ch D. 736; *Forrer* v. *Nash*, 14 W. R. 8, 35 Beav. 167; *Lloyd* v. *Crispe*, 5 Taunt. 249.

A. L. SMITH, L.J.—This is an appeal from Bucknill, J., and in my opinion his judgment cannot be supported. The facts of the case are that a lease of a public-house for a term of years was granted to the defendant. The lessor, who was the owner of the house, had lent £900 to the defendant upon mortgage, the money being repayable on demand, there being an understanding that the loan should be paid off by annual instalments of £50, but as a matter of fact only one such instalment was ever paid, so that there remained on mortgage the sum of £850. The plaintiff desired to purchase the residue of the defendant's lease provided that the owner would allow the money then due on the mortgage to remain outstanding, and on the 10th of September, 1898, he entered into an agreement with the defendant for the sale, the purchase to be completed on the 10th of November, 1898. A deposit was to be paid by the plaintiff on signing the contract, which deposit was to be forfeited in case of any default on his part. The agreement contained a clause which provided that it was subject to the condition that the owner would transfer the loan to the plaintiff. It seems clear to me that if the owner was willing to transfer the loan, the defendant had until the date fixed for completion in which to obtain the consent of the owner to the transfer, and if he obtained such consent by that date he would have performed his part of the agreement in that respect. On the 4th of October the plaintiff and the defendant, accompanied by a broker, had an interview with the owner, who refused to allow more than £700 to remain on mortgage. The plaintiff thereupon at once said that he would have nothing more to do with the purchase, and that the contract was off. Subsequently on the same day the broker, on behalf of the defendant, had another interview with the owner, when the latter agreed that he would consent to the transfer of the loan of £850, provided that it was paid off by annual instalments of £50, according to the existing condition. The question for us is whether the plaintiff, after the interview of the 4th of October, was justified in treating the contract as at an end. In my opinion, he was not so entitled because the defendant had until the date fixed for completion—viz., the 10th of November, to procure the consent of the owner to the transfer of the mortgage. The plaintiff might have receded from the position he took up after the interview when he later on found that the owner had consented to the transfer of the whole mortgage, and he might then have said he was willing to complete, and had he done so there would have been nothing to prevent him from suing the defendant if there had been any breach of the agreement by the latter. But the plaintiff never did recede from the position he took up after the interview, and that being so it was through his fault, and not through any fault on the part of the defendant, that the purchase was not completed. He therefore cannot recover the deposit, and the appeal must be allowed.

COLLINS, L.J.—I am of the same opinion. The whole question is whether the plaintiff was entitled to treat what happened at the interview as a final declaration by the defendant that he was unable to carry out his part of the contract. If he was so entitled, then he could rescind the contract and sue for the recovery of his deposit. In the present case it was clearly proved that the plaintiff finally withdrew on the 4th of October from the contract, and that he never afterwards altered his position. If the plaintiff had legal rights in so treating what happened on that date as a final refusal on the part of the defendant to carry out the contract, then he was right in the present case; if not, then he was in the wrong. What right had he to treat what happened at that interview as a final declaration on the part of the defendant that he was unable to carry out his part of the contract or that he refused so to do? True it is that at that interview the defendant was not then in a position to say that he was able to fulfil the condition as to the transfer: but the contract does not say that that condition is to be fulfilled before the 10th of November. If inability to perform the condition at some date prior to the date fixed for completion is to be taken as a ground for the rescission of the contract, such right to rescind must be established by the contract itself or by some independent agreement between the parties. But there is absolutely no evidence of any such right or agreement, or even of any custom to that effect, and therefore the defendant retained all his rights up to the date fixed for completion.

The plaintiff was wrong in treating the events of the 4th of October as a final refusal or declaration of inability on the part of the defendant to carry out the contract, and having taken up that position and held to it he cannot now aver readiness and willingness on his part to carry out the contract. This view of the law is nowhere more clearly dealt with than by Lord Esher, M.R., in *Johnstone* v. *Milling*, 34 W. R. 238, 16 Q. B. D. 460.

I am therefore of opinion that the plaintiff cannot succeed in this action.

ROMER, L.J.—I agree. It is clear to my mind that the vendor has until the time fixed for completion in which to obtain the consent of a mortgagee to accept the purchaser as a mortgagor, or, if no time for completion is fixed, then a reasonable time in which to obtain such consent. Though the condition that the vendor shall obtain the consent of the mortgagee

is one that may be fulfilled at any time before the completion, yet I do not think that the purchaser is always bound to wait until the actual date fixed for completion. I can suggest several such cases. One such where the purchaser is able to prove that the conditions cannot practically be fulfilled by that date. Another where the vendor has practically admitted that the condition cannot be fulfilled. A third where a vendor and purchaser have agreed that a particular refusal of the mortgagee to accept the purchaser as mortgagor is to be taken as conclusive, which agreement need not be expressly stated, but may be implied from the circumstances.

It is for the purchaser to show some special agreement or circumstances whereby he is entitled to treat the contract as at an end, and if he is unable to show that he is so entitled and goes back from his contract, the vendor may treat the contract as broken by the purchaser, and he would be relieved from further carrying out his part of the contract or performing the condition, and in such a case the purchaser is not entitled to recover the sum he has paid as a deposit.

The cases which have been cited are, with one exception, cases where the purchaser, before the time for completion had arrived, became aware of the fact that the vendor did not possess the legal title and was unable to complete the contract.

Those cases therefore have no bearing upon the present one. The only case cited that has any bearing upon this case is that of *Davis* v. *Nisbett*. That case was one on a demurrer, and the fifth plea was treated by the court as an averment of final and irrevocable disapproval of the person proposed as a tenant, and it therefore comes within that class of case I have already pointed out—namely, where there is a failure to perform a condition which is shown to be final and conclusive.

It seems to me that the present case does not come within any of the classes of cases that I have alluded to. It is perfectly clear that the defendant in this case did not treat the refusal of the owner as final and conclusive, and in my opinion the plaintiff under the circumstances was not justified in treating the contract as at an end.

Further, as to the stipulation that the plaintiff should pay off the mortgage debt by annual instalments, that imposed no burden upon him, inasmuch as the money was payable on demand. I agree, therefore, that the appeal must be allowed.

*Appeal allowed.*

Solicitor for the appellant, *S. J. Attenborough.*

Solicitors for the respondent, *Benwell & Norfolk.*

---

## High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } March 30.

*In re* WHITEHEAD & BROTHERS (LIMITED). (a.)

*Company—Shares—Fully paid up—Certificate of incorporation—Contract—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act,* 1898 (61 & 62 *Vict. c.* 26), *s.* 1.

*The certificate of incorporation of a company was dated the 9th of August,* 1870. *A contract under which the vendor to the company was to receive a certain number of fully-paid shares was signed on the 21st of October and registered on the 27th of October,* 1870. *The vendor had subscribed for the same number of shares in the memorandum of association. It was held in the case of* Dalton Time Lock Co. *v.* Dalton, 66 *L. T. Rep.* 704, 40 *W. R. Dig.* 40, *that the certificate of incorporation operated as the issue of the shares signed for in the memorandum of association.*

*Held, that, in the special circumstances of the case, relief would be granted to the personal representative of the vendor; and the court ordered the company to file a memorandum, which should operate as a sufficient contract in writing within the meaning of section* 25 *of the Companies Act,* 1867, *and as if it had been duly filed at or before the issue of the shares.*

This was a motion under section 1, sub-sections 1 and 4, of the Companies Act, 1898, for an order for the filing of a memorandum in writing specifying the consideration for which 1,068 ordinary shares of £100 each in Whitehead & Brothers (Limited) were issued, and that such memorandum when filed should operate as if it were a sufficient contract in writing within the meaning of section 25 of the Companies Act, 1867, and had been duly filed at or before the issue of the above shares.

The company was incorporated on the 9th of August, 1870, and its nominal capital was £130,000 divided into 1,300 shares of £100 each.

By an agreement made on the 21st of October, 1870, Ralph Radcliffe Whitehead, as vendor, sold the business to the company for £130,000, of which £106,800 was to be paid in 1,068 fully-paid shares.

The agreement was registered on the 27th of October, 1870, and afterwards the 1,068 shares, numbered from 1 to 1,068, were allotted to R. R. Whitehead as fully paid up. The remaining 232 shares in the company were issued and fully paid up. There were certain material omissions in the articles. No provisions were made with regard to calls upon shares, and no provision was made to enable the directors to allot the capital, but there was a provision as to new shares.

R. R. Whitehead died in 1871. His will was proved by his widow and two other executors, of whom his widow was the survivor. She was now dead, and the present application was made by her executor.

The difficulty in the case arose from the fact that the vendor had signed the memorandum of association in respect of the 1,068 shares, and as the certificate of the incorporation operated as the issue of such shares, the contract whereby the 1,068 shares were to be deemed fully paid up, was not, therefore, a sufficient compliance with section 25 of the Companies Act, 1867, which requires that such a contract should be filed at or before the issue of such shares.

*Theobald, Q.C.,* and *Bunting,* for the applicant.—According to the decision in *Dalton Time Lock* v. *Dalton,* 66 L. T. Rep. 704, 40 W. R. Dig. 40, the issue of the shares took place when the memorandum and articles were registered, and, therefore, in the present case before the contract was filed. In the case of *In re Jarvis & Co.,* 47 W. R. 186, [1899] 1 Ch. 193, Romer, J., refused to grant relief under the Companies Act, 1898, but that case was distinguishable from the present one. In the present case there was no definite contract concluded at the time the memorandum was registered, but the intended contract was set out in full in the memorandum. In the case decided by Romer, J., there were two separate contracts, and there was not apparently sufficient evidence to identify the shares concerned.

*Eve, Q.C.,* and *E. S. Ford,* for the company.

COZENS-HARDY, J.—I think Mr. Theobald is

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

entitled to the relief he asks. I think this case is quite distinguishable from that decided by Romer, J. There can be no difficulty about identifying these shares with those in the memorandum. I think this should be made quite clear. I will preface the order by an expression to the effect: "That the court being of opinion that the 1,068 shares, numbered 1 to 1,068, referred to in the agreement of the 27th of October are the shares for which R. R. Whitehead signed the memorandum of association."

Solicitors, *Johnson, Weatherall, & Sturt.*

---

Chan. Div. Farwell, J. } March 14.

RUDD v. LASCELLES. (a.)

*Vendor and purchaser — Specific performance—Open contract—Restrictive covenants—Compensation.*

*In the case of an open contract the court will not decree specific performance with compensation where a vendor has entered into an open contract to sell property which, unknown to the vendor, is subject to restrictive covenants, and where there is no condition in the contract as to compensation, as to decree specific performance with compensation in such a case would be making a new contract, and not enforcing the one which the parties agreed to.*

*The very great difficulty in assessing compensation in such a case is another ground for refusing such relief.*

Action for specific performance with compensation.

The defendant had agreed to sell the plaintiff certain houses and land at Harrogate, Yorkshire, for £3,500.

The contract was an open one and there were no conditions inserted as to restrictive covenants.

The defendant had not looked into her title when she entered into the agreement for sale. When the title came to be looked into it was found to contain restrictive covenants as to building and user.

The plaintiff now claimed specific performance of the agreement with compensation for the restrictive covenants, which compensation he estimated at £1,000.

*Bramwell Davis, Q.C.*, and *T. P. Perks*, for the plaintiff.—Here the purchaser can insist on specific performance on the part of the vendor, although the latter could not compel him to take the property against his will. The difference between what the vendor contracted to sell and what he is able to sell is a matter for compensation: Fry on Specific Performance (3rd ed.), sections 1257-1278. Where you can form a reasonable estimate of the amount of compensation from the evidence of competent persons the court will do so—*e.g.*, where another person had the right to dig for coal under the land: *Ramsden* v. *Hirst*, 6 W. R. 349, 4 Jur. N. S. 200. The misdescription was not wilful here and therefore is not ground for refusing to grant specific performance: *Price* v. *Macauley*, 2 De G. M. & G. 339. There is no hardship in this case, as the price after compensation has been deducted will represent the real value of the defendant's property.

*Hughes, Q.C.*, and *A. L. Ellis*, for the defendant.—This is not a case for compensation, as it would entail great hardship on the defendant. The plaintiff is only entitled to rescind the contract or to enforce it by paying the full price: *Earl of Durham* v. *Legard* 13 W. R. 959, 34 Beav. 611; *Collier* v. *Jenkins*, Younge 295; *Thomas* v. *Dering*, 1 Keen 729. *Ramsden* v. *Hirst* is distinguishable, as there there was an express condition for compensation.

*Bramwell Davis, Q.C.*, in reply.

FARWELL, J.—It is very material that both parties knew the vendor had not looked into her title nor knew what that title was; certainly there was no holding out of an indefeasible right to a fee simple. There was no wilful misrepresentation on the part of the vendor. I am asked to decree specific performance without compensation. I adhere to what I said in *Hexter* v. *Pearce*, *ante*, p. 330, [1900] 1 Ch. 341, the right to sue on a contract is the same in law and equity but the remedies differ and a court of equity will grant the equitable remedy in all cases, so far as I have been able to discover, unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or in some rare instances where there would be great hardship imposed on an innocent grantor or lessor by reason of some mistake which he has made, even if the other party did not contribute to it. I adopt the view expressed by Lord Langdale, M.R., in *Thomas* v. *Dering*: "It is impossible not to see that the *cy près* execution of the contract which is given in these cases is in fact the execution of a new contract which the parties did not enter into, in which there is no mutuality, and in which there are no adequate means of ascertaining the just price." Now, if I decree specific performance in this case, I shall compel the parties to enter into a contract they never contemplated. The jurisdiction in a case of this sort rests on a sort of equitable estoppel—viz., that the vendor cannot say that, though he has valuable interests he has not got the entirety of the property, and therefore the purchaser shall not have the benefit of his property: *Mortlock* v. *Buller*, 10 Ves. 292, at p. 315. It is in fact a *cy près* execution of the contract founded on the principle that the vendor is estopped from denying that he had the property which he had represented he was able to sell. That the doctrine rested on that ground is, I think, also borne out by the judgment of Gifford, L.J., in *Castle* v. *Wilkinson*, 18 W. R. 586, L. R. 5 Ch. App. 534. Here, however, there has no been no direct representation, although it is true that a person selling in this way implies that the fee is unincumbered. Having regard to all the other circumstances of the present case, I cannot find the slightest foundation for any idea that the purchaser has been misled by any misrepresentation whatever. Now I come to the defence that was raised—namely, that specific performance with compensation ought not to be decreed, because of the impossibility or great difficulty in ascertaining the right compensation in cases of this kind. Jessel, M.R., in referring to the great difficulty in assessing compensation, says in *Cato* v. *Thompson*, 9 Q. B. D. 616, at p. 618, 31 W. R. Dig. 210: "This is not a case for enforcing specific performance on a purchaser with compensation. It is almost impossible to assess compensation for covenants of this nature. I think that cases of specific performance with compensation ought not to be extended. In many of them a bargain, substantially different from that which the parties entered into, has been substituted for it and enforced, which is not right. I think this is not a case for compensation." I respectfully entirely agree with this. There should be no extension to cases like the present, where the subject-matter which the vendor has to convey is substantially different from that which was agreed upon. I have seen no case contravening the *dictum* of Jessel, M.R., brought to my notice. In *Ramsden* v. *Hirst* there was an express condition for compensation. In *Barnes* v. *Wood*, 17 W. R. 1080, L. R. 8 Eq. 424, which was referred to in *Castle* v. *Wilkinson*, a

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

man chose to say he had something which as a fact he had not. But in this present case there has been no wilful misrepresentation at all. Further, it would be a great hardship on the defendant if special performance was decreed, for instead of obtaining £3,500 as she expected she would receive almost one-third less—a serious matter for a woman with a limited income. I think, therefore, the plaintiff fails, and as an offer was made by the defendant to reduce the purchase-money by £250, the plaintiff must pay the costs.

Solicitors, *F. Hatton*, for *W. Topham*, Harrogate; *Morgan, Price, & Mewburn.*

---

Q. B. Div.
(Ridley and Bigham, JJ.) May 22.

HAWKINS AND OTHERS v. JUSTICES OF BRIDGWATER. (a.)

*Licensing law—Renewal—General annual licensing meeting—Proceedings where no notice of opposition—Objection—Licensing Act,* 1872 (35 & 36 *Vict. c.* 94), *s.* 42.

*At the general annual licensing meeting of a division in which a certain beerhouse was situated, a report made by the head constable of the division was read, in which he asked that the renewal of the licence of the beerhouse should be withheld until the adjourned meeting. No notice of opposition to the licence had been served on the licence-holder prior to the meeting, nor had he had notice to attend at the meeting. The justices thereupon adjourned the granting of the licence, and gave notice to the licence-holder to attend at the adjourned meeting.*

*Held, that an objection was made within the meaning of section* 42 (2) *of the Licensing Act,* 1872, *and that the justices had jurisdiction to consider the objection of the head constable at the adjourned meeting.*

Case stated by the justices of Somersetshire.

The appellant Hawkins was the tenant of The Mariner's Compass beerhouse in Bridgwater which was licensed as such prior to the 1st of May, 1869, for consumption on the premises.

Prior to the general annual licensing meeting for Bridgwater, which was held on the 28th of August, 1899, no notice of objection to the renewal of the licence of the beerhouse had been served on the appellant, and he did not attend the meeting, nor was he requested to do so.

At the meeting, the head constable for Bridgwater presented his annual report (which was read in open court) as to offences committed by licensed victuallers in and about licensed premises during the year.

In the report the following passage occurred: "It is my pleasure to report a decrease in the charges of drunkenness during the year and also that the licensed houses generally have been well conducted; but I respectfully ask that the renewal of the Mariner's Compass beerhouse, St. Mary-street, may be withheld until the adjourned meeting." No other objection to the renewal was made nor was any ground of objection stated. The justices thereupon directed the matter to stand over until the 25th of September following.

On the 7th of September, 1899, two summonses were issued against Hawkins, one for permitting his licensed premises to be the resort of prostitutes on the 26th of August, 1899, the other for permitting his licensed premises to be used as a brothel on the 2nd of September, 1899.

The fact that the justices had directed the renewal of his licence to stand over was personally brought to Hawkins' notice a day or two after the 28th of August, 1899, and he was at the same time told that the charges contained in the summonses would be preferred against him. Hawkins was convicted on the first of the two summonses on the 18th of September, and the conviction was ordered to be indorsed on his licence. The second summons was withdrawn.

On the 21st of September the justices served on Hawkins a notice requiring him to attend at the adjourned annual licensing meeting on the 25th of September if he intended to apply for the renewal of his licence.

At the adjourned annual licensing meeting the head constable objected to the renewal of the licence, and Hawkins, who attended with his solicitor, objected that the justices had no jurisdiction to entertain any objection to the renewal, on the grounds, *inter alia*, that no notice in writing of objection had been served upon him as required by section 42 (2) of the Act of 1872, and that no objection to the renewal of the licence was made at the general annual licensing meeting on the 28th of August within the meaning of the proviso.

The justices overruled Hawkins' objection, and, having heard the evidence, refused to renew the licence. The appellants appealed to the quarter sessions, who dismissed the appeal subject to this case, the question for the opinion of the court being whether the request of the head constable that the renewal of the licence should be postponed was an objection within the proviso of section 42 (2) of the Licensing Act, 1872, which, coupled with the notice to Hawkins to attend at the adjourned meeting, conferred jurisdiction upon the justices to hear the objection at the adjourned meeting without other notice of objection.

Section 42 of the Licensing Act, 1872, provides as follows: "Where a licensed person applies for the renewal of his licence the following provisions shall have effect:

"(1) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend.

"(2) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered as if the notice hereinbefore prescribed had been given."

*Foote, Q.C.* (*F. E. Weatherley* and *Haythorne Reed* with him), for the appellants.—The justices had no jurisdiction to hear the objection. It was a condition precedent to their jurisdiction that, in the absence of notice to the licence-holder prior to the general annual meeting, an objection should be made at the meeting. No such objection was made: see *Reg.* v. *Merthyr Tydvil Justices*, 14 Q. B. D. 584, 33 W. R. Dig. 122.

*Duke, Q.C.* (*D. Metcalfe* with him), for the respondents.—An objection within the meaning of section 42 of the Licensing Act, 1872, was made at the general annual licensing meeting. What the head constable said at the meeting was intended to be an objection, and it was treated as such by the magistrates.

RIDLEY, J.—The question in this case is whether an objection within the meaning of section 42 of the

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Licensing Act, 1872, was made at the general annual licensing meeting. I have come to the conclusion that such an objection was made. The section referred to for the first time allowed a licensed person who desired a renewal of his licence not to attend at the general annual licensing meeting unless he was required so to do, and it provides that the licensing justices are not at that meeting to entertain objections to renewals unless a written notice of the objection has been served upon the licence-holder before the meeting. But notwithstanding no notice has been given, upon an objection being made at the meeting the justices may adjourn the granting of the licence to a future day.

Here no formal objection was made—that is to say, no one said, "I object to the renewal of the licence, and I ask you to adjourn the granting of it." But the head constable said: "I respectfully ask that the renewal of the 'Mariner's Compass' beerhouse may be withheld until the adjourned meeting." Thereupon the justices, treating that as an objection, and acting in pursuance of section 42, adjourned the granting of the licence. The words of the head constable were regarded by the justices as an objection within the meaning of the section, and they were also so regarded by the head constable himself, though he had not at that time made up his mind as to what course he would adopt, awaiting, as he was, the result of the proceedings which were then about to be taken against the licence-holder. We ought therefore to treat this matter as if an objection had been made at the general annual licensing meeting. The rest of the proceedings having been regular, the justices had jurisdiction to hear the objection, and the appeal would therefore be dismissed.

BIGHAM, J.—I am of the same opinion. It is alleged that the licensing justices acted without jurisdiction because a condition precedent to their jurisdiction required by the provisions of section 42 of the Licensing Act, 1872, was not complied with. That condition precedent is that in the absence of a written notice to the licence-holder to attend the general annual licensing meeting an objection should have been made at the meeting itself. The question is whether in the present instance such an objection was in fact made. The head constable had made a report to the justices which was read in open court by the clerk to the justices. It contained a request that the renewal of the licence in question should be withheld until the adjourned meeting. What is that request but an objection to the renewal of the licence? It means that the head constable objected to that being done on that day which might have been done—that is to say, the granting of the renewal. He objected to that being done. How did the justices treat the request? They treated it as an objection, for they did what had to be done in the event of an objection being made. They adjourned the granting of the licence and required the attendance of the licence-holder at the adjourned meeting. They did so in order that they might comply with the requirements of the Act and in order that they might have the appellant before them when they dealt with the objection. We should fritter away the provisions of the Act if we held that what was done here was not an objection within the meaning of the Act. It was intended as such, heard as such, and acted on as such.

*Appeal dismissed.*

Solicitors for the appellant, *Prideaux & Sons*, for *Charles E. Hagon*, Bridgwater.

Solicitors for the respondents, *Prior, Church, & Adams*, for *Brice*, Bridgwater.

Q. B. Div.
(Channell and Bucknill, JJ.) Feb. 16.

MILLER v. BORNER & CO. (a.)

*Ship—Charter-party—Agreement to load cargo "say about 2,800 tons"—Obligation to load more than 2,800 tons.*

*The charterer of a ship the capacity of which was 2,880 tons agreed by a contract of charter-party to load "a cargo of ore, say about 2,800 tons." He loaded 2,840 tons.*

*Held, that he had performed his contract.*

Morris v. Levison, 24 *W. R.* 517, 1 *C. P. D.* 155, *distinguished.*

Appeal from the Mayor's Court.

The plaintiffs, owners of the ship *Marie*, by a contract of charter-party dated the 20th of December, 1898, agreed with the defendants, the charterers, that the ship should load "a cargo of ore, say about 2,800 tons."

The capacity of the ship was 2,880 tons. The defendants loaded 2,840 tons.

The plaintiffs brought this action to recover a sum alleged to be due for freight on forty tons above the amount actually loaded.

The judge at the trial held, upon the construction of the charter-party and upon the authority of *Morris* v. *Levison*, 24 W. R. 517, 1 C. P. D. 155, that the defendants were bound to load 3 per cent. in excess of the 2,800 tons, the ship having capacity for that amount. He therefore gave judgment for the plaintiffs.

The defendants appealed.

*Laing, Q.C.*, and *Balloch*, for the defendants.—Judgment ought to have been entered for the defendants. The judge was wrong in holding that the case was governed by *Morris* v. *Levison*. The words of the charter-party in that case were "to load a full and complete cargo of iron ore not exceeding what she could reasonably stow . . . say about 1,100 tons"; the ship could carry 1,210 tons, and the cargo actually loaded was 1,080 tons only; the court had regard to the words "full and complete cargo" in holding that 3 per cent. over the 1,100 tons was a fair cargo. In the present case the language of the charter-party is different and it is satisfied by loading the stipulated 2,800 tons or 3 per cent. more or less. [BUCKNILL, J., referred to *Carnegie* v. *Conner*, 24 Q. B. D. 45, 38 W. R. Dig. 185.]

*Bateson*, for the plaintiffs.—A "cargo" is what the ship will carry, and there is no distinction between "cargo" and "full and complete cargo." The case is therefore governed by *Morris* v. *Levison*, and the decision of the judge at the trial was right.

CHANNELL, J.—I am of opinion that this appeal must be allowed. The contract was to load "a cargo of ore, say about 2,800 tons." The real point is, does that contract differ from the contract in *Morris* v. *Levison*. The decision in that case proceeded entirely on the fact that there the contract was to ship "a full and complete cargo," and that it was necessary in some way or another to give effect so far as possible to all the words of the contract, and to put a construction upon the subsequent words "of say about 1,100 tons" that would, as far as possible, be consistent with the meaning put upon the words "full and complete cargo." The carrying capacity of the vessel in that case was larger than anything that could be considered to be about the quantity specified. The judgment of the court proceeds entirely on the

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

words "full and complete," and that was pointed out in the subsequent case of *Carnegie* v. *Conner*, to which my brother Bucknill has referred. Having regard to those words the court held that the charterer was bound to load the maximum amount, which could be described as "about 1,100 tons," and being empowered to draw inference of fact, they put the maximum amount at 3 per cent. of the stipulated amount. Here the word used is "a cargo"—not a full and complete cargo, and what is a cargo for a particular ship would, I think, be a question of fact. A very small quantity of goods in comparison to the carrying capacity of the vessel would not be called a cargo. It must to some extent approach her carrying capacity before it could be called a cargo, and the question, therefore, what number of tons would make a cargo would be a question for the jury; but to make it necessary to leave it to the jury the facts must be such as to make it reasonable for them to answer either way. Here the quantity shipped was 2,840 tons, and it would be unreasonable to say that this was not a cargo for this particular vessel, the carrying capacity of which was 2,880 tons only. I think, therefore, that there was no question for the jury: 2,840 tons was undoubtedly "a cargo" for this particular vessel, and if it was a cargo it was certainly a cargo of about 2,800 tons. Judgment ought therefore to have been entered for the defendants.

BUCKNILL, J.—I am of the same opinion. In *Morris* v. *Levison* it was said that where the contract is to load "a full and complete cargo of, say, about so many tons," and where the ship is in fact capable of holding more than the specified number of tons, it is a question for the jury what the word "about" means. But here the word "cargo" only is used, and if the amount loaded is capable of being called a cargo for the vessel in question and also equals or exceeds the specified amount there is no question for the jury; the charterer has done all that the contract required him to do.

*Appeal allowed.*

Solicitors for the defendants, *Ince, Colt, & Ince.*

Solicitors for the plaintiff, *Holman, Birdwood, & Co.*

---

Q. B. Div.
(Channell and Bucknill, JJ.) } Feb. 16.

BAILEY v. ISLE OF THANET LIGHT RAILWAYS CO. (a.)

*Lands Clauses Acts — Compensation for injuriously affecting—Intention to use land for special purpose—Adaptability.*

*Notice was given by a railway company to treat for the purchase of a part of a piece of land which the claimants had recently purchased with the intention of building a school thereon. The land was specially suitable for that purpose, and no other site in the vicinity was equally suitable. The construction of the railway would render the remaining part of the land less suitable for a school. The claimants had not begun to build the school.*

*Held, that, in assessing compensation for injuriously affecting the land retained by the claimants, their intention to build a school thereon and the suitability of the land for that purpose ought to be taken into consideration.*

Case stated by an arbitrator on a reference as to the compensation to be paid on the taking of land under the Land Clauses Acts.

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

The claimants in the early part of 1899 entered into a contract for the purchase of a plot of land at Margate, with the intention of erecting thereon a ladies' school, for which purpose the land was by reason of its nature and position well suited.

After the contract had been so entered into, the Isle of Thanet Light Railways Co. gave the claimants notice that they required to take a small portion of the said plot of land for the purposes of their railway.

By reason of the construction of the railway the portion of the plot not taken would be rendered less suitable for the purposes of a ladies' school. And it was admitted that there was no other land in the neighbourhood equally suitable for that purpose.

The claimants contended that, in assessing compensation in respect of the land not taken but injuriously affected as aforesaid, the intention of the claimants to use it for a ladies' school and its special adaptability for that purpose should be taken into consideration.

For the company it was contended that the needs and intention of the claimants in respect of the land in question should not be considered in determining the amount of compensation, but that there should be taken into account alone the value of the land taken, plus compensation, if any, for injuriously affecting the adjoining land on the basis of the land being the property of a claimant who did not intend to make any special use of it. The arbitrator awarded the sum of £1,200 as purchase-money for the portion of the land taken, and as compensation for damage by reason of the injurious affection of the part not taken, if in the opinion of the court the intention of the claimants and the adaptability of the land for the purposes aforesaid should be taken into consideration, and the sum of £726 if in the opinion of the court the intention and adaptability aforesaid should not be taken into consideration.

*Macmorran, Q.C.*, and *E. F. Lever*, for the claimants.—Regard must be had to the actual loss sustained by the claimants. They bought the land for a special pupose and they have lost its value to them for that purpose: *Countess Mary Ossalinsky* v. *Manchester Corporation*, reported only in Browne and Allan on Compensation, p. 718.

*Page, Q.C.*, and *Vesey Knox*, for the company.—Special adaptability of land injuriously affected is to be considered in ascertaining its value; but not the intention of the claimant to put it to any particular use where the intention has not been begun to be carried out.

CHANNELL, J.—In my opinion, our judgment must be for the claimants. The intention to put the land to a particular use may properly be taken into account. Compensation is assessed on the basis of the value of the land to the particular claimant. For instance, where trade premises with a goodwill attached are taken, the question is not what is the market value of the premises, but what is their value to the trader who has the goodwill. If these ladies had already built their school it could not be disputed that they would be entitled to compensation on the basis of the injury to the school; and if the arbitrator is satisfied that the intention to build the school existed, he must treat the land as the site of a school, and assess the compensation accordingly. No doubt, if there had been other neighbouring land equally adaptable for a school the compensation would have been only upon the basis of the market value. But it was admitted that no such other land was available, and I think that the claimants are entitled to compensation for injury to the land as a site for a school, although it was not yet built.

*Held, that evidence as to the meaning of the expressions "the total costs of the work" and "the estimate of £35,000" was admissible.*

This was an appeal from the Supreme Court of New South Wales.

The facts are fully set out in their lordships' judgment.

*Asquith, Q.C.*, and *Vaughan Hawkins*, for the appellants.

*Upjohn, Q.C.*, and *Danckwerts*, for the respondent.

The judgment of their lordships (Lords DAVEY, ROBERTSON, and Sir RICHARD COUCH) was delivered by

Lord DAVEY.—The respondent is an engineer, who was employed by the appellants, the Bank of New Zealand, to superintend, on their behalf, the construction of a railway from Rosehill to Pennant's Hills. He sues the bank for extra commission alleged to be due to him from them under the agreement between them. The appeal is from an order of the Supreme Court of New South Wales dated the 18th of November, 1898, setting aside the verdict of a jury in favour of the appellants and directing a new trial. The question between the parties is exclusively one of the admissibility of certain evidence.

On the 22nd of January, 1894, an interview took place between the respondent and Mr. Chapman, the manager of the bank. On the following day the respondent wrote to Mr. Chapman as follows:

"113, Phillip-street, Sydney, N.S.W.,
"January 23, 1894.

"To I. Chapman, Esq.,
Manager of the Bank of N. Zealand Estates Co. (Limited), Pitt-street, Sydney.

"Dear Sir,—In reply to your inquiry as to the engineering expenses of the construction of the first section of the Pennant Hills and Dural Railway, I beg to inform you that I am prepared to undertake the work on the following terms, which shall include the payment of all necessary professional assistants and inspectors:—

For contract specification and drawings, 2½ per cent. on £35,000.

For supervision of work, 5 per cent. on ditto.

For measurement of work, 1 per cent. on ditto.

Provided I should be allowed another 1½ per cent. on the estimate of £35,000, in the event of my being able to reduce the total cost of the works below £30,000. I propose to effect this saving by extra labour in making comparative drawings of works for the sake of economy and not by sacrificing the character of the work, and for this reason I do not recommend the adoption of any rail under 71½lbs.

"I shall be glad to hear from you in reply to the terms contained herein.—Yours very truly,

"(Signed) B. C. SIMPSON."

No reply to this letter was written, but the offer contained in it was verbally accepted on behalf of the bank and it admittedly expresses the terms of the contract between the parties.

The works were proceeded with under the respondent's supervision and the railway was completed. The cost of constructing the railway exclusive of the purchase of land was £28,116 16s. 4d. The cost of the land purchased was £5,774 12s. 11d. The amount of the respondent's commission at 8½ per cent. on £35,000 was £2,975. There were further fees paid to the respondent in connection with the purchases of land and other expenses bringing the total up to £43,174 19s. 5d. If, therefore, "the total cost of the works" referred to in the letter of the 2nd of January, 1894, included the cost of the land and the respondent's commission of 8½ per cent., or either of those sums, he did not succeed in reducing the cost below £30,000, and the respondent was not entitled to his extra commission of 1½ per cent.

The respondent contended that according to the true meaning of the agreement the estimate of £35,000 did not include the cost of the land purchased or the amount of his commission, and on the 22nd of February, 1898, he commenced an action to recover £525, the amount of the extra 1½ per cent.

The action was tried by Cohen, J., with a jury. The respondent gave evidence and stated his version of what took place at the interview of the 22nd of January, 1894, and of the intention of the parties. Mr. Chapman was called by the bank and gave his version of what had taken place between the respondent and himself, and the respondent was called in reply. Chapman's evidence was objected to by the respondent's counsel, but admitted by the learned judge. The appellants' counsel also tendered a certain circular which had been prepared by the respondent and issued by him with the concurrence of the bank before the date of the agreement, and certain correspondence between the parties which it was said tended to support the view of the appellants. This evidence was also objected to by the respondent's counsel, but admitted by the learned judge.

The circular in question stated that the "estimated cost of the line" (meaning the line in question) was £35,000, but that by economy in works it would probably be constructed for less, and after giving figures showing an estimated net revenue of £1,913, proceeded thus: "Assuming that the cost will be £35,000 the net revenue will yield a dividend of 5½ per cent. on the capital."

At the close of the trial (after the jury had retired) respondent's counsel asked the learned judge to construe the letter of the 23rd of January and direct a verdict for the respondent. The learned judge declined, and the jury gave a verdict for the appellants.

The respondent moved for and obtained a rule *nisi* for a new trial on grounds which fully raised the questions between the parties and need not be stated at length. The rule was made absolute. The learned Chief Justice in his judgment held that according to the true construction of the letter "the total cost of the works" meant the cost of the actual construction of the railway and could not with legal certainty be applicable to both the total cost of the works (alone) and also to the cost of the works plus the cost of the land plus the engineer's commission, and that, therefore, the extrinsic evidence objected to ought to have been rejected. The Chief Justice added that they could not understand any person receiving the letter, after due consideration being misled by its contents.

Their lordships cannot agree with the views so expressed. The respondent admitted in his evidence (as indeed is plain without his admission) that which was proposed to be reduced was the £35,000 to below £30,000, or, in other words, that the two sums are co-extensive. It is not therefore a mere question of the meaning of the words "the total cost of the works" standing alone, but the meaning of "the estimate of £35,000" has also to be considered. These words point to something which was known to, and in the contemplation of, both parties to the contract and with reference to which they contracted, and in order to construe and apply the contract you must ascertain what was included in "the estimate of £35,000," on the reduction of which the contract depended. Extrinsic evidence is always admissible not to contradict or vary the contract, but to apply it

But again, owing to the number of steamers waiting o be loaded, a quay-berth was not ready for *The City f Newcastle* until the 2nd of June at 8 a.m. By learing for a foreign port—viz., Constantinople, she ost her turn for a quay-berth, and on her arrival ack at Poti found a number of fresh steamers had n the meantime arrived, which made her position ith regard to getting a quay-berth much worse. he loading was completed at 7 p.m. on the 9th of une, and *The City of Newcastle* sailed from Poti at a.m. on the 10th of June, laden with a cargo of bout 2,578 tons of manganese ore.

On the 14th of July *The City of Newcastle* arrived Philadelphia, and discharged her cargo in two ays. The time allowed for discharge under the arter-party for her cargo of 2,578 tons at 400 tons r day was 6 days eleven hours, and therefore a ving of 4 days and 11 hours was effected.

On the 14th of June, by which date differences had isen between various parties to the adventure, the esent defendants undertook by letter of that date consideration of the plaintiffs signing a certain bill lading for the cargo then on board *The City of ewcastle*, to be responsible to the plaintiffs for the murrage if any proved to be legally due to them der the charter-party whether in loading or charging and to waive all terms of cesser of bility clause.

Upon the plaintiffs' contention, *The City of Newcastle* s on demurrage from noon of the 24th of February til 1 a.m. of the 4th of March, a period of 7 ys 13 hours, and from 5.30 a.m. of the 19th of ril until 10 a.m. of the 10th of June, a period of days 4½ hours. The plaintiffs do not claim any nurrage for the period from the 4th of March until 19th of April, during which *The City of Newcastle* s incapacitated from loading by reason of collision. plaintiffs bring into account the 4 days 11 hours ed in the discharge. In respect of the balance of days 18½ hours, or 1,314½ hours, the plaintiffs make ir present claim. The plaintiffs claim they should e had a ready quay-berth without reference to any n.

Upon the defendants' contention, inasmuch as *The of Newcastle*, but for the collision, would have a quay-berth on the 8th of March, the charterers not responsible for the demurrage for more than t they would have been liable for if *The City of castle* had got her quay-berth on the 8th of March finished loading by the 16th of March, and on assumption that they would also have saved the ys 11 hours on the discharge.

*rver, Q.C.* (*A. A. Roche* with him), for the ntiffs.—The whole risk of obtaining a berth for hip must, under the charter-party, be borne by lefendants, and the plaintiffs are entitled to be for all the hours that she was detained in port the lay-days had run out: *Jones* v. *Adamson*, . D. 60.

*seph Walton, Q.C.*, and *T. G. Horridge*, for the ndants.—The decision in *Jones* v. *Adamson* does not t the present case, as in that case there were no ptions, whereas in this case there are. If it had been for the accident the vessel would have ned a berth and have completed her loading on 16th of March, the failure, therefore, to get a there was due to a cause beyond the control of lefendants, and comes within the exceptions ined in clause 4: see Carver's Carriage by Sea ed.), s. 630.

*rver, Q.C.*, in reply, cited *Kay* v. *Field & Co.*, 31 . 332, 10 Q. B. D. 241.

NNEDY, J.—I have come to the conclusion that from the time this vessel was in such a position that her owner was entitled to say, "My vessel is on demurrage," and so long as she was at Poti, unless there was some act or default which may be attributed to the shipowner, the demurrage obligation must be enforced against the charterers.

What happened was that after the vessel did come on demurrage in accordance with the terms of the charter-party, and after the demurrage obligation had begun to operate, the vessel was run into by another ship, and, as it was not disputed, her captain took the proper and necessary step, under the circumstances, of taking her to Constantinople to repair. There was no claim for demurrage whilst she was there. She could not be said to be on demurrage when, instead of being at Poti, she was at Constantinople, but, although she was at Constantinople and not on demurrage, she was not there by reason of any violation of the charter-party engagement. She was there for a good reason, which would absolve her from any blame as between herself and those who were to load her. She again came on demurrage when she returned to Poti, and on the whole it seems to me that although during this intervening time there could be no claim made against her owners for breach of the charter-party, and no claim made by her under the demurrage clause, the period of demurrage was resumed without any break in the legal continuity of the charterers' obligation in respect of demurrage. I do not think, on the whole, that it can be truly said that this is an exception protecting the charterers from liability with respect to the demurrage claimed. The fact that, owing to the presence of a large number of other steamers, she was unable to obtain a berth appears to me no more to excuse the charterers than would the fact that while at Poti she had been driven out to sea by a gale of wind, and had thus lost her turn. In that case there would be no default on the part of the owner. When once the demurrage period has begun, it appears to me the liability continues. I therefore hold that the plaintiffs are entitled to recover.

*Judgment for the plaintiffs.*

Solicitors for the plaintiffs, *Maples, Teesdale, & Co.*, for *Bramwell & Bell*, Newcastle-on-Tyne.

Solicitors for the defendants, *Field, Roscoe, & Co.*, for *Batesons, Warre, & Nixon*, Liverpool.

## Privy Council.

(*From the Supreme Court of New South Wales.*)

Feb. 17.

BANK OF NEW ZEALAND *v.* SIMPSON. (*a.*)

*Contract—Evidence—Extrinsic evidence—Meaning of words used—Parol evidence to explain.*

*Extrinsic evidence is always admissible, not to contradict or vary a written contract, but to apply it to the facts which the parties had in their minds and were negotiating about.*

*Therefore, where S. undertook to do certain work on terms embodied in a letter of his to the appellants, and which "provided that S. should be allowed an additional percentage on the estimate of £35,000 in the event of his being able to reduce the total cost of the work below £30,000,"*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Finding that the rabbits on the farm were doing damage to his crops, the defendant caused them to be trapped.

The plaintiff brought this action for trespass to his exclusive right of sporting, and he claimed damages and an injunction.

The defendant pleaded that he was entitled to trap the rabbits by virtue of the Ground Game Act, 1880.

The question was whether the occupier of a farm, who was also the owner, was entitled to the benefits of the Ground Game Act.

Wright, J., gave judgment for the defendant.

The plaintiff appealed.

*Duke, Q.C.*, and *Bodilly*, for the appellant.—The Ground Game Act, 1880, was passed to confer a new statutory right on agricultural tenants. The word "occupier" throughout the Act means tenant, and does not include occupying landlord. The Act has no application where the landlord is in occupation: *Smith* v. *Hunt*, 54 L. T. Rep. 422, 34 W. R. Dig. 79.

*Foote, Q.C.*, and *Clavell Salter*, for the respondent.—The word "occupier" in the Act includes occupying landlord. So long as an occupying landlord has not alienated the rights of shooting he does not want the protection of the Act, but as soon as he does alienate them he wants the protection of the Act as much as a tenant does. *Smith* v. *Hunt* was a decision on section 6 of the Act, which does not speak of "occupier" at all. And in that case there was no severance of the shooting rights.

A. L. SMITH, L.J.—Although I am in the minority I have a strong opinion that this appeal ought to be allowed. The question is whether the Ground Game Act was passed in the interests of landlords as well as of tenants. Speaking for myself I have no doubt that it was passed for the purpose of protecting tenants against their landlords and not of protecting landlands against their tenants. Then does the word "occupier," which occurs all through the Act, include a landlord who has no tenant? In the year 1880 landlords were in no need whatever of the protection which the Act was intended to afford. They had everything in their own hands. It is suggested that the Act was passed in the interests of good husbandry. It seems clear to me that it was passed to protect tenants whose crops were being eaten up by ground game in consequence of their landlords failing to keep down the ground game. The Act is intituled "An Act for the better protection of occupiers of land against injury to their crops from ground game." The word "occupiers" there must mean tenants. Where the occupier of a farm is the landlord himself, he is completely *dominus*, and does not require any protection. The preamble says, "Whereas it is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game." There again "occupiers" must mean tenants. Then section 1 enacts that "Every occupier of land"—*i.e.*, every tenant—"shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land." An occupier of land who was the landlord and had no tenant would not require such a right to be conferred on him by the statute. Then follow three provisoes, in each of which "occupier" again clearly means tenant; this is specially obvious in the third proviso with regard to moorlands. The same considerations apply to the following sections 2, 3, 4, and 5, in none of which, as it appears to me, can the word "occupier" mean landlord. Whether or not we were right in our judgment in *Smith* v. *Hunt* on the construction of section 6, I am of opinion that the main provisions of the Act are in the interests of tenants, and that they are only to be brought into play in cases where there is both a landlord and a tenant. I therefore think that the appeal ought to be allowed.

VAUGHAN WILLIAMS, L.J.—I am of opinion that the judgment of Wright, J., is correct. We have to determine the meaning of the words "occupier of land" in the Ground Game Act. It does not seem to me to be necessary to limit the meaning of the words in any way. I think we may take them as meaning what they naturally mean—viz., an occupier of land. I do not say that the Act was passed for the protection of landlords, but neither do I know that it was passed only for the protection of tenants. I think it was passed to prevent the separation of the right of killing and taking ground game from the occupation of land. It provides that every occupier of land shall always have the statutory right of killing and taking ground game inseparable from the occupation of his land. That right is given subject to certain limitations. Those limitations are inapplicable to the case where a landlord occupies his own land and retains the rights of shooting. I think that *Smith* v. *Hunt* was rightly decided. In that case there was no alienation of the shooting rights and no occasion for the statutory right. Where, however, a landlord occupies his own land, but has alienated the rights of shooting, the limitations are applicable. This view is strengthened by section 2, which is wide enough to cover the case of an occupier who is also landowner as well as that of an occupying tenant. I wish to say plainly that there is nothing in my judgment which involves the proposition that, where a landlord is in occupation and has not parted with the rights of shooting, this Act has any operation. In such a case I think it has no operation.

ROMER, L.J.—I think that the judgment of Wright, J., ought to be affirmed. In my opinion the policy of the Ground Game Act is to insure that all occupiers of land shall have the right to kill and take ground game. The Legislature intended to give that right to all occupiers of land who without the Act would not have such right. Subject to that it seems to me that the Act contemplates occupiers of all sorts. It does not on the face of it draw any distinction between different kinds of occupiers. The object of the Act to be gathered from the title and the preamble is to provide protection for the occupiers of land against injury to their crops from ground game. Such protection is necessary for occupiers of every kind, who, not having the rights of shooting, cannot keep down the ground game. The Act does not seem to me to be an instance of class legislation; it does not purport to exclude wealthy persons from its benefits. The intention appears to be that all occupiers of land, if not able otherwise to keep down ground game, are to have the right given by the Act. It is argued that an occupier within the meaning of the Act must have only a chattel interest in the land. I cannot see why. The policy of the Act applies to an owner in fee as much as to a tenant for a long term. I see nothing to justify the distinction that is sought to be drawn; and, if it were drawn, I think it would cause injustice in the working of the Act. For instance, take the case of a landlord who has an agricultural tenant, and who has granted a lease of shooting rights. The lessee of the shooting

rights cannot interfere with the right of the agricultural tenant to kill and take game. Suppose, then, that the agricultural tenant absconds, and that the landlord goes into possession. According to the contention of the appellant, the landlord would then be obliged to work the farm subject to the right of the lessee of the shooting, if he thought fit, to let the ground game multiply. Why should the rights of the lessee of the shooting be thus enlarged? Take another case. A young farmer is lessee of a farm of which his father is owner in fee, and the father has let the shooting rights. Suppose, then, that the father dies, and the son succeeds as heir, so that his lease becomes merged in the freehold. According to the appellant the son loses his statutory right, and the lessee of the shooting acquires a right which he did not before possess. I do not think we should be justified in saying that we were forced to put that construction on the Act by something which is certainly not in the Act itself, but is supposed to have been the reason of the Act. In my opinion, all occupiers of land are within the Act so long as, apart from the Act, they have not the right to kill and take ground game. The case of *Smith* v. *Hunt* was on a different footing from the present case, and in my opinion that decision does not conflict with the view which I am taking.

*Appeal dismissed.*

Solicitors for the appellant, *Mann & Crimp*, for *Hacker & Michelmore*, Newton Abbot.

Solicitors for the respondent, *Church, Rendell, Todd, & Co.*, for *Baker, Watts, Alsop, & Woolcombe*, Newton Abbot.

---

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) May 16.

WELSBACH INCANDESCENT GAS LIGHT CO. *v.* NEW SUNLIGHT INCANDESCENT CO. (*a.*)

*Practice—Interrogatories—Officer of company—Knowledge—Matters previous to formation of company—Course of employment—Sufficiency of answers—R. S. C., ord.* 31, *rr.* 5, 24.

*A corporation answering interrogatories by the proper officer is in the same position as an individual. The officer, therefore, who answers on behalf of the corporation cannot be compelled to inquire of the officers, servants, or agents of the corporation as to matters which happened before the corporation came into existence, or their knowledge of which was not acquired by them as servants of the corporation and in the ordinary course of its business.*

This was an appeal from an order of Byrne, J., that a further and better answer should be given to interrogatories.

The action was brought by the plaintiff company on the ground of the infringement by the defendants of letters patent.

The plaintiff company was incorporated in 1897, and acquired the business and assets of an old company as a going concern. The officers and servants of the old company were continued in the employment of the plaintiff company.

The letters patent related to the use of thorium and cerium for the purpose of impregnating incandescent mantles, and by their particulars of objections the defendants alleged want of novelty because of the user of these materials for the purpose by the old company in 1891 and 1892.

Byrne, J., gave leave to the defendants to interrogate the secretary of the plaintiff company as to the user of these materials by the old company.

The secretary by his answer stated that he had no personal knowledge whatever; that he had made inquiries of the directors, officers, servants, and agents of the plaintiff company as to what knowledge they had acquired in the course of their employment by the plaintiff company, and had been unable to obtain any information from them, they informing him that, as such directors, officers, servants, and agents, they had no knowledge of the matter. He also stated that he was advised that he was not bound to make inquiries of any persons who might happen to be directors, officers, servants, or agents of the plaintiff company as to any information they might possess accidentally, not in the course of their employment and not in the ordinary course of their business as such; and he had therefore not made such inquiries.

The defendants applied for an order that the secretary should give a further and better answer to the interrogatories, and Byrne, J., made an order to that effect.

The plaintiff company appealed.

*Moulton, Q.C., T. Terrell, Q.C.*, and *A. J. Walter*, for the appeal.

*Bousfield, Q.C.*, and *Neill, contra.*

The following cases were referred to: *M'Intosh* v. *The Great Western Railway Co.*, 4 De G. & Sm. 502, 544; *Re Barned's Banking Co.*, 15 W. R. 524, L. R. 2 Ch. App. 350; *Moline* v. *Tasmanian Railway Co.*, 32 L. T. Rep. 828, 23 W. R. Dig. 177; *Bolckow, Vaughan, & Co.* v. *Fisher*, 31 W. R. 235, 10 Q. B. D. 161; *Chaddock* v. *British South Africa Co.*, 44 W. R. 658, [1896] 2 Q. B. 153.

Lord ALVERSTONE, M.R.—This case raises a somewhat important and perhaps in some respects a novel point; but we do not think, after the full arguments we have heard, that it is necessary for us to take any further time to consider before delivering our judgment.

The case arises by way of appeal from a decision of Byrne, J., who has thought that the answer of the secretary of the plaintiff company is insufficient, the main point of principle being raised by the second paragraph, which I will read:

"I have been advised and believe that I am not bound for the purpose of answering the interrogatories to make inquiries of any persons who may happen to be at the present moment directors, officers, servants, or agents of the plaintiff company as to any knowledge or information they may possess accidentally, not in the course of their employment by the plaintiff company, and not in the ordinary course of their business as such, and I have therefore not made such inquiries."

The question therefore that arises is whether or not the officer of the company who has been ordered to answer interrogatories is bound to make inquiries as to the knowledge and information of the persons from whom he ought to seek information as to the affairs of the company, with regard to matters which are outside those affairs, and which may have arisen before the company was incorporated.

I think it would perhaps be convenient, in order that my judgment at any rate may be understood, that I should state a little more specifically the actual way in which the case is raised so far as it is material. It appears that the plaintiff company was incorporated to purchase, and did purchase, one of the incandescent light patents. It appears that this patent had previously belonged to the vendors, a former company,

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

and that among the managers there were officers who apparently had been in the employment of the previous company, as well as the plaintiff company, and it is suggested by the particulars of objections that the defendants have put in in an action for infringement of the patent that at some time prior to the actual taking out of that patent the patented invention had been worked by the predecessors of the company, and I do not know whether it is not suggested also by somebody before the first company was formed, but, I will take it, by the predecessors of the company; therefore, no doubt it will be a material matter to discuss, when the action comes to be tried, whether that allegation is true.

Now, I am of opinion that Byrne, J., has gone too far. In my opinion in substance the objection that was taken by the officer of the plaintiff company is a well-founded objection, and assuming that he has honestly made investigation as to the affairs of the company, he is not bound to inquire as to things which happened before the company was constituted, or, it may be, as to matters that come to the knowledge of servants of the company quite apart from their position as such servants.

We have been addressed very clearly, and I do not think at too great a length, with regard to the old practice. Speaking for myself, I do not think there is very much difference between the practice as it now stands and the practice as it existed, certainly before the Judicature Act. I understand that an order is made on a company, as upon anybody else, to answer interrogatories. In order that those interrogatories may be answered, some officer of the company has to answer them, and the court unquestionably has discretion to say who shall answer, and would, in the exercise of that discretion, in my opinion, choose the officer who knew of his own knowledge most about the questions about which he was being interrogated. But the questions as to which he is being interrogated still are, and still ought to be, with reference to the business of the company, and while I should apply to such an officer the same rules as are laid down in a case to which our attention has been called as to the duty to answer to the best of his knowledge, information, and belief, still it must be to the best of his knowledge, information, and belief with reference to the affairs of the company, and not with reference to the affairs of anything else. Now, it is suggested that rules 1, 5, and 24 of order 31 enable us to decide this question. I do not think myself that there are any specific words in any of the rules which decide the question one way or another. Take rule 24, which has been so much relied on by the appellants. The words are: "Any party may at the trial of a cause, matter, or issue, use in evidence any one or more of the answers, or any part of the answers, reserving to the judge discretion to use the rest." In my judgment that rule was only directed to the use that can be made of an answer when the answer has been filed on behalf of a party. I do not think those words were meant to determine this question. I think the solution of this question rests upon this broad ground: What is the real position of a person who answers an interrogatory? It seems to me that whether you speak of an individual who has to get information from his servants, or whether you speak of a company that answers by a secretary or manager, who also has to get information from other officials, the reason why the answer can be read is that when it has been answered according to the rule which I have indicated it is a statement on the part of the party by which he is bound. I do not want to say that no case may arise in which a person answering on behalf of a company may not be able to protect himself in some way or other by the form of the answer; but, speaking of it as a statement of fact, I think the answer to the interrogatory is intended to be practically an admission by the person making the statement, or at any rate an answer by which under ordinary circumstances he would be bound. It was said that the defendants did not want to take it as an admission; they were content to take the answer as giving them information, and not as being a statement by the plaintiffs. I personally am not aware of any case which has contemplated answers to interrogatories being framed in that way. It seems to me that it might let in a very dangerous practice, for it might thus enable a person to get the benefit of hearsay evidence, or of evidence which would not be admissible before the court, simply because he had forced a defendant company through their officer to make an inquiry. I think I should come to this conclusion without any previous authority, and I do not know that it can be said that there is any absolute authority, but I must say that I think that the opinion of Smith, L.J., in *Chaddock's case*, which coincides with the view I am expressing, is certainly an opinion which ought not lightly to be disregarded, where he says, "I think the meaning of ord. 31, r. 5, must be that if a judge thinks a member of a company is in such a position with regard to the company that he is a proper person to answer interrogatories on their behalf he may order him to do so, and his answers in that case will bind the company." Certainly, as I understand the old practice, to a large extent it depended upon the theory that the person answering had to search his conscience and answer in reference to the matter so that the statements made by him would be binding upon him, and although it is quite true that the late Master of the Rolls, Brett, L.J., and Lindley, L.J., in *Bolckow, Vaughan, & Co.* v. *Fisher* may not have had this particular argument in their minds, yet still it is to be noted that they speak of a person being bound to answer as to what was known to his servants in the course of his business and not what they came to know accidentally. It seems to me that the principle which lies at the bottom of this distinction is that you are really intended to get the answer of the party through the knowledge of those persons for whose knowledge the party is responsible, and you are not intended to use interrogatories or the answers to them for the purpose of a channel to procure information which would not be binding upon parties by whom it was produced, but which may have some indirect advantage to the person by whom the questions have been put forward. If I could have seen that there was some use that could be made of the further investigation by the secretary which would have brought the answers within the rules, I should have been disposed to require further answers to be given. It seems to me that the question of principle is clearly raised in this case and for the reasons I have given, I think the judgment of Byrne, J., went too far and that this appeal ought to be allowed.

RIGBY, L.J.—In my opinion there never was any principle that there should be obtained from an incorporated company more discovery than could be got from individuals. All the practice has been a sort of makeshift endeavour to get the same sort of discovery as far as possible on oath from a company that is got from individuals.

Now I begin with what I conceive to be the correct conclusion from all the practice and the authorities in the case of an individual. Can you insist upon the individual going out of his way to collect evidence for the plaintiff? Certainly not. The individual who

chooses or is obliged to have his affairs transacted by servants and agents could not, by keeping ignorant himself, decline to answer what he would have been obliged to disclose if he had managed his own affairs himself, and therefore it is incumbent upon him to ask from anyone who had acted for him what they knew about it in the course of their employment, but he was not obliged to ask and therefore he was not obliged to answer as to anything that they had happened to pick up outside the course of their employment. That, I think, is sufficiently illustrated in the case of *Bolckow, Vaughan, & Co.* v. *Fisher*, and, as I understand, is the rule of the court.

Coming then to the case of a corporate body, the first idea was to have a proper officer made party, and to get discovery from him. It is unnecessary to go into the history of that, but it became established that you might make the proper officer of a corporation party to the action in order to obtain from him discovery; but he was not bound to give discovery on any other principle than any other party would be. The importance was, that you got discovery on oath from him, but the answer so made by him was in exactly the same position as the answer of any other person who happened to be a co-defendant, and, among other things, it could not be read as evidence against his co-defendant, the company. By degrees we have altogether moved away from that practice; and I think in *Wilson* v. *Church*, 28 W. R. 284, it was laid down that the old practice had gone. The practice now is to get against the corporation an order that they shall put in an answer through the proper officer, whoever he may be, and I do not see how you can avoid the conclusion that the answer so put in by the corporation, not by a co-defendant any longer, must be capable of being read against them. It therefore becomes very important that such an officer should not include in the answer, or be bound to inquire into matters which the corporation or the company themselves, if they had been individuals, would not have been bound to trouble themselves about—that is to say, the knowlege of outsiders, or the knowledge even of their servants, if it were acquired otherwise than in the course of their employment. I cannot say that it would not be capable of being read against the corporation. I refrain from saying that it would be absolutely, and in all cases, binding upon them, for if they were able to make clear that any of the answers were mistaken or otherwise wrong, I cannot say they could not do so, but it seems to me that the officer, in gaining the information that he is bound to disclose, is in the same position as any private individual acting in his own business for himself, and is not bound to go further. I think, therefore, that this order of Byrne, J., that the secretary should put in a further answer, meaning, as it does, by my understanding of it, that he shall go to all the officers of the company, who, by accident, and apart from the course of their employment by the company, have got any knowledge, collect it, and put it into an answer, is not founded upon a right principle, and in fact the order ought to be discharged.

Then it is said you have always got a right to go to the person who knows. Very well. Within proper limits that is a right principle. If you are inquiring into details, for instance, of a manufactory, it would be idle to suggest that you should go to the secretary, who probably does not know one thing from another in the manufactory, when there may be an important officer or manager of the manufactory who could give you reasonable and plain answers; I do not think, because you can argue from surrounding circumstances that So-and-so, who seems to be an officer of the company, happens also to be able to tell you the truth about particular matters, that that makes him the proper officer; and above all, I do not think you can go from one to another. You have had an answer from the secretary, and that ought to satisfy you. It may not contain everything that you want, but if it contains all that you are entitled to, you cannot then go to other persons and ask them what they know about the matter independently of the question how they acquired the knowledge; and, indeed, I do not see that you can get any answer from them. The answer here seems to me to fulfil all the objects of an answer; it gives the defendants in this case as much as they would have been entitled to if the plaintiffs had been individuals, and there the duty of the court ends. You are not going to go round. If you go to another, why not go to a third, and then a fourth, and find out among them someone who happens to know something that this company knows nothing about at all, and that he has not acquired in the business of the company? You have had an answer, the answer is a sufficient answer, and I think that no further order should be made.

We have heard arguments based on the theory, for instance, that this is a partnership. It appears to me the plain answer is that it is not a partnership. It is a corporation. No doubt there is something in that argument. For instance, if you want to know the rights of the shareholders among themselves, you may say company law is based upon partnership law, and find how that can be adapted to the case of a company; but I am quite sure that that argument was never intended to give a party to an action a right to get further or other discovery than the parties would have been entitled to if the company were treated as a company quite separate from the law of partnership. I do not think it is necessary to add anything further.

COLLINS, L.J.—I am of the same opinion, and as this is a matter of some importance, and we are differing from the decision of the learned judge below, I will add a very few words.

I think that when you realise that the evidence given by the answer is the evidence of the company and not of the individual who gives it, the difficulty is solved. It seems to me that on the modern system, at all events, the answers of a company are on precisely the same footing as the answers of an individual—that is to say, they are in both cases admissions by the person who makes them—in this case the company. Being admissions, they can be read against that person. It is idle to say that the admissions can be qualified. That is not *ad rem* at all. The question is, Does it come under the category of admission? If it does it can be read against the person who makes it, with all the suggestions, sinister or otherwise, as to the amount admitted, or the qualification sought to be put upon it, and that is precisely the reason why when you have to introduce somebody who really is not the company to answer for the company you must hedge that admission round with proper restrictions. Now, you are introducing necessarily—because you cannot make a corporate body answer—somebody to answer for the company. It is obvious that that person is not the company, but his function is to give the answer of the company. Therefore you must put some restriction upon the knowledge which he brings to bear in answering questions. Where are you to draw the line? It seems to me that the line has been drawn logically and practically in the restriction which has been put, I think by Sir George Jessel, where he says that the person who is called upon to answer is not bound to answer as to what he

has learnt accidentally, or not in the ordinary course of his business. It is the function of the judge, with the assistance of the counsel, when the person is named who is to answer for the company, to see that he is such a person as will, from the course of his business in that company, be able to give the proper information, which, when given, binds the company just as much as if the company itself were able to take an oath, but with that limitation put upon it, the answer is the answer of the company, and can be read against the company just as it can be read against the individual. But it is said that the information obtained by interrogatories may be exceedingly valuable; so it may be; but it may be entirely outside the function of interrogatories, or of the court, to help to get that information. The party desiring the information has it in his power, if he desires, to *subpœna* the person who can give him the information, and, if the evidence is relevant, it will be admitted, but, as my learned brother Rigby has pointed out, it is by no means part of the duty of the company, by means of its officers, to assist the plaintiff in getting up evidence to support his case. It seems to me that the whole thing is perfectly logical when you once realize what I am bound to say is the fundamental principle, that these answers are the answers of the company and not of the individual. When you once grasp that, it seems to me that the whole thing follows logically; and therefore the decision of Byrne, J., in this case was wrong, and ought to be overruled.

*Appeal allowed.*

Solicitors, *Faithfull & Owen; Michael Abrahams & Co.*

---

Appeal.
(Collins, Vaughan Williams, and Romer, L.JJ.) April 6.

STUART *v.* NIXON AND BRUCE. (*a.*)

*Master and servant—Employers' liability—Accident—Compensation—Duration of employment—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37).

*For the dependants of a workman who has met his death by an accident arising out of and in the course of his employment to be entitled to compensation under the Workmen's Compensation Act,* 1897, *it is necessary that the workman, at the time of the accident, should have been in the employment of the employer for at least two weeks.*

Appeal from the decision of the county court judge of Liverpool on a point of law arising on a claim for compensation under the Workmen's Compensation Act, 1897.

The appellant was the widow of a deceased workman, who at the time of the accident causing his death was a stevedore's labourer in the employment of the respondents.

The deceased was a casual labourer and had been employed by the respondents for five days continuously at daily wages. On the fifth day he was killed by an accident.

The county court judge held, under Schedule I. (*a*) (*i*) of the Act, that the deceased having been employed for less than a week the appellant was not entitled to compensation.

*Leslie Scott* (*Joseph Walton, Q.C.*, with him), for the appellant.—The decision in *Lysons* v. *Andrew Knowles & Sons, ante*, p. 408, [1900] 1 Q. B. 780, does not govern this case, since it turned upon clause 1 (*b*) of Schedule I., where the language is different. The first part of clause 1 (*a*) (*i*) of Schedule I. gives compensation equal to the workman's earnings in the employment of the same employer during the three years next preceding the injury, with a maximum of £300 and a minimun of £150. The rest of the clause merely provides a method of calculating the workman's weekly earnings where such a calculation is necessary. The right to compensation is given by Schedule I. In the present case the appellant is entitled to the minimum amount, £150.

*Ruegg, Q.C.*, and *A. G. Steel*, for the respondents, were not called upon.

COLLINS, L.J.—In my opinion the appeal must be dismissed. The question is whether the case of a labourer who was employed only for one day—taking an extreme case—and who met with an accident arising out of and in the course of his employment on that day, comes within the Workmen's Compensation Act. It is contended that the case of *Lysons* v. *Andrew Knowles & Sons* does not govern the present case. In that case the workman who was injured, but not killed, by an accident had at the time of the accident been employed by the same employer for a period less than two weeks. It is said that the observations of the court in that case upon clause 1 (*a*) (*i*) are merely *obiter dicta* and do not decide the present case, and that the appellant is entitled to compensation to an amount not less than £150. I—and I think I can also speak for A. L. Smith, L.J.—arrived at the conclusion, taking all the sections and provisions of the Act together, that the Legislature could not have intended to introduce labourers of this class into the Act. I am not pressed with the difficulties of this view suggested in the argument. I cannot follow those difficulties. I do not think that clause 1 of Schedule I. creates any real difficulty of construction at all. Its meaning is reasonably simple. The first part of clause 1, which deals with the death of a workman, contemplates, in the first place, that the workman should have been in the employment of the same employer during the three years next preceding the injury causing his death. If his earnings during those three years amounted to or exceeded £300, the workman's dependants would get that sum. If his earnings did not amount to £300 they would get the amount of his earnings, the minimum sum being fixed at £150. So far the clause relates to employment by the same employer during the three years next preceding the injury. The next part of the clause deals with a case where the employment is for less than three years.

The Act says that in such a case "The amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer." The compensation is based upon the average weekly earnings during the period short of three years. That is subject to this, that the employment must have lasted for at least two weeks. I do not say that it is absolutely necessary that the workman should have been employed every day during those two weeks, but the employment must be such as to form the basis for the calculation of average weekly earnings. That was the reasoning adopted by this court in *Lysons* v. *Andrew Knowles & Sons*, to which I still adhere. It would be most anomalous to hold that a casual workman who was injured by an accident not resulting in death would not be entitled to any compensation, whereas if the workman died from the effects of the accident his dependants would be entitled to compensation. In

(*a.*) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

my opinion this case is governed by the decision in *Lysons* v. *Andrew Knowles & Sons*.

VAUGHAN WILLIAMS, L.J.—In *Lysons* v. *Andrew Knowles & Sons* the court decided the case on the ground that, upon the construction of the Act, a workman who has not been in the employment of the employer from whom compensation is claimed for at least two weeks is not within the Act, and not merely, as it was contended, on the ground that there is no provision for measuring the compensation to such a workman when the accident has not resulted in his death. I think we must regard all the provisions of the Act on the basis that the case of a workman who has not been in the employment of the employer for a period of two weeks is not within the Act at all. The appeal must therefore be dismissed.

ROMER, L.J.—I agree that the case is governed by the decision in *Lysons* v. *Andrew Knowles & Sons*.

*Appeal dismissed.*

Solicitor for the appellant, *G. J. Linskey*, Liverpool.

Solicitors for the respondents, *William Hurd & Son*, for *Oliver Jones, Billson, & Co.*, Liverpool.

---

Appeal.
(Collins, Vaughan Williams, and Romer, L.JJ.) April 6.

PEARCE v. LONDON AND SOUTH-WESTERN RAILWAY CO. (a.)

*Master and servant—Employers' liability—Accident—Compensation — Sub-contractor — Accident to contractor's workman—Work ancillary or incidental to business of undertakers—Erection of railway station —Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

*A workman employed by a contractor, who in turn was employed by a railway company to erect a railway station for them, cannot recover compensation from the railway company for injuries sustained in such employment, since the work undertaken by the contractor is merely ancillary or incidental to, and is no part of, the trade or business of the railway company within the meaning of section* 4 *of the Workmen's Compensation Act*, 1897.

Appeal from the decision of the judge of the Southwark County Court in proceedings to assess compensation under the Workmen's Compensation Act, 1897.

The appellant was a painter in the employment of Messrs. Perry & Co., who were builders and contractors. They had entered into a contract with the respondents to do such work in the way of altering, repairing, and painting the respondents' stations in the London district as they might be directed to do by the district engineer at a fixed schedule of prices. Under this contract Messrs. Perry & Co. were engaged in reconstructing Hampton Court Station, and the appellant was employed by them on the work when he met with the accident in respect of which he claimed compensation.

The county court judge held that the respondents were not liable, because the operation of section 4 of the Act was excluded by the clause at the end, the building of a station being "no part of or process in the trade or business carried on by" the railway company being "merely ancillary or incidental thereto."

(a.) Reported by P. B. DURNFORD, Esq., Barrister-at-Law.

*J. D. Crawford*, for the appellant.—The respondents are liable under section 4. The case falls within the first part of the section, and not within the exception. The work was not merely ancillary to, but essential to the respondents' business.

He referred to *South-Eastern Railway Co.* v. *Railway Commissioners*, 6 Q. B. D. 586, 29 W. R. Dig. 108; *Caterham Railway Co.* v. *London, Brighton, and South Coast Railway Co.*, 1 C. B. N. S. 410.

*Lawson Walton, Q.C.*, and *R. B. D. Acland* were not called upon.

COLLINS, L.J.—I am of opinion that the learned judge was perfectly right in this case. The question arises in this way: The appellant was employed by a contractor who was engaged by the South-Western Railway Co. to rebuild or to execute some repairs or additions to the Hampton Court Railway Station. There was a point raised before the county court judge as to whether this man met with his injury in the course of his employment, but I will assume that he was disabled from an accident arising out of and in the course of that employment. Inasmuch, however, as he was not employed by the South-Western Railway Co. he could only make them liable by virtue of the provisions of section 4 of the Workmen's Compensation Act, which is in these terms: "Where, in an employment to which this Act applies, the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under the Act to those workmen in respect of any accident arising out of or in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workmen (whether under this Act or in respect of personal negligence or wilful act, independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies." Now, to stop there: This section, which is certainly an enabling section giving to a person a right against another which he would not have had but for it, would impose, if the Act stopped there, I think, a liability on the South-Western Railway under that section. They are the undertakers; they have employed a contractor to do the work, and a person employed by the contractor in the course of his employment has met with an accident, and therefore down to that point the section would apply, but inasmuch as the Legislature is conferring a boon upon such persons, giving them a right of action against others, against whom but for the section they would have had no right or remedy, they have quite naturally clogged that boon with certain conditions which are just as much part of the section as the primary enacting part itself. Now come the conditions: "Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of or process in the trade or business carried on by such undertakers respectively."

Now the undertakers in this case are the railway company, and the work for which they had contracted with the contractor to do was the building or improving of a railway station. It is said that it is not work merely ancillary or incidental to the business of a railway company. In my opinion it would be difficult to give a better illustration of work which is "ancillary or incidental to" as distinguished from being the actual work or business which the under-

takers carry on. The difficulty that arises in this case is not so much a difficulty in construing the section as the difficulty in trying to make it applicable to a railway company. There are plenty of other classes of work to which this section might apply without any difficulty. There is some difficulty in applying it to the case of a railway company, because it is not easy to conceive a railway company letting out or contracting with others for the purpose of doing any part of that business which is their own primary duty. You do not find railway companies contracting with other persons to drive their engines; you do not find them contracting with other persons to carry their goods for them from place to place. It might be done, but we do not often meet with it, and therefore it is not easy to put an illustration of a railway actually contracting with somebody else to do something that is not merely incidental to or ancillary. But the business of a railway company is to carry, and "carriage" may of course embrace more than mere haulage; but they are bound to carry, and that is their primary duty. Now, to build a railway station does not seem to be part of their duty at all; in fact there is no obligation on the part of a railway company to put intermediate stations along their line. They must start from some place and arrive at some place, but dealing with the intermediate stations on the line is a matter within their discretion. They had not taken any statutory obligation to put them at all, or put them at one place rather than another, and although a station is defined and a railway is defined, still, after all, the stations, when they are there, are ancillary to the main purposes of the line. Nothing is carried at them, goods are received at them, but some portions of the accommodation give unquestionably facilities which the railway company are bound to give and which are ancillary. On the other hand some parts of the station frequently are not, and what this man was doing was not anything which the railway company could describe as being "part of or process in the trade or business carried on." Their trade is to carry passengers and goods from place to place, therefore it seems to me the work this man was doing was something ancillary or incidental to the ordinary work.

If it was necessary to refer to authority, I think there is authority in this court covering this very case. There is the case referred to by Mr. Crawford where the owners of a dye works applied to a person who deals with machinery to send someone to look over their machinery; the person came and met with an accident while engaged in doing it, and an action was brought by him against the owners of the dye works. It was held in this court that he had no remedy against the owners of the dye works. He was only engaged in doing work which was not their primary work at all, but which was simply ancillary to and incidental to their trade and business. He had no claim against the dye works. Mr. Crawford says that point was not necessary for the decision in that case. It is not very fully reported in the *Times Law Reports*, but that is my impression of it. Even if I am wrong I think this was an instance where the work was not the main work of the company, but can only properly be described as work ancillary or incidental to the main business. For this reason I am of opinion that this appeal must be dismissed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. I will take the most extreme hypothesis that Mr. Crawford put before us. I will assume that a railway station is essential, and I will also assume that there was an obligation upon the railway company to have this railway station, still it seems to me perfectly clear that the work of building a railway station is not a part of or process in the trade or business carried on by the railway company as an undertaking.

ROMER, L.J.—I quite agree, and cannot add usefully anything to what my learned brothers have said.

*Appeal dismissed.*

Solicitors for the appellant, *Brooks & Heller.*

Solicitor for the respondent, *S. Bircham.*

## High Court of Justice.

Chan. Div.
Kekewich, J. } June 21, 28.

*In re* ARCHIBALD D. DAWNAY (LIMITED). (a.)

*Company—Registered contract—Shares subscribed for in memorandum—Sale to company for similar number of shares—Identity of shares—Relief—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act,* 1898 (61 & 62 *Vict. c.* 26), *s.* 1.

*A company was formed to take over the business of D., and it was agreed that D. should sell the business to the company for* 4,069 *fully-paid shares. On the formation of the company D. signed the memorandum of association for* 4,069 *shares. Subsequently a contract setting out the terms of the sale to the company was duly filed in accordance with section* 25 *of the Companies Act,* 1867. *There was evidence that the shares for which D. signed the memorandum were considered by all parties to be the same as those issuable to him under the contract.*

*Held, on a motion under the Companies Act,* 1898, *s.* 1, *for an order for filing a fresh contract, that the court had no power to grant the relief.*

In re F. W. Jarvis & Co. (Limited), 47 *W. R.* 186, [1899] 1 *Ch.* 193, *followed.*

The above company was incorporated under the Companies Acts on the 7th of August, 1897, with a nominal capital of £75,000 in 7,500 shares of £10 each. The object of the company was the acquisition of the business established by a Mr. Archibald D. Dawnay, with the stock, plant, machinery, and business premises. The basis on which the company was formed was the purchase from Mr. Dawnay of the business for £40,690, by the allotment to him or his nominees of 4,069 fully-paid shares, and a draft agreement to that effect was prepared before the incorporation of the company ready to be adopted by it and executed on its incorporation. Mr. Dawnay, who himself drew up the memorandum of association, signed it for "4,069" shares of £10 each which, though not indicated by any numbers, he understood and were intended, as he deposed, to be the paid-up shares which were the consideration to be given him for his business. He also signed the memorandum for 200 further shares, which he paid for in cash. He stated that he never agreed to take any other shares than those mentioned, and that when he signed the memorandum he was not aware his doing so implied any contract or obligation to pay cash for the 4,069 shares, and that his signing for them in those circumstances was an inadvertence.

There were other subscribers to the memorandum for shares amounting in all to 231 shares and one other share had since been issued, the total issue thus being 4,501 shares; the remaining 2,999 shares were never issued.

(a.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

The agreement for the sale and purchase of the business was duly executed on the 11th of August, 1897, after the incorporation of the company, and on the 13th was filed with the Registrar of Joint Stock Companies.

After reciting the objects and formation of the company it was agreed that the vendor, Mr. Dawnay, should sell and the company should purchase the business in question, and that part of the consideration should be "£40,690 to be satisfied by the allotment to the vendor or his nominees of 4,069 fully paid-up shares in the capital of the company to be numbered 1 to 4,069 both inclusive," and that, as the residue of the consideration, the company should undertake to discharge all the debts and liabilities of the business.

Shortly after the filing of the agreement the 4,069 shares, numbered as stated in the agreement, were duly allotted to the vendor and registered in his name, and certificates for them were duly issued to him. No further capital beyond the 75,000 shares was ever created. No notice of any call in respect of any of the 4,069 shares had ever been given.

The question then arose whether Mr. Dawnay, the vendor, was not liable to pay in cash for the 4,069 for which he subscribed the memorandum, there being nothing to show that those shares were identified with the 4,069 numbered shares specified in the agreement. Section 25 of the Companies Act, 1867, requires that every share in a company "shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." By section 1 of the Companies Act, 1898, the court is empowered to grant relief for an omission to file a sufficient contract under section 25 of the previous Act, where the omission has been "accidental or due to inadvertence"; and accordingly the vendor applied by motion under section 1 of the Act of 1898 that the company should, within fourteen days after the order now asked for, file with the Registrar of Joint Stock Companies a memorandum in writing in the form scheduled to the notice of motion; and that an order might be made to the effect that—the court being of opinion that the 4,069 fully paid-up shares mentioned in the agreement were the 4,069 shares for which the vendor had signed the memorandum of association—on the filing of the said memorandum in the form scheduled within the time aforesaid, such memorandum should, in relation to the 4,069 shares, operate as if it were a sufficient contract in writing within section 25 of the Act of 1867, and had been duly filed at or before the issue of such shares. The scheduled form of memorandum purported to state that the 4,069 shares numbered in the agreement were the 4,069 shares for which the vendor had signed the memorandum of association, and had been issued in satisfaction of the £40,690, part of the consideration agreed to be paid to the vendor. An affidavit by a director of the company agreed with the vendor in saying that the company never contemplated an allotment of any further shares to him, and never made any call in respect of the 4,069 shares for which he signed the memorandum of association, "considering them to be the very shares agreed to be allotted as fully paid up under the terms of the filed agreement, and that the omission to file a sufficient agreement with the memorandum arose from inadvertence." It appeared that the company was in a prosperous condition and paying large dividends.

*Warrington, Q.C.*, and *Bunting*, for the vendor, relied upon *In re Whitehead & Brothers (Limited)*, [1900] 1 Ch. 804, and argued that the present case was distinguishable from *Dalton Time Lock Co.* v. *Dalton*, 66 L. T. Rep. 704, 40 W. R. Dig. 40, and *In re F. W. Jarvis & Co. (Limited)*, 47 W. R. 186, [1899] 1 Ch. 193.

*W. Brinton*, for the company, did not oppose.

*Cur. adv. vult.*

KEKEWICH, J., said: Judgment was reserved because I was unwilling to depart from the decision of Romer, J., in *In re F. W. Jarvis & Co. (Limited)*, or to adopt that of Cozens-Hardy, J., in *In re Whitehead & Brothers (Limited)*, without further consideration. Unless the distinctions which satisfied Cozens-Hardy, J., in the latter case, and which were also urged here, are sufficient, this case must be governed by the decision of Romer, J., which is directly in point. The case before him was like this one. It was one in which a vendor had signed the memorandum of association for a number of shares in precisely the same way as in the present case in consideration of the issue of which as fully paid up he contracted after the incorporation of the company to sell his property; and there, as here, the vendor's shares were protected by a registered agreement, and the question arose respecting the same number of shares for which the memorandum of association was signed. The report states ([1899] 1 Ch., at p. 194) that there was evidence that the share for which the vendor signed the memorandum of association were the same as those issuable to him under the agreement; but the learned judge did not consider the evidence as sufficient, and indeed says, on p. 198, that the two lots of shares could not be identified. He held that the case was not one contemplated by the Act of 1898; but, more than that, he considered it on its merits, and though deeming it a case of great hardship and expressing his regret that he could not help the applicant, he determined, for the reasons set out in his judgment, that the application ought not to be granted. Cozens-Hardy, J., came to a different conclusion in *In re Whitehead & Brothers*. He held that case to be distinguishable from that decided by Romer, J. The only distinction noticed in his judgment is that there was no difficulty in identifying the shares registered in the name of the vendor as being the same shares as those subscribed for by him on the memorandum. I cannot myself see from the report that he had any better evidence of identity than was before Romer, J.; but perhaps there was some which has escaped my notice or is not expressly mentioned in the report. The other distinction urged in argument, but not referred to by the learned judge, was that, in the case before Romer, J., there were shares not taken up more than sufficient to provide for the double allotment, whereas in *In re Whitehead & Brothers* all the shares had been issued. I do not say that this is not a fact worth consideration, and it is undoubtedly present here; but I do not think it sufficient, standing alone, to induce me to distinguish a case similar in other respects from *In re F. W. Jarvis & Co.* As regards the other distinction which I have commented upon in connection with the case before Cozens-Hardy, J., I need only say that I have no more convincing evidence than was before Romer, J., and that it seems to me—as it seemed to him—insufficient. Besides these distinctions there is a fact peculiar to this case which deserves separate notice, because much was made of it in argument. The applicant subscribed the memorandum of association not only for the same number of shares as that for which he agreed to accept in payment of purchase-money, but also, and separately, for 200 shares for which he admits he is

liable to pay. The argument I understand to be this—that this is evidence of two classes of shares subscribed for, and that one of them is identical with the other, being undoubtedly distinct from the vendor's shares. To my mind the observations of Romer, J., are equally applicable to both, and the fact, peculiar though it be, does not assist the applicant. Under these circumstances I must follow the decision of Romer, J., and refuse the application. It is as well to add that I do this not so much because I am bound by the case of *In re F. W. Jarvis & Co.* as because it approves itself to my judgment, and I ought not readily to adopt distinctions from it. As stated by that learned judge at the conclusion of his judgment, my order will not prejudice any question that may hereafter arise between the applicant and the court as to whether, under the circumstances, he is or is not bound to take other shares under the memorandum of association; but, seeing the importance of the case, the considerable amount involved, and the public inconvenience of a difference of opinion between judges on such a question, I venture to hope that my conclusion will be submitted to review in the Court of Appeal.

His lordship accordingly refused the application, but made no order as to costs.

Solicitors, *Bartlett & Co.*

---

Chan. Div. Kekewich, J. } May 16; June 22.

*In re* DE NICOLS.

DE NICOLS *v.* CURLIER. (*a.*)

*Domicil — Marriage according to French law—Community of goods—Subsequent English domicil—After-acquired real estate.*

*The principle of the decision in* De Nicols *v.* Curlier, ante, *p.* 269, [1900] *A. C.* 21, *is applicable to real estate in England.*

*Where, therefore, two French subjects domiciled in France married there without a contract of marriage, and afterwards acquired an English domicil,*

*Held, that the rights acquired by the marriage under the French law of "community of goods" extended to freehold and leasehold property in England acquired by the husband, and therefore his power to dispose of them by will was limited to a moiety.*

Originating summons.

In 1854 M. and Madame De Nicols, who were French subjects born and domiciled in France, were married in Paris. No contract or settlement was made by the parties on the marriage, and consequently by French law their rights with respect to property were regulated by the law of "community of goods."

In 1863 M. De Nicols came to England with his wife, where they became permanently domiciled and naturalized as English subjects.

On the 28th of February, 1897, M. De Nicols died leaving a large fortune, including freehold and leasehold estates, and leaving a will whereby he gave his residuary estate, real and personal, to trustees upon trust for sale, and to hold the proceeds upon trust for his wife for her life, and after her death upon trusts for the daughter of the marriage and her husband and children. The widow, however, claimed a moiety as her own absolute property under the French law, and an originating summons was taken out to determine the question.

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

Kekewich, J., decided that the change of domicil did not affect the rights acquired by M. and Madame De Nicols in each other's unsettled movable property by their marriage in France. The Court of Appeal, however, held otherwise, and reversed the decision of Kekewich, J., on the authority of *Lashley* v. *Hog*, 4 Paton's Sc. App. 581.

On the 15th of December, 1899, the House of Lords reversed the decision of the Court of Appeal, and restored the decision of Kekewich, J. The decision of the House of Lords, however, only had reference to movable property, and the question now to be decided was whether the same principle applied to the testator's freehold and leasehold estates in England.

*Renshaw, Q.C.*, and *Ingle Joyce*, for Madame De Nicols.

*Warrington, Q.C.*, and *E. J. Elgood*, for the trustees of the will.

*P. O. Lawrence, Q.C.*, and *Whinney*, for the daughter and her children.

*Cur. adv. vult.*

KEKEWICH, J., in delivering judgment, said: Undoubtedly the House of Lords considered and determined merely the question whether the marriage contract affected movable goods notwithstanding the change of domicil, and all that was said must be read with reference to that question, as the only one to which attention was directed. Albeit so restricted, the decision proceeded on the broad principle that a contract operating by force of law in the absence of expression by the parties is as complete and as obligatory as a contract expressed, and must have effect given to it on the same footing. Unless, therefore, there is some inherent disability in some particular property to be bound by such a contract, it must equally be applied to and enforced against all falling within its scope, and this is according to the language of the code and the evidence given in explanation of it. On the present occasion the court is asked to determine whether in enforcing the contract it is right to include freehold and leasehold estates in England—that is, what we term real estate and chattels real, as distinguished from personal estate other than chattels real which is covered by the decision of the House of Lords. Assuming that these freehold and leasehold estates are within the scope of the contract, it is impossible to avoid the conclusion that they are affected by it, unless, to repeat what has been already said, there is a disability inherent in this species of property. There are, therefore, two questions for consideration—one of fact—viz., whether these estates are within the scope of the contract; the other of law, whether they can be affected by it. The first question depends on the evidence which was before the House of Lords, some further evidence given by affidavit and orally on the hearing of the present application, and additional evidence adduced under leave given after the hearing in consequence of a letter from one of the witnesses which was communicated to the court. This evidence was directed to the proper meaning of "immeubles" in the French code. There is no difficulty about the meaning of the word as regards the character of property comprised in it. It means, broadly, the soil itself and that which is attached to the soil as distinguished from that which, being unattached, is therefore movable. As in our own system of law so in that of France some things are, from their close connection with the land, treated as attached to it, and therefore immovable, but these exceptions do not impair the general description and are of no importance here. The difficulty which arose was whether the term comprised immovables abroad—that is, beyond France. The words of the code are apparently wide enough to

cover all, wherever situate, and if it were an instrument which the court is competent to construe it would be impossible to avoid the conclusion that this is its real meaning. The construction of the code, however, is beyond the competence of the court. It is a matter of fact with which the court can only deal according to the testimony of those qualified to give it. Hence the oral and the additional evidence subsequently given, to which reference has already been made. That evidence has set the matter at rest and removed all difficulty. It may be stated in general terms that, unless an exception is established in a particular case on the ground of public policy (and there is no suggestion of that here), the provisions of the code as regards "immeubles" are of universal application, that is, apply equally to immovable property situate in France and to that situate in a foreign country. Turning now to the question whether there is any objection in law to the contract operating according to the intention of the parties so as to bind the freehold and leasehold estate, one is at once confronted by the principle which distinguishes obligations respecting real estate from those which affect personal estate. That principle is well established, and is to be found stated in different language in many books. It will suffice to cite one. In Story's Conflict of Laws, section 158, the learned author says this:

"The result of this reasoning (and it certainly has very great force) would seem to be that in the case of a marriage without any express nuptial contract the *lex loci contractus* (assuming that it furnishes any just basis to imply a tacit contract) will govern as to all movable property, and as to all immovable property within that country, and as to property in other countries it will govern movables but not immovables, the former having no *situs*, and the latter being governed by the *lex rei sitæ*."

In the following section, 159, he expounds this subject in a manner so apposite to the case in hand that it is worth while to quote it at length. It runs thus:

"Perhaps the most simple and satisfactory exposition of the subject, or at least that which best harmonizes with the analogies of the common law, is that in the case of a marriage where there is no special nuptial contract, and there has been no change of domicil, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property whatever that is acquired and wherever it may be situate, but real or immovable property ought to be left to be adjudged by the *lex rei sitæ* as not within the reach of any extraterritorial law. Where there is any special nuptial contract between the parties that will furnish a rule for the case, and as a matter of contract ought to be carried into effect anywhere under the general limitations and exceptions belonging to all other classes of contracts."

According to the decision of the House of Lords there is here a special nuptial contract between the parties ascertained by reference to the code, but not less precisely ascertained because it was not reduced into writing in connection with the particular marriage. It ought, therefore (to adopt the language just quoted), to be carried into effect everywhere, but under the limitations and exceptions belonging to all other classes of contracts, one of which is, that as regards immovables, the *lex rei sitæ* must prevail. There is nothing in the common law of England to make the contract which we have already seen to be definite unenforceable respecting the freeholds and leaseholds in question, and if there be any obstacle, it must be found in some statutory provision. There is none but the Statute of Frauds, but that does not raise a formidable objection. Reference was made in argument to both the 4th and 7th sections of the statute. I do not propose to consider which of them is the more applicable, because, without doubt, either one or the other prohibits the creation of equitable interests in land, such as sought to be established here, except by writing under the hand of the creator of the trust. Nevertheless, it is insisted that the statute has no application to the circumstances of this case, and that the agreement between the parties made in consideration of marriage is sufficiently obligatory notwithstanding the absence of any writing. That is the point I am called upon to determine. It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the Statute of Frauds will not avail. In such an action therefore the rights of the parties to the land, their respective interests in it, and their mutual obligations respecting it, may and must be determined and enforced notwithstanding there has been no compliance with the statutory provision. The authorities for this are not numerous, but they are conclusive—namely, *Forster* v. *Hale*, 3 Ves. 696, 5 Ves. 308, and *Dale* v. *Hamilton*, 5 Hare 369. In the latter case Wigram, V.C., applied this ruling to a case where the partnership was intended to deal exclusively with land. Lord Lindley in his work on partnership (6th ed., p. 89) says that the latter case goes a long way towards repealing the Statute of Frauds, and that it is difficult to reconcile it with sound principle or the more recent decision of *Caddick* v. *Skidmore*, 6 W. R. 119, 2 De G. & J. 52. This is a strong adverse comment, but yet I am bound to treat the decision as sound, and I did so in *Gray* v. *Smith*, 38 W. R. 310, 43 Ch. D. 208. Whether it is competent for the Court of Appeal now to disturb the ruling above quoted, or whether being competent the court would be willing to do so, is not for me to say, but at any rate I must take the ruling to be established. It by no means follows that I ought to extend it, and it is fairly open to question whether the rule obtaining in contracts of partnership is properly applicable to a contract of marriage. In one sense, no doubt that is also a contract of partnership, but no one would, I think, venture to rely on this, the ruling in the two cases referred to having reference to commercial partnerships with which the court was there exclusively concerned. Nevertheless, the reasoning of the Lord Chancellor in *Forster* v. *Hale* seems to me to show that he intended to lay down a general rule, which may be applied without extension to the case in hand. This, I think, was the view of Wigram, V.C., in *Dale* v. *Hamilton*, and also, as it seems to me, of Lord Lindley, who cites the passage from the Vice-Chancellor's judgment in *Forster* v. *Hale*, which supports it. The Lord Chancellor held that the question whether there was a partnership or not must be tried as a fact, and if it were established by evidence that there was a partnership, then the premises necessary for the purposes of that partnership would by operation of law be held for the purposes of that partnership. It is established here by evidence that land acquired by either of the two parties to the contract would by force of the contract be held by him or her in certain terms described briefly by the phrase community of goods. Any lands subsequently acquired are an acquisition brought within, and are required to fulfil the purposes of the contract, and according to the Lord Chancellor's reasoning they are by operation of law held for those purposes. There may be error in this way of stating the case and applying the Lord Chancellor's ruling, but I am unable to discover it, and

must, therefore, hold that the freehold and leasehold estates are as much subject to the community of goods as the movables which have been held subject to it by the decision of the House of Lords.

Solicitors, *Hicks, Arnold, & Mozley; Tyrrell Lewis, Lewis, & Broadbent.*

---

Chan. Div.
Cozens-Hardy, J. } May 19.

*In re* BOWES.
EARL OF STRATHMORE *v.* VANE. (*a.*)

*Solicitor—Translations made in office—Costs—Taxation.*

*Certain letters and legal documents necessary to the conduct of an administration action were translated into English from French by competent clerks in a solicitor's office. On the taxation of the bill of costs, the taxing-master disallowed the charges for translation.*

*Held, that the taxing-master must allow reasonable costs for the translation of such documents as had been used and entered as read in the orders of the court.*

This was an appeal, on a summons, against the decision of the taxing-master as to taxation of costs.

The facts were briefly these: John Bowes, an Englishman, died leaving a large estate in France, and also having contracted debts due to persons residing in France. An action was brought for the administration of his estate. A portion of the letters and legal documents in the case were written in the French language, and it was necessary to have a translation made of these documents. The solicitors for the defendant had them translated into English, and transcribed by competent clerks in their office, instead of by professional translators. The same course was pursued as regards replies and notices required by the rules of the court to be served on persons resident in France—that is, they were first written in English, then translated into French and transmitted abroad.

E. Y. Western, the defendant, a member of the firm of Western & Sons, was a trustee and executor of the testator's will, with power to charge for work done as a solicitor. A bill of costs, which included charges for the translation of the various French and English documents, was drawn up. No objection was raised by plaintiff's solicitors; but, when the bill came to be taxed, the taxing-master disallowed these charges, relying on the case of *Ellington* v. *Clark, Bunnett, & Co.*, 36 W. R. 873, 38 Ch. D. 332.

*Macnaghten, Q.C.*, and *W. B. Heath*, for the summons.

*Vernon Smith, Q.C.*, and *C. M. Pitman*, for the other executors.

COZENS-HARDY, J., said that it was clearly necessary to have these documents translated into the English language. If it were laid down that documents of this nature, many of them confidential, must necessarily be sent out of the solicitor's office, it would be a most inconvenient precedent.

Every consideration of convenience pointed to this—that, if a solicitor had a staff competent for the purpose, it should be within the scope of the solicitor's duties to use this staff in making translations. The matter must go back to the taxing-master for him to make such allowances as he might think reasonable in respect of such translations as were absolutely necessary for the due conduct of the case, and which had been used and entered as read in the orders of the court.

Solicitors, *Western & Sons; Young, Jones, & Co.*

---

Chan. Div.
Cozens-Hardy, J. } Jan. 24, 31.

*In re* NORTH OF ENGLAND IRON STEAMSHIP ASSOCIATION. (*a.*)

*Company—Alteration of memorandum—No capital—Jurisdiction—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-section* 1—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1, *sub-section* 1.

*The High Court has jurisdiction to sanction an alteration in the memorandum of association of a registered company with unlimited liability, because it has also jurisdiction to wind it up.*

Petition.

This was one of several petitions by which application was made to the court to confirm special resolution for the alteration of the memoranda of association of similar companies of a special kind.

The association was registered in 1876 as an unlimited company for the mutual assurance of steamships belonging to its members. It had no capital, and the only qualification required of a member was that he should insure a ship in his own name or in his name as agent in pursuance of the company's articles and rules. The special resolution aimed at the enlargement of the scope of the company's operations.

*Leigh Clare*, for the petition, argued that companies of a similar kind had been wound up, and therefore there was jurisdiction to sanction alterations in their memoranda of association: 53 & 54 Vict. c. 62, s. 1.

*Cur. adv. vult.*

Jan. 31.—COZENS-HARDY, J., after reading the memorandum of association, continued as follows: This complied strictly with section 10 of the Companies Act, 1862. The company has no shares and no capital. It is, however, a company the winding up of which is plainly contemplated by section 79 of the Act of 1862, and under section 81 of that Act the Chancery Division of the High Court has power to wind it up. But by section 33 of the Companies (Winding-up) Act, 1890, section 81 of the Act of 1862 is repealed and section 1 of that Act is substituted. That section is as follows: "The courts having jurisdiction to wind up companies in England and Wales shall be the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, the county courts, and the Stannaries Court." And the question arises whether there is now any court competent to wind up a company which has no capital paid up or credited as paid up. Upon the whole I have come to the conclusion that I cannot attribute to the Legislature the intention to render all companies formed under section 9 or section 10 of the Act of 1862 exempt from the jurisdiction of any court and to leave companies formed under section 8 liable to be wound up. Section 32, sub-section 2, of the Act of 1890, which is as follows, "In Part IV. of the Companies Act, 1862, and in this Act the expression 'the court' shall, unless the contrary intention appears, mean the court having jurisdiction under this Act to wind up the

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

company," assumes that Part IV. of the Act of 1862, which is headed "Winding up of companies and associations under this Act," continues in full force. I think I am justified in holding that sub-section 1 of section 1 defines the courts which have jurisdiction to wind up all companies in England and Wales, except so far as set down by the following sub-sections, and that sub-sections 2 and 3 apply only to companies formed under section 8, and which therefore possess a capital. The result is that the High Court has jurisdiction to wind up the association, and therefore has jurisdiction to sanction alteration of the memorandum of association. The question of jurisdiction being settled, I feel no difficulty in confirming the special resolution, the object of which is to enlarge the scope of the operations of mutual insurance. The order, therefore, will be as prayed.

Solicitors, *Williamson, Hill, & Co.*, for *Ingledew & Fenwick*, Newcastle-on-Tyne.

---

Q. B. Div.
(Ridley and Bigham, JJ.) May 21.

REG. *v.* WINDER. (*a.*)

*Justices—Licensing law—Appeal to quarter sessions—Costs—Taxation out of sessions—Consent—Order on borough treasurer to pay costs of licensing justices—Right of treasurer to be present at the taxation—Jurisdiction—Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29.

*Section* 29 *of the Licensing Act*, 1828, *provides that, in the case of an appeal from the judgment of a justice in or concerning the execution of the Act to the court of quarter sessions having been reversed, "it shall be lawful for the court, if it shall think fit, to adjudge and order that the treasurer of the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment shall pay to such justice, or to whomsoever he shall appoint, such sum as shall, in the opinion of such court, be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been so put."*

*When a court of quarter sessions under this enactment orders the expenses of licensing justices to be paid by the treasurer of the county or place for which the justices acted, the amount of such expenses ought not to be taxed out of sessions without the consent of the treasurer; and if, in the absence of such consent, the court refer the taxation to their clerk of the peace, they must adopt his decision during the sessions. The treasurer is entitled to have notice of, and to attend, the taxation of the expenses.*

*A court of quarter sessions ordered the treasurer of a borough to pay a sum of money to the clerk of licensing justices whose judgment, while acting for the borough, had been appealed against, for the expenses to which he (the clerk) had been put in supporting the judgment of the justices.*

*Held, that the order was bad.*

Rule for a *certiorari* to quash an order of the justices of Lancashire made at their quarter sessions held in October, 1899.

In August, 1899, an application was made by James Paisley to the licensing justices of Bolton for a alehouse licence in respect of premises known as Calliwell Lodge in substitution for, and by way of renewal of, a licence theretofore held by Paisley in respect of premises known as the "Rope and Anchor." The licensing justices refused the application and Paisley appealed to the quarter sessions.

The quarter sessions allowed the appeal and granted the renewal of the licence. They also ordered the cost of the justices to be paid by the borough treasurer, and adjourned the sessions until the 14th of November.

The clerk of the peace thereupon drew up the order for the payment of the costs, leaving the amount thereof to be filled in afterwards.

On a day after the close of the sessions and prior to the 14th of November Winder attended before the clerk of the peace and produced a bill of the costs and expenses incurred by him on behalf of the justices.

The bill included several items of "profit" costs which Winder, under the terms of his employment by the justices, would be entitled to retain for himself.

The treasurer of the borough did not attend before the clerk of the peace on this occasion, nor had notice been served upon him to do so.

The clerk of the peace did not tax any sum off the bill, but certified the amount of the costs to be as stated in the bill. He then inserted the amount in the order of the quarter sessions, which was dated the first day of the sessions.

The order was as follows: "This court doth order the treasurer of the county borough of Bolton forthwith to pay unto Robert Winder, Esq., the sum of £310 16s. 4d. for the reasonable costs, charges, and expenses which he hath been put unto and hath incurred in supporting the act, order, or adjudication of William Nicholson, Esq., and others, justices of the peace of the same borough, whereby they refused to grant an alehouse licence to one James Paisley, for doing which this shall be the said treasurer's warrant."

The treasurer, when the order was served upon him, refused to pay the costs, and the justices had obtained a rule to move the order of quarter sessions into the High Court for the purpose of being enforced. Thereupon the Corporation of Bolton moved for the present rule, seeking to quash the order on the following grounds: (1) Because the taxation took place in the absence of the borough treasurer; (2) because no copy of the bill of costs was served with the order; (3) because the order directed that the money should be paid to Winder for the reasonable costs, charges, and expenses which he (Winder) had incurred; and (4) because the costs were taxed out of sessions without the consent of the person who was ordered to pay them.

It appeared from an affidavit sworn by Winder that on the 9th of October, 1899, the justices of Bolton passed a resolution authorizing Winder to incur the expense of appearing to support their decision at the quarter sessions, and that nine of the justices, being a majority of three of those who were present on the 9th of October, afterwards signed an authority or appointment appointing Winder to receive the sum of £310 16s. 4d. payable under the order of the quarter sessions.

*Avory* showed cause on behalf of the justices.—The order for the payment of the costs by the borough treasurer is not like an order for the payment of costs by one party to another. It is analogous to an order for the payment of the costs of a prosecution. The justices instead of adjourning the sessions for the purpose of the clerk of the peace ascertaining the amount of the costs, might there and then have fixed the amount and made it a part of their order. For these reasons the treasurer had no right to be present when the amount was ascertained by the clerk of the peace, nor had he a right to be served with a copy of the bill of costs, and his consent to the fixing of the amount out of sessions was, for the same reasons,

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

unnecessary. With regard to the objection that the order made the amount payable to Winder instead of to the justices, that was merely erroneous procedure and not a defect of jurisdiction: see *Reg.* v. *Binney*, 22 L. J. M. C. 127, and *Reg.* v. *Justices of the Isle of Ely*, 4 W. R. 5, 25 L. J. M. C. 1. The order of the justices of the 9th of October was a sufficient appointment within section 29 of Winder as the person to receive the money, taking into consideration the fact that he was their clerk and the person they would naturally appoint for the purpose.

*Lawson Walton, Q.C.* (*C. W. Mathews* with him), in support of the rule on behalf of the Corporation of Bolton —The order is bad on its face, because it does not direct that the costs incurred by the justices should be paid, but that the costs incurred by Winder should be paid. The result of that would be that it would be immaterial whether Winder were paid by salary or by fees. Winder, in fact, sent in a bill of costs as between solicitor and client of an exorbitant amount, containing many "profit" items. The bill contained charges in respect of the employment of special counsel. It ought to be decided by someone whether the cost of briefing such counsel ought under the circumstances, to be allowed. If the order stood as an order for the payment of the costs incurred by Winder, then, assuming that the employment of the special counsel was authorized by the justices, the cost of employing them must be allowed. But if the order had been—as it ought to have been—an order for the payment of the costs incurred by the justices, then the taxing officer would be entitled to exercise his discretion as to whether the special counsel should have been employed. The order was also bad because the justices never exercised their jurisdiction as to the amount of the costs, either directly or by the subsequent adoption of the figure fixed by the clerk of the peace. The justices cannot delegate their jurisdiction in this respect (*Reg.* v. *Long*, 10 L. J. M. C. 124); and the taxation cannot take place out of sessions without the consent of the person ordered to pay the costs: *Reg.* v. *Mortlock*, 7 Q. B. 459; *Freeman* v. *Read*, 30 L. J. M. C. 123; *Sellwood* v. *Mount*, 10 L. J. M. C. 121; and *Midland Railway Co.* v. *Edmonton Union*, 43 W. R. 309, [1895] 1 Q. B. 357.

RIDLEY, J.—The question is, whether, under the circumstances of the case, the order made by the court of quarter sessions was good or bad. [Having stated the facts and read section 29 of the Licensing Act, 1828, his lordship proceeded:] One objection taken was as to the person to whom the order is addressed. The order is an order upon the treasurer of the county borough of Bolton to pay unto Robert Winder, Esq., such-and-such a sum. It will be noticed that section 29 says that the order is to be that the treasurer of the county or place shall pay to such justice or whomsoever he shall appoint, and the objection is that the order should have directed payment to be made to the justices and not to Robert Winder. I do not think that that is a good objection, for I think that the fact that Robert Winder had been appointed or designated by the justices as the person to whom the money should be paid (which, I will assume, was the case) would be sufficient. So that the fact that the order directed payment to Robert Winder instead of to the justices would not be one which would invalidate the order. It was an objection which could be got over.

I come, however, to another objection, and it is this: That whereas the Act says that the sum of money to be paid shall be such as in the opinion of the court is sufficient to indemnify the justices, the order is that the sum of money to be paid is for the reasonable costs, charges, and expenses which Robert Winder hath been put to and incurred in supporting the act of the justices. I think there is a sufficient distinction. Different considerations would apply to the question how much would indemnify the justices, and to the question how much is to be allowed to a solicitor instructed on behalf of the justices to support their decision. It may be that the difference in amount would be only fractional in some cases, but in the present instance, having seen the bill of costs, I am satisfied that this is a substantial distinction. I therefore think that the order is bad on that ground.

Another objection was that the sum inserted in the order was fixed by the officer of the court out of court, and not at the sessions at which the decision was given. That objection can also be taken notice of on the present occasion, because if it is true it goes to the jurisdiction of the court of quarter sessions to make the order. The court have not in point of fact done that which the statute directs them to do—that is to say, they have not directed by their order such a sum to be paid as in their opinion would be sufficient to indemnify the justices from all costs and charges. The law is that although the court may, by its officer, if it so thinks fit, arrive at the sum which is to be paid in respect of costs, yet they must do it at the same sessions and must adopt it as their own act. That is the conclusion which ought fairly to be arrived at from the decisions in *Sellwood* v. *Mount*, *Reg.* v. *Long*, and *Midland Railway Co.* v. *Edmonton Union*. That seems to be the general law, and although in the section under which the present order was made there are words indicating that the opinion of the court is to be taken as to the amount of the sum to be paid, I take it that that opinion could be arrived at by them by appointing their officer to ascertain the amount and by adopting his act. Further, the amount of the costs could also be ascertained out of sessions by consent of the parties, but here there was no such consent. Therefore I think that as the sum inserted in the order was ascertained by the officer of the justices out of sessions without adoption by the court and without the consent of the parties, it is not a sum which in the opinion of the court was sufficient to indemnify the justices from all costs, charges, and expenses whatsoever to which such justices may have been put.

For these reasons it appears to me that the order of the court of quarter sessions cannot be supported.

BIGHAM, J.—I am of the same opinion. I think the order is bad in two respects. It is bad upon its face because it does not state that the money is to be paid to any person whom the justices have appointed for the purpose of receiving it, and it is bad because the court of quarter sessions have not, in my opinion, exercised any jurisdiction at all in making it.

It appears to me upon the affidavits that Mr. Winder, in whose favour the order purports to be made, has never been appointed as a person to receive the money in question. Some of the justices appear to have consented to it, but the justices who are entitled to the indemnity have not in fact consented, and I do not think, therefore, that the order is in point of form right. But a far more serious question arises in considering whether the court of quarter sessions have exercised their jurisdiction at all in this matter. What have they the power to do? They have power to order the treasurer of the county or place to pay such sum as shall in the opinion of the court be sufficient to indemnify such justice from the costs and charges incurred. The court of quarter sessions never has formed in this case any opinion at all upon the matter. It is true they made an order

that the treasurer should pay, but as to how much he should pay they have never formed any opinion at all, nor expressed any opinion. What the treasurer is to pay is the costs and charges to which the justice may have been put. What does that mean? I take it that it means, may have been properly put. There has been no taxation at all of this bill in the proper sense of the word. A very large bill was brought in by the solicitor who represented the justices, and placed, as I understand, before the clerk of the peace. The person who had to pay—namely, the treasurer of the corporation, had no notice of this so-called taxation; he did not know what was going on, and his voice had never been heard in the matter. In point of fact, not a penny-piece was taken off the bill, and I, for my part, do not believe that any real taxation took place.

In proceedings such as these I am of opinion that the person who is ordered to pay should have an opportunity of coming before the taxing officer, whoever he may be, and should have an opportunity of being heard as to what he should pay. He should have an opportunity, as all persons have who are ordered to pay costs, of making objection to the items which are charged against him. That right is in accordance with common sense and with justice, and the treasurer of the corporation in this case has not had that right given to him. The court of quarter sessions has never formed any opinion whatever as to what costs or charges the justices in the court below were put to, and the order ought never to have been drawn up. It must be quashed.

*Rule made absolute.*

Solicitor for justices, *R. Winder.*

Solicitors for the Corporation of Bolton, *Holt Beever & Co.*, for *R. G. Hinnell*, Bolton.

---

Q. B. Div.
(Ridley and Bigham, JJ.) May 17.

*In re* GREENWOOD & CO. (*a.*)

*Company—Winding up—Creditor's petition—Right of creditor to winding-up order for his own benefit only.*

*When a company is insolvent and has no assets distributable amongst its creditors generally other than debenture-holders, an unpaid creditor of the company is not entitled to a compulsory winding-up order which would benefit himself only, but which would not benefit the general body of creditors.*

Appeal from a judgment of Judge Whitehorne, sitting at Birmingham County Court.

An application had been made to the learned judge for an order for the compulsory winding up of the business of a limited company called Thomas Greenwood & Co. (Limited), of Birmingham.

The company had issued debentures in the ordinary way by way of a floating charge upon the assets of the company. A portion of the assets so covered by the debentures was a debt owing by certain persons to the company, and before any action was taken on the debentures that debt was assigned by the company in the ordinary way of trade to one Mr. Butler.

The debenture-holders then commenced an action to enforce payment of their debentures, and got a receiver appointed. The company, being in difficulties, passed resolutions for its voluntary winding up, and they afterwards commenced an action for the recovery of the debt assigned to Butler on the ground that it still belonged to them and had never been effectually assigned to Butler.

In the course of that action interpleader proceedings were taken between Butler and the company to determine to whom the debt belonged; and in these proceedings it was found that Butler was the real creditor and that the debt belonged to him, and judgment was given for him with costs against the company. These costs thus became a debt due from the company to Butler. The proceedings taken by the company were really in the interest of the debenture-holders, as the debt, if recovered by the company, would have gone to the debenture-holders, and no part of it could have gone to the creditors generally.

Butler applied to the receiver, who occupied the two-fold position of receiver for the debenture-holders and voluntary liquidator, to pay these costs. The receiver replied that the company had not got sufficient assets even to pay the debenture-holders, and had no assets for the creditors generally.

Butler then presented a petition in the county court and applied for an order for a compulsory winding up of the company, or in the alternative for the continuance of the voluntary winding up under the supervision of the court. He contended that the only persons interested in fighting the action were the debenture-holders, and that the proceedings were for the benefit, not of the insolvent company or the other creditors, but solely for the benefit of the debenture-holders; that the company were therefore entitled to indemnity from the debenture-holders, and that he was entitled to the benefit of that indemnity.

The company, it was admitted, had no assets that could be distributed among the creditors other than the debenture-holders. No other creditors supported the petition, and the debenture-holders opposed it.

The judge was of opinion that the expensive machinery of statutory liquidation ought not to be used at the instance of one particular creditor to enable him to obtain payment of a sum of money for himself alone by means of a possible right of indemnity against the debenture holders, and that as the granting of the application would benefit the petitioning creditor only and not the general body of creditors, the case was an exception to the general rule that a creditor is entitled to a winding-up order *ex debito justitiæ*. He accordingly refused to make the order.

The petitioning creditor appealed.

*C. A. Russell, Q.C.* (*Mansfield* with him), for the appellant.—The judge was wrong in the view he took that the petitioning creditor was not entitled to the order, because he alone, and not the general body of creditors, would be benefited. An unpaid creditor is entitled to the order *ex debito justitiæ*. It is not necessary for him to show that the creditors generally will be benefited by the order; it is sufficient if he show that he himself will be benefited. The judge relied on *In re Chapel House Colliery Co.*, 31 W. R. 933, 24 Ch. D. 259, but that case is distinguishable. There the creditor was not able to show that he himself would be benefited, and the decision merely is that a winding-up order ought not to be made at the instance of a creditor who would derive no benefit from it. Here the petitioning creditor would benefit by the order; and the order ought therefore to have been made.

*Ashton Cross*, for the liquidator (the respondent).—The learned judge had a discretion in granting or refusing the application, and he has exercised that discretion rightly. The order asked for by the petitioning creditor was for his own benefit only, and

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

the general body of creditors could have got no benefit out of it. It was not intended that the machinery of a statutory winding up under these Acts should be used merely for the benefit of one creditor only and to enable one creditor only to recover his debt. The decision in the case of *In re Chapel House Colliery Co.* is wide enough to cover this case, and is not confined to the case where the creditor can get no benefit for himself. The judge was right in refusing the application.

*Russell, Q.C.*, in reply.

RIDLEY, J.—I think the county court judge was right. He had a discretion to grant or refuse the application within certain limits, and it has not been shown that he has gone outside those limits. I think he exercised his discretion rightly in refusing the application. The petitioning creditor asked for this order for his own benefit only, and not for the benefit of the creditors generally, and he did so to compel the liquidator to raise the question whether the debenture-holders could be compelled to pay these costs. I agree with the judge that he would not have been justified in employing the expensive machinery of statutory liquidation at the instance of one particular creditor to enable him to recover payment of a sum of money which would not have been distributable among the creditors generally. The case of *In re Chapel House Colliery Co.* is an authority, so far as it goes, in favour of the decision of the judge. There were no other creditors assenting to the petition; the application was at the instance of one creditor for his own benefit only and not for the creditors generally; but this machinery was not intended for one creditor only. We cannot, therefore, interfere with the discretion of the judge in refusing the application.

BIGHAM, J.—I agree. The Act provides that where a resolution has been passed for a voluntary winding up a creditor may come to the court and ask to have the voluntary liquidation converted into a compulsory liquidation, or else to have it continued under the supervision of the court. It is in the discretion of the judge to make or refuse such order, and unless it is asked for in the interest of the general body of creditors, the order ought not to be granted. The order in this case was applied for in the interest of one creditor only, and I think the judge was right in refusing it.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Cartwright & Cunningham*, for *Hargreave & Heaton*, Birmingham.

Solicitors for the respondent, *Timbrell & Deighton*, for *Hooper, Tanfield, & Fairbairn*, Birmingham.

---

Q. B. Div.
(Channell and Bucknill, JJ.) Jan. 26.

OVER *v.* HARWOOD. (*a.*)

*Vaccination—Non-compliance with order—Evidence of non-vaccination—Burden of proof—Vaccination Act,* 1867 (30 & 31 *Vict. c.* 84), *s.* 31.

*In proceedings under section* 31 *of the Vaccination Act,* 1867, *for non-compliance with a vaccination order, the burden of proving non-vaccination lies on the prosecution, and evidence that the fact of vaccination has not been notified to the proper officer is good* primâ facie *evidence from which non-vaccination may be presumed until the contrary is shown by the defendant.*

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Case stated by justices for the county of Surrey.

An information had been preferred by the respondent, a vaccination officer appointed by the guardians of the Farnham Union, charging that the appellant, being the parent of a certain child called Gilbert William Over, under the age of fourteen years, unlawfully omitted to carry into effect a certain order of a court of summary jurisdiction made pursuant to section 31 of the Vaccination Act, 1867, whereby it was directed that the appellant should cause the said child to be vaccinated within twenty-eight days from the date thereof, the said period having expired, and the said child not having been so vaccinated, nor shown to be unfit to be vaccinated, nor to be insusceptible of vaccination, contrary to section 31 of the Act.

Upon the hearing of the case the respondent produced the original order, and deposed upon oath that he had not received any certificate of successful vaccination of the child, neither had he received any certificate that the child was unfit to be vaccinated or insusceptible of vaccination. He admitted that he had never seen the child the subject of the information. He also produced and submitted the register of vaccinations kept by him pursuant to section 24 of the Vaccination Act, 1867, and the Acts amending the same. No other evidence was given on behalf of the prosecution, and no evidence was given on behalf of the appellant.

It was contended on behalf of the appellant that the evidence given by the respondent was not sufficient proof that the appellant was guilty of the offence alleged in the information. For the respondent it was contended that the evidence was sufficient proof that the appellant had not complied with the order.

The justices, having regard to the statutory provisions requiring under penalty every certificate of successful vaccination or of a child being unfit for or insusceptible of vaccination, if given by a public vaccinator to be transmitted by him, and if given by any other medical practitioner to be transmitted by the parent of the child, accepted the view of the respondent and convicted the appellant.

The question for the opinion of the court was whether, upon the facts stated in the case, the decision of the justices was right in point of law.

The Vaccination Act, 1867, s. 31, empowers a justice (in certain cases) to order an unvaccinated child to be vaccinated within a certain time, "and if at the expiration of such time the child shall not have been so vaccinated, or shall not be shown to be then unfit for vaccination or to be insusceptible of vaccination, the person upon whom such order shall have been made shall be proceeded against summarily, and unless he can show some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding 20s."

*Schultess Young*, for the appellant.—The section does not cast upon the defendant the burden of proving vaccination; it is upon the prosecution to prove the averment as in other cases of criminal neglect of duty: *Williams* v. *East India Co.*, 3 East 192. The register does not prove non-vaccination. The public vaccinator ought to have been called to prove that he had not vaccinated the child. The parent is only required to transmit the certificate to the registrar where the vaccination has been performed by a private practitioner.

He also cited *Allen* v. *Worthy*, L. R. 5 Q. B. 168, 18 W. R. Dig. 99.

*Ryde*, for the respondent.—The conviction was right. The evidence of the vaccination officer was good presumptive evidence of non-compliance with

the order. If the child had been vaccinated and no notification thereof sent to the registrar an offence under the Act would have been committed, and the justices could not presume, in the absence of direct evidence, that an offence had been committed.

CHANNELL, J.—I am clearly of opinion that this appeal ought to be dismissed. The case is defectively stated. It does not show that the original order under which these proceedings were taken was served on the appellant or (which would probably be sufficient) made in his presence. It does state that no evidence was given besides that which is set out in the case. It appears, therefore, that the justices had no evidence before them on these points. But it is clear that the question was raised whether sufficient evidence had been given of non-compliance with the order, and we must take it that proof of service of the order was given (and the evidence on this point omitted from the case stated) or that this point was not taken before the justices.

The question is, Was there any evidence of non-compliance with the order? I agree that the burden of proving non-compliance is on the prosecution. In some matters under the Vaccination Act, 1867, the burden is thrown upon the defendant; for instance, in this very section 31—"if the child shall not be shewn to be then unfit," &c.; but this shows that it was not intended to throw on the defendant the burden of proving that the child has been vaccinated; the prosecution must prove non-vaccination. Some evidence must therefore be given of the negative proposition, unless the question arises on some exception, exemption, proviso, excuse, or qualification within the meaning of section 39 (2) of the Summary Jurisdiction Act, 1879, and this question does not so arise. The ordinary, and in most cases the only, way of proving a negative is by presumption, and the court has to apply the proper presumption. Under this Act machinery is provided whereby the fact of vaccination is to be notified by various persons, and if it is not notified it can only be because someone has failed to do his duty. The fact, therefore, that no notification has been received by the proper officer is, to my mind, *primâ facie* evidence that the child has not been vaccinated. Whether this is the best proof is a question which does not concern us. Even if the public vaccinator had been called it would still be possible that another practitioner had vaccinated the child and the justices would still have to be asked to rely on a presumption arising from the evidence of the public vaccinator. For these reasons I think that there was evidence on which the justices were justified in convicting, and that this appeal should be dismissed.

BUCKNILL, J.—I concur.

*Appeal dismissed.*

Solicitor for the appellant, *H. T. Nicholson.*

Solicitors for the respondent, *Johnson, Weatherall, & Sturt*, for *Potter & Crundwell*, Farnham.

## Court of Appeal.

Appeal.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) June 30.

CROSSFIELD & SONS v. TANIAN. (a.)

*Master and servant—Employers' liability—Accident—Compensation—Award—Application for review of weekly payment—Change in circumstances—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (12).

*An application under paragraph* 12 *of Schedule I. of the Workmen's Compensation Act*, 1897, *for a review of a weekly payment can only be made where some change in the circumstances of the case has taken place since the making of the award.*

*So held*, Vaughan Williams, L.J., *doubting.*

Appeal from the refusal of the judge of the Warrington County Court to allow an application under paragraph 12 of Schedule I. of the Workmen's Compensation Act, 1897, for a review of a weekly payment.

The workman, who had lost an eye through an accident in the course of his employment, duly filed a request for arbitration, and in the particulars annexed to the request he stated that his average weekly earnings previous to the accident were 30s., and that his average weekly earnings since the accident were 17s. 1d.

The employers, in their answer, stated that the workman's average weekly earnings previous to the accident were 19s. 10d.

The answer was filed only two days before the day fixed for the hearing.

Rule 17 of the Workmen's Compensation Rules, 1898, requires that the respondent's answer shall be filed five clear days at least before the day fixed for proceeding with the arbitration.

At the hearing, which took place in August, 1899, the county court judge held that the employers, having filed their answer out of time, were precluded from giving evidence, and he accepted the statement contained in the workman's particulars, and made an award for a weekly payment of 12s. 6d.

In March, 1900, the employers applied to the county court judge, under paragraph 12 of Schedule I., asking that the weekly payment which had been awarded might be reviewed.

Paragraph 12 of Schedule I. is as follows: "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

It was not suggested on the part of the employers that any change in the circumstances of the case had taken place between the making of the award and the application for a review.

The county court judge refused the application.

The employers appealed.

*Arthur Powell*, for the employers.—The learned county court judge was wrong in refusing the application. Paragraph 12 ought to be construed according to the natural meaning of the words, which is that either the employer or the workman may at any time apply to have the weekly payment originally awarded reviewed, and may show any grounds why the amount should be altered, and the

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

county court judge ought on such application to fix the payment at such an amount as may then appear to be right.

*W. D. Benson*, for the workman, was not called upon to argue.

A. L. SMITH, L.J.—The question is whether, on the true construction of paragraph 12 of the first Schedule to the Workmen's Compensation Act, employers can apply for a review of a weekly payment where the circumstances which existed at the time of the making of the award have not in any way altered. An award has been made by a county court judge who had before him a statement in the workman's particulars that his average weekly earnings before the accident were 30s. The employers desired to show that the man's average weekly earnings before the accident were 19s. 10d. But the county court judge held that, as they had not filed their answer five days before the hearing, they were out of time, and it was not open to them to take this point or to give any evidence, and he therefore made an award on the basis of the workman's statement. The award was made in August, 1899, and no appeal was brought from it. In March, 1900, the employers made an application under paragraph 12 of the first Schedule to the Act for a review of the weekly payment. The question arose, what change had taken place in the circumstances of the case since the making of the award. The answer was that no change whatever had taken place. The employers admitted that the position of the workman remained the same. But the point which the employers really wished to raise was that the award was wrong, because the county court judge ought to have found that the workman's earnings before the accident were 19s. 10d. Can it be shown that the award is wrong in an application under paragraph 12? In my opinion it cannot; I think that paragraph 12 was enacted *alio intuitu* altogether. It contemplates that an injured workman may get well, or get better, or get worse, and it enacts that "any weekly payment"—not any award—"may be reviewed at the request either of the employer or of the workman, and on such review may be ended."—*i.e.*, if the workman gets well — "diminished" — if he gets better — "or increased"—if he gets worse. I think that the decision of the county court judge refusing to review the weekly payment was right, and that the appeal must be dismissed.

VAUGHAN WILLIAMS, L.J.—I agree that it would be manifestly unfortunate if paragraph 12 of Schedule I. could be used for the purpose of appealing against any award which one party or the other did not like. I feel sure that the Legislature did not intend this enactment to be used for such purpose. But though I agree in coming to that conclusion, I know no power of the court which it is more difficult to exercise, or which, in my opinion, ought to be more sparingly exercised, than the power of what I may call interlinear legislation—that is to say, of introducing into an Act of Parliament words which are not there. Now what are the words of this enactment? "Any weekly payment"—it does not say "awarded," but it is clear that it means any weekly payment awarded—"may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased." It is suggested that in the exercise of the power which we have of interlinear legislation we should read in the words "if the circumstances are changed." I do not feel the necessity for introducing those words. But however that may be, it seems to me that the employers here wish to bring before the court circumstances which differ from the circumstances which were before the court at the original hearing. They wish to show that the weekly earnings of the workman were less than they were then taken to be. It is said that they cannot do that because they are estopped by the previous award. I am not sure that that is so. An award is not a judgment so as to operate technically as an estoppel. And if abstract justice requires us to say whether there ought not to be an estoppel in this case, I cannot help seeing that this is a case in which the question of amount has never been determined on the merits at all. It may be that the result is that there is an estoppel, but I am not sure. At any rate I hesitate to read into the Act words which are not there, though I am much impressed by the fact that the paragraph is so drawn that if we strictly follow the mere words it might be much abused by being allowed to give indirectly an appeal which the statute does not give directly.

ROMER, L.J.—This is an attempt to re-open an arbitration under the Workmen's Compensation Act and to impeach the award on the ground that facts were admitted at the hearing which should have been contested. This is done under cover of an application under paragraph 12 of Schedule I. In my opinion that paragraph was directed to another purpose and was not intended to enable an award to be impeached on any such ground as that which the employers now rely upon. I think it applies to cases in which some change in the circumstances has taken place since the making of the award. Here the parties admit that no new fact has arisen. If the appeal were allowed I think it would lead to great abuse. Whenever either party was dissatisfied with an award he could continue to have fresh arbitrations until he obtained an award in his favour. We are bound, in my opinion, not to give such an interpretation to the enactment as would lead to such a result.

*Appeal dismissed.*

Solicitors for the employers, *W. Hurd & Son.*

Solicitors for the workman, *Cunliffes & Davenport*, for *Davies & Forshaw*, Warrington.

---

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) June 15, 23.

ELLIOTT v. YATES AND ANOTHER. (a.)

*Inland revenue—Income tax—Non-payment—Distress—Authority of collector—Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *ss.* 73, 86.

*The power to distrain in the event of non-payment of taxes, conferred upon a tax collector by section* 86 *of the Taxes Management Act*, 1880, *may be lawfully exercised after the expiration of the year in respect of which the tax is payable, provided that, at the time of the distress, the collector has not been required to pay over the sums collected by him, and to deliver a schedule of arrears, as provided by section* 103 *of the Act.*

Application by the plaintiff for judgment or a new trial in an action tried before Channell, J., and a common jury.

The defendants were collectors of income tax and inhabited house duty, and the action was brought against them to recover damages (1) for trespass for breaking and entering, and (2) for irregularity in the

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

distress by remaining in possession for too long a period.

The facts, which are fully set out in the judgment, were shortly as follows:

The defendants were appointed collectors of income tax and inhabited house duty for the year ending the 5th of April, 1899, and by the warrant of the Commissioners of Taxes they were authorized to demand and collect the income tax and house duty during that period.

The plaintiff failed to pay his income tax and house duty after demand duly made, and thereupon on the 25th of May, 1899, the defendants levied a distress at the plaintiff's premises to recover the amount due. The plaintiff subsequently paid the amount, and the distress was withdrawn. The plaintiff then brought this action.

Channell, J., held that the defendants had authority to levy the distress, and that there had been no illegal distress, but the learned judge asked the jury to assess the damages, and the jury assessed the damages at £10.

The plaintiff applied for judgment or a new trial upon the first head of claim.

*Witt, Q.C.*, and *Poley*, for the plaintiff.

*Bowen Rowlands, Q.C.*, and *Layman*, for the defendants.

*Cur. adv. vult.*

June 28.—A. L. SMITH, L.J., read the following judgment: The plaintiff in this action seeks to recover from the defendants damages for having trespassed upon his dwelling-house at Maidenhead on the 25th of May, 1899. The defendants are collectors of income tax under Schedules A and B of the Income Tax Acts, and also of inhabited house duties, and were appointed by the Commissioners of Taxes to collect the same pursuant to the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), for the year ending the 5th of April, 1899. The defendants justify the alleged trespass under a warrant dated the 13th of December, 1898, duly granted to them under the Taxes Management Act, 1880. It is not in dispute (1) that the taxes for which the defendants distrained had been duly demanded of the plaintiff upon the 1st of January, 1899; (2) that such taxes then became due and payable by the plaintiff, and continued so down to the distress (which is the alleged trespass) upon the 25th of May, 1899; and (3) that the plaintiff throughout persisted in refusing to pay what was due from him, and that he had no valid excuse for such refusal. The first point taken on behalf of the plaintiff is that under the warrant the defendants' authority to distrain came to an end upon the 5th of April, 1899, and consequently they were *functi officio* upon the 25th of May, 1899, and could not justify under it. In my judgment this is not so, and the authority under the warrant has no such limitation, and this will be seen upon reading it. The warrant, after reciting the appointment of the defendants to be collectors of the duties arising from property, professions, trades, and offices, and of the duties on inhabited houses for the year ending the 5th of April, 1899, enjoins and requires the collectors to make demand of the several sums upon the parties charged therewith, and upon payment thereof to give acquittances, and "if any person should refuse to pay the sum or sums charged upon him upon demand duly made, for non-payment thereof to distrain for the same by virtue of this our warrant without further authority." I do not find in this warrant that the power to distrain is limited to a distress made on or before the 5th of April, 1899, but, on the contrary, the power given is to distrain without limit as to time "for duties payable for the year ending the 5th of April, 1899." I would point out that the collectors appointed in the succeeding year for the year ending the 5th of April, 1900, could not distrain for the taxes and duties due for the preceding year ending the 5th of April, 1899. So much for the warrant itself under which the defendants justify. But it is further argued for the plaintiff that by the Taxes Management Act, 1880, the collectors became *functi officio* on the 5th of April, 1899. I will first deal with the only section that has any possible bearing upon this point prior to section 100, for in that and the following sections the statute deals with a new state of circumstances which does not exist in the present case. Section 73, sub-section 1, which is the only section referred to in this part (Part V.) of the Act, deals with the nomination of collectors in the month of April in each year. There is nothing in this section which enacts that after the month of April, 1899, the nominated collectors may not get in unpaid arrears which they were appointed to collect and which they could not collect owing to the persistent refusal of the taxpayer to pay, and, indeed, sub-section 9 of the section points to this, that it is not until the collectors' account for the year have been closed that the collectors' office is at an end. I can find down to section 100 nothing which enacts that a collector's power to distrain under section 86 of the Act ceases upon the 5th of April in any year under a warrant similar to that in the present case. The collector appointed is not for one year only and no more, his appointment is to collect the taxes for the year ending the 5th of April. Although there is a fresh appointment every year, the collectors appointed are not in place of those appointed in the preceding year, but to collect another year's taxes. No doubt, as a rule, the duties of the collectors for a particular year would be practically ended with the year, but they are not appointed only for the period of a year, nor do their duties of necessity end with the year. As a short method of description they might be referred to as collectors appointed for a year, and I think that the expression in section 117, sub-section 1, "for the remainder of the year," is explicable in the view that the Act intended to show clearly that the appointment of one collector in lieu of another was not intended to invalidate the latter's acts for the period during which he had acted. At section 100 there comes a new part of the Act—viz., Part VII., headed "Receipt and Account." This gives rise to other considerations. By section 100 the board may appoint in each year a day to receive the moneys received by the collectors, on which day the collectors shall account for all moneys given them in charge to collect. By section 103 on the appointed day the collectors are to pay over to the collector of Inland Revenue the moneys received by them, and by sub-section (*b*) to deliver a schedule of arrears. Until this is done, in my judgment, the collectors' authority to collect has not terminated. By section 105 and the following sections, under the heading of "Schedules of Arrears," different processes are prescribed by which a defaulting taxpayer may be brought to book by the commissioners and others. In the present case no day prior to the day of distress had been appointed for receipt of the moneys collected by them under section 100, and consequently no schedule of arrears was in existence, and it will be seen that in this state of circumstances none of the sections after and including section 100 have any application to this case, and I have not to consider what effect they would have if they did apply. I cannot find in the Act prior to section 100, which is the part of the Act which applies to this case, any more than in the warrant itself, that the authority of the collector to collect arrears due before the 5th of April, 1899, terminates upon that day; and

as no day for receipt has been appointed under section 100 the sections subsequent thereto do not apply. The argument that the proceedings to make the plaintiff pay after the 5th of April, 1899, must be by way of making him a Crown debtor is not well founded in this case, and, in my opinion, in the present case there is nothing to justify such an argument. The above are the only points now remaining in the case. I agree with my brother Channell that the defendants can justify, as they have done, under their warrant of distress of the 13th of December, 1898. The appeal must therefore be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I agree. No doubt there is a fresh nomination of collectors in each year, and no doubt the statute contemplates the rendering of accounts and the collection of arrears and the closing of the accounts in each year, and when once the account has been closed there is no power in a collector to distrain for arrears without the special authority of the commissioners; but, notwithstanding this, the fact remains that neither in section 86 nor in the warrant is there any limitation of the power of distress to one year.

ROMER, L.J.—I have had an opportunity of reading my lord's judgment, and I entirely agree with it.

*Appeal dismissed.*

Solicitors for plaintiff, *Samuel Price & Sons.*

Solicitor for defendants, *F. FitzPayne*, for *C. R. Thomas*, Maidenhead.

---

From Chan. Div. (Lindley, M.R., and Rigby and Collins, L.JJ.) — March 13, 14.

DIXON *v.* WINCH. (*a.*)

*Mortgage—Transfer—No notice to mortgagor—Sale by mortgagor and mortgagee without disclosing mortgage—Fraudulent retention of purchase-money by mortgagee—Satisfaction of mortgage.*

*A solicitor conveyed certain land to a builder. The builder built some houses thereon and mortgaged it to the solicitor. The solicitor transferred the mortgage. No notice of such transfer was given to the builder. Subsequently the solicitor and the builder sold the land, which was conveyed by a deed containing a recital that it was free from incumbrances. The proceeds of sale were received by the solicitor, who retained the mortgage debt out of them. The solicitor till he absconded paid interest to the transferee.*

*Held, that the purchaser took the property subject to the mortgage, but the builder, having placed himself entirely in the hands of the solicitor, must have imputed to him the knowledge which the solicitor actually had, and must indemnify the purchaser against any payments to be made to the mortgagee.*

*Decision of* Cozens-Hardy, J. (47 *W. R.* 620), *affirmed.*

This was an appeal from a decision of Cozens-Hardy, J. (reported 47 W. R. 620).

The facts may be stated shortly as follow:

By a deed of the 24th of March, 1892, one Dent conveyed certain land at Harlow to the defendant Winch.

By a deed dated the 11th of January, 1893, Winch mortgaged a portion of the land, with some houses which he had built on it, to Dent to secure £350 with interest at 5 per cent.

On the 16th of January, 1893, Dent transferred to the defendant Miss Ellman the mortgage debt of £350 and the mortgaged property subject to redemption.

No notice of the transfer was given by Miss Ellman to Winch. Miss Ellman received and had since retained in her own possession the title-deeds.

Dent paid Miss Ellman interest on the mortgage debt till 1898, when he absconded.

On Dent's disappearance it was discovered that part of the mortgaged land had been conveyed by Dent and Winch to the plaintiff for £685 by a deed dated the 15th of September, 1893.

This deed recited that Dent was seised in fee of the land free from incumbrances, and that he had agreed to sell to Winch for £100, but that no conveyance of the land had been executed, and that Winch had built houses on the land and had agreed to sell to the plaintiff for £685, £100 of which was to be paid to Dent.

By a deed dated the 25th of April, 1894, and containing similar recitals, the rest of the land was, in consideration of £375 paid to Winch, conveyed by Dent and Winch to the plaintiff. No investigation of title was made on behalf of the plaintiff, the arrangement being that she was to have a free conveyance prepared by Dent and to accept Winch's title from him.

The purchase-money for the first purchase was paid to Dent, and he retained thereout £451 10s. for principal, interest, and costs said to be due to him from Winch.

It was not alleged that the plaintiff had any knowledge of Miss Ellman's mortgage, and Winch denied all knowledge of the transfer to Miss Ellman.

The plaintiff claimed a declaration whether the defendant Miss Ellman's mortgage was a valid and subsisting security or not, and if it was to be entitled to redeem and to be indemnified by Winch.

The defendant Miss Ellman counterclaimed foreclosure or sale in default of payment.

Cozens-Hardy, J., held that Miss Ellman's mortgage was a valid subsisting charge, and that the defendant Winch must indemnify the plaintiff against all payments to be made by her to Miss Ellman.

The plaintiff and the defendant Winch appealed.

*Eve, Q.C.*, and *Christopher James*, for the plaintiff.

*Hayter*, for the defendant Winch.

*Micklem, Q.C.*, and *Harman*, for the defendant Miss Ellman.

The following cases were referred to: *Norrish* v. *Marshall*, 5 Madd. 475; *In re Lord Southampton's Estate, Allen* v. *Lord Southampton*, 29 W. R. 231, 16 Ch. D. 178; *Matthews* v. *Wallwyn*, 4 Ves. 118; *Williams* v. *Sorrell*, 4 Ves. 389; *Le Neve* v. *Le Neve*, 3 Atk. 646; *Marjoribanks* v. *Hovenden*, 6 Ir. Eq. Rep. 238; *Bradley* v. *Riches*, 26 W. R. 910, 9 Ch. D. 189; *Cave* v. *Cave*, 28 W. R. 798, 15 Ch. D. 639; *In re Cox and Neve's Contract*, 39 W. R. 412, [1891] 2 Ch. 109; *Oliver* v. *Hinton*, 48 W. R. 3, [1899] 2 Ch. 264; *Kettlewell* v. *Watson*, 30 W. R. 402, 21 Ch. D. 685; *Jones* v. *Gibbons*, 9 Ves. 407; *Bickerton* v. *Walker*, 34 W. R. 141, 31 Ch. D. 151; *Atterbury* v. *Wallis*, 4 W. R. 734, 8 De G. M. & G. 454; *Hewitt* v. *Loosemore*, 9 Hare 449; *In re Cousins' Trusts*, 34 W. R. 393, 31 Ch. D. 671; *Rolland* v. *Hart*, 19 W. R. 962, L. R. 6 Ch. App. 678.

LINDLEY, M.R.—I think it is unnecessary to consider the authorities which have been cited, for there is one view of the case which, as it seems to me, is quite sufficient to enable us to dispose of it. The

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

question is whether the plaintiff, who has bought this property (previously mortgaged by the defendant Winch), is entitled to compel Miss Ellman, to whom the mortgage has been transferred, to give up her security. One thing is clear—namely, that Dent, the solicitor who acted in the matter, and the original mortgagee, cheated both Winch and Mrs. Dixon. Dent, having become owner of the land, entered into certain arrangements with Winch, for whom he acted as solicitor in every transaction. Dent having sold part of the land to Winch, the latter made a legal mortgage to Dent, which Dent transferred to Miss Ellman. Miss Ellman paid the money to Dent and received the deeds from him. It did not occur to her to give notice to Winch of the transfer of the mortgage to her. Dent ought to have done this; it was his duty both to her and to Winch to do so, and not to allow Winch to pay the mortgage-money to the wrong person. Dent continued after the transfer to pay the interest to Miss Ellman. Then Dent and Winch together sold and conveyed the property to Mrs. Dixon. Winch left everything connected with the sale to Dent. Dent inserted in the conveyance to Mrs. Dixon a deliberately false recital, suppressing altogether the mortgage and the transfer of it, and stating that the property was unincumbered. The result is that a gross fraud has been perpetrated upon Mrs. Dixon, but Winch was a mere tool of Dent in the transaction. The property was sold as free from incumbrances, when it was really subject to the mortgage to Miss Ellman. Winch cannot derive any benefit from that. Then Dent, having thus cheated Mrs. Dixon, proceeded next to cheat Winch. An account was settled between them, Dent retaining the mortgage debt out of Mrs. Dixon's purchase-money, which she had paid to him. And now she says that this transaction enables her, though she had in fact bought the property subject to the mortgage, to throw the loss upon Miss Ellman. She says that though she bought only the equity of redemption, yet luckily for her Miss Ellman has been paid off by means of the payment to Dent, because Winch had no notice of the transfer. This seems to me to be a subtle refinement based upon the equitable doctrine that, when a mortgage has been transferred, the mortgagor is still enabled to go on paying the original mortgagee if he has no notice of the transfer. But was the payment to Dent such a payment of the mortgage debt as would have entitled Winch to have demanded a reconveyance of the property from Miss Ellman? Considering the manner in which Winch had placed himself entirely in the hands of Dent, I think the knowledge which Dent had must be imputed to him. He is, in my opinion, affected by the knowledge of that which Dent knew, and cannot therefore avail himself of his actual ignorance of the transfer of the mortgage. He must be treated as having known that it had been transfered to Miss Ellman, and that he was paying the mortgage money to the wrong person, and the plaintiff stands in no better position than Winch. The mortgage must be treated as still subsisting and as a security to Miss Ellman for £350 and interest, and the plaintiff must take the property subject to it. Both the appeals must be dismissed.

RIGBY, L.J.—I agree. I sympathise equally with Mrs. Dixon and with Miss Ellman, who were both ignorant of legal matters, and are both free from blame. Nor can I withhold my sympathy from Winch. There is no ground for attributing to him any fraudulent intention, though every act of Dent in the matter was tainted with fraud. I have not looked carefully at the cases which have been cited to us because, in my opinion, we can set them aside for the purpose of deciding the present case. Under the circumstances I think Winch is not entitled to say that he was ignorant of any material fact which was known to Dent. He must be taken to have known that the mortgage had been transferred to Miss Ellman, and that in paying Dent he did not discharge the mortgage in her hands.

VAUGHAN WILLIAMS, L.J.—I am much troubled about this case, because it deals with matters my familiarity with which is of but recent acquisition. But under these circumstances I do not think I should be discharging my judicial duty in differing from my brethren, unless I were perfectly certain that I was right, nor merely because, but for their opinion, I might myself have arrived at a different conclusion. Still, I think it is my duty to express the doubts and difficulties which I feel in arriving at the same conclusion as they do. Cozens-Hardy, J., based his decision upon the ground that, although it is a recognized rule in equity that, when a mortgage has been transferred, a payment made by the mortgagor to the original mortgagee is good as against the transferee, provided that the mortgagor has received no notice of the transfer, yet that rule ought not to be extended to a case like the present, in which the money paid by the mortgagor to the original mortgagee was part of the purchase-money fraudulently obtained by means of a false recital in the conveyance to the purchaser to the effect that there was no mortgage. I do not understand that either of my learned brethren has based his affirmation of the decision on that ground. I understand the ground of their decision to be this—that in these transactions as a whole there was such a general agency of Dent for Winch, that the knowledge of Dent must be imputed to Winch, and that Winch cannot be allowed to set up his actual ignorance of matters which were within the knowledge of Dent. My difficulty in accepting this view of the case is that there were, as it seems to me, two distinct transactions in which different persons were engaged. The first transaction was the conveyance of the property by Dent and Winch to Mrs. Dixon. I agree that in that transaction you must impute to Winch the knowledge of all that Dent knew, and that as between Winch and Mrs. Dixon he cannot be heard to say that he did not know of the transfer of the mortgage to Miss Ellman. This is something very like an estoppel against Winch setting up his actual ignorance of the transfer. But in my view this estoppel does not extend to anything outside that particular transaction. The result of the first transaction was that Mrs. Dixon took the property subject to the mortgage to Miss Ellman, and I do not understand her to deny this. Of course Winch is bound to indemnify her against that mortgage. That was the state of things when the conveyance was completed, and Mrs. Dixon had paid the purchase-money to Dent as agent for Winch. Shortly afterwards a settlement of accounts took place between Dent and Winch, and Winch allowed Dent to retain the mortgage debt out of the purchase-money. Then the question is, ought we to impute to Winch at that moment the knowledge of the fact that Dent had transferred the mortgage to Miss Ellman? In truth and in fact Winch knew nothing about it, and his allowing Dent to retain the money is the strongest possible evidence that he believed Dent to be still the mortgagee, and as such entitled to receive the mortgage-money. It may very well be that the knowledge of Dent must be imputed to Winch on the ground that he had placed himself in such a general relationship to Dent that he must be treated in all matters as having the knowledge which Dent had. I agree that the two transactions were immediately consequent on

one another, and were very closely connected, though I have felt a difficulty in treating them as one. Under the circumstances, it might be right to draw the inference of fact that there was such a general agency of Dent for Winch that we ought to impute to Winch the knowledge of all which Dent knew, and that he must be taken to have known that he was paying the money wrongfully. On this question of imputed knowledge I prefer to adopt the judgment of my learned brethren. I have only intended in what I have said to point out the difficulties which I have felt in treating both the transactions as one, and then imputing Dent's knowledge to Winch.

Solicitors, *Druces & Attlee; West, King, Adams, & Co.; C. F. Ingram.*

---

## High Court of Justice.

Chan. Div. } April 7.
Byrne, J. }

EASTWOOD BROTHERS (LIMITED) *v.* HONLEY URBAN COUNCIL. (*a.*)

*Local government—Sewer—Sewage matter—Pollution—Trade effluent—Rivers Pollution Prevention Act,* 1876 (39 *&* 40 *Vict. c.* 75)—*West Riding of Yorkshire Rivers Act,* 1894 (57 *&* 58 *Vict. c. clxvi.*), *ss.* 9, 10—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 17, 21—*Public Health Amendment Act,* 1890 (53 *&* 54 *Vict. c.* 59), *s.* 17.

*Where a prescriptive right exists to discharge drainage into a sewer, trade effluent may also be discharged, and a local authority has no right to cut off the connection of the drain and the sewer, although as a matter of fact the discharge may prejudicially affect the discharge of the sewage matter.*

Trial of action.

This was an action tried without pleadings on affidavit evidence, in which the plaintiffs claimed an injunction to restrain the defendants from cutting off the connection between a sewer and a drain from the plaintiffs' mill.

The facts of the case were as follows: The mills in question were known as Thirston Mills and were acquired by the plaintiffs in 1890. The mills which had existed in 1853 had been from that time materially enlarged and there was some evidence to the effect that the volume of trade effluent had increased in recent years, but there had been no material alteration in its character.

In 1893 a dam was constructed from the mills which carried the trade effluent discharged in the processes of the manufacture into a channel known as Thirston dyke, that channel discharged itself into a stream which itself flowed into the River Holme. There was no interruption on the user of the drain for trade effluents so long as it discharged into Thirston dyke.

In 1885 the Honley Local Board, the then sanitary authority for the district, carried out a sewerage system, under which they constructed a sewer near Thirston dyke, and the workmen of the board (as appeared from the evidence), without any direction or any communication with the then owners of Thirston mills, took up the drain from the mills at the point where it met the new sewer and made a connection between them; so that from that time the drain ceased to discharge into Thirston dyke, and the effluent matter passed into the River Holme through the sewer.

Under the Local Government Act, 1894, the Honley Local Board became the Honley District Council.

In 1896 a joint committee of the Honley Urban District Council and the South Croyland Urban District Council was formed for the purpose of making sewers for the two districts, and subsequently this committee acquired land for the construction of outfall and purification works.

In April, 1897, the joint sewerage committee was, under a provisional order, superseded by a joint sewerage board, but only for the management of the main sewers, sewers already made by either of the two councils remained vested in and under the control of the council in whose district they were situate.

The defendants were advised that the trade effluent from Thirston Mills into this sewer on account of temperature and for other reasons injuriously affected the disposal of the sewage matter, and exposed them to liabilities under the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 4. They accordingly informed the plaintiffs of their intention to cut off the connection between the sewer and the drain.

*Levitt, Q.C.,* and *Waggett,* for the plaintiffs.

*Asquith, Q.C.,* and *Clayton,* for the defendants.

BYRNE, J.—Having regard to the circumstances under which the connection between the drain and the sewer was made, and to the length of time, during which the connection has continued, I think I ought to hold that the connection was duly and lawfully made.

The plaintiffs' predecessors in title had a right to cause the drain to empty into the sewer of the local authority, now vested in the defendant district council (see *Ainley* v. *Kirkheaton Local Board,* 60 L. J. Ch. 734, and *Brown* v. *Dunstable Corporation* 47 W. R. 538, [1899] 2 Ch. 378), and the plaintiffs have a right to cause their drain to empty into the same sewer under section 21 of the Public Health Act, 1875.

The plaintiffs' predecessors in title were and the plaintiffs still are entitled to open through the drain into the sewer in question, not only sewage matter, but manufacturing effluents: see *Peebles* v. *Oswaldtwistle Urban Council,* [1897] 1 Q. B. 384 (reported on appeal 45 W. R. 454, [1897] 1 Q. B. 625). This case was reversed, but it was not reversed on any point material to the present case. Under these circumstances the plaintiffs are, in my judgment, entitled to an injunction to restrain the defendants from cutting off, as they threaten to do, the communication between the plaintiffs' drain and the defendants' sewer: see, amongst other cases, *Attorney-General* v. *Clerkenwell Vestry,* 40 W. R. 185, [1891] 3 Ch. 67, and the cases there cited.

Having regard to the provisions of section 16 of the Rivers Pollution Prevention Act, 1876, I do not think that section 7 of that Act gives power to the defendants to stop up the communication in question even if it had been proved beyond all question—as it has not, in fact, been proved—that the liquid discharged from the drain into the sewer would prejudicially affect the disposal by sale, application to land, or otherwise of the sewage matter conveyed along the sewer. The defendants may or may not be entitled to some other remedy against the plaintiffs in respect of the effluent discharged into the sewer; I express no opinion on this point which does not arise in this action, but I am of opinion that the plaintiffs are entitled to an injunction to restrain interruption of the communication of the drain with the sewer.

---

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

*Judgment for plaintiffs.*

Solicitors, *Van Sandau & Co.*, for *Mills & Co.*, Huddersfield; *Jaques & Co.*, for *Armitage, Sykes, & Hinchcliffe*, Huddersfield.

---

Chan. Div. } Farwell, J. } May 28.

HAY v. NORTHCOTE. (*a*.)

*Conflict of laws — Marriage — Validity — Marriage solemnized abroad before British consul — British subject and foreigner—Foreign decree of nullity—Consular Marriage Act*, 1849 (12 & 13 *Vict. c.* 68).

*A marriage between a British subject and a foreigner solemnized abroad in accordance with the requirements of the Consular Marriage Act*, 1849, *is valid in England, although such marriage has been declared void by a foreign court.*

Action to set aside a settlement on account of its failure of consideration.

On the 24th of May, 1880, Louis Alphonse Duperrel, a Frenchman domiciled in France, but born in the Mauritius, and Louisa Harriet Tyrwhitt, an English woman domiciled in England, were married before the British Consul at Bordeaux, in accordance with the regulations of the Consular Marriage Act, 1849.

By an indenture dated the 20th of July, 1880, made between Edmund Tyrwhitt (since deceased) of the one part and George Burges (since deceased) of the other part, after reciting that previously to the marriage of Louis Alphonse Duperrel with the defendant Louisa Harriet Tyrwhitt, a daughter of the said Edmund Tyrwhitt, the said Edmund Tyrwhitt agreed to assign the two policies of assurance thereinafter particularly described upon the trusts thereinafter declared concerning the same, and also to enter into a covenant for the payment of an annual sum of £40 in the manner thereinafter provided, and that the marriage of the said L. A. Duperrel and the defendant L. H. Tyrwhitt was duly solemnized on the 25th of May, 1880, for effectuating the said agreement, and in consideration of the promises the said Edmund Tyrwhitt assigned the two policies of assurance therein particularly described unto the said George Burges, his executors, administrators, and assigns, to hold the same upon trust, to receive and invest all moneys assured by, or to become payable under, the said policies, and to pay the income thereof to the defendant L. H. Tyrwhitt during her life and after her decease upon trust for all the children of the defendant L. H. Tyrwhitt by the said L. A. Duperrel or any future husband, and it was thereby declared that if there should be no issue in whom the trust funds should become absolutely vested, then the trustee should hold the said funds upon trust for the next-of-kin of the defendant L. H. Tyrwhitt, and the said Edmund Tyrwhitt covenanted to pay during the joint lives of himself and the defendant L. H. Tyrwhitt the annual sum of £40 to the said George Burges for the benefit of the defendant L. H. Tyrwhitt.

On the 15th of March, 1882, the tribunal of first instance of Bordeaux made a decree on the petition of the wife, the husband concurring, declaring this marriage null and void. After this decree Louisa Harriet Duperrel lived with her father, who ceased to pay her the £40 annuity, but kept up the policies which remained in the hands of the trustee of the settlement.

On the 21st of July, 1899, Edmund Tyrwhitt died, and his will was proved by his executors, the plaintiff and the defendant G. R. Northcote.

The defendants G. S. Northcote and G. R. Northcote were the present trustees of the settlement.

The defendants had received the moneys payable under the policies since the death of Edmund Tyrwhitt.

The plaintiff now claimed a declaration that the said indenture of settlement was not binding on the estate of the said Edmund Tyrwhitt and ought to be delivered up, and an order to the defendants G. S. and G. R. Northcote to transfer and pay the trust fund to the executors of the will of the said Edmund Tyrwhitt.

*Bramwell Davis, Q.C.*, and *E. S. Ford*, for the executor.—The marriage was solemnized in France, the French court is therefore competent to declare the marriage null and void: *Sottomayer* v. *De Barros*, 27 W. R. 917, 5 P. D. 94.

*Badcock, Q.C.*, and *A. F. Peterson*, for the trustees of the settlement.—By the Consular Marriages Act, 1849, a marriage celebrated before a British Consul abroad is as valid as if it had been celebrated in her Majesty's dominions, and its validity can only be determined by an English court: *Simonin* v. *Mallac*, 2 Sw. & Tr. 67, 8 W. R. Div. Dig. 16. *Pemberton* v. *Hughes*, 47 W. R. 354, [1899] 1 Ch. 781, was a case of divorce, where different considerations apply.

*Bramwell Davis, Q.C.*, in reply.—The court should follow the decree of the French court unless it offends views of substantial justice: *Pemberton* v. *Hughes*.

FARWELL, J., after stating the facts: It is now contended that a marriage which has been declared null and void by a court in France should be also declared null and void in this country. In the first place I have to decide if the marriage is good in England. I do not think the case is distinguishable from *Simonin* v. *Mallac*. That was a case of two foreigners domiciled abroad who came to England and were married in order to evade the law of their own country, and the marriage had on that ground been there declared void. In the present case the parties are not two foreigners, but an Englishwoman and a Frenchman who were married before the British consul at Bordeaux in 1880. Now, a marriage of this nature was at that date governed by the Consular Marriage Act, 1849. [His lordship read the preamble and section 1 of the Act, and continued:] It is admitted that the marriage was solemnized in the manner provided by the Act. There is, therefore, first, an enactment of the English Legislature saying that a marriage solemnized as this was, before a duly authorized British Consul, shall be valid according to English law; and secondly, an English settlement providing for the wife and children, the trustee being an Englishman resident in England and the trust funds being in this country. I am asked to say that the marriage was void here because it was declared void in France. But it seems perfectly clear that the marriage was not void in England. The Act was exactly followed and covered the very case, thereby giving statutory validity to the marriage. In *Simonin* v. *Mallac*, Sir Cresswell Cresswell, in delivering the considered judgment of himself, Channell, B., and Keating, J., says: "The great importance of having some one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that of the law of a country where a marriage is solemnized shall, in that country at least, decide whether it is valid or invalid; the absence of any judicial decision, or *dictum*, or even any opposite opinion of any writer of authority on the law of

(*a*.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

nations have led us to the conclusion that we ought not to found our judgment in this case on any other rule than the law of England as prevailing amongst English subjects." In my opinion, on the true construction of this Act, this marriage must be treated as solemnized in England. The consulate must for this purpose be considered as English territory. The English Legislature, it is true, cannot make French territory English, but it can say that acts done in a certain manner shall have the same effect as if the territory were English. *Simonin* v. *Mallac* is therefore applicable, and whether the decree of the French court was good or not in France, this marriage is perfectly good in England. In *Sottomayer* v. *De Barros* there was an inability of the parties to contract *inter se*, and *Simonin* v. *Mallac*, though distinguished on those grounds, was cited without disapproval by the Court of Appeal. I therefore hold that the settlement is binding on the father's estate.

Solicitors, *Robins, Hay, Waters & Hay.*

---

Chan. Div.
Farwell, J. } March 12.

CARR v. LYNCH. (a.)

*Statute of Frauds—Memorandum in writing—Sufficient description.*

*The Statute of Frauds is satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed. Thus a letter stating: "In consideration of your having this day paid me the sum of £50, I hereby agree and undertake to grant you or your assigns a further lease of twenty-four years . . . of the . . . Warden Arms . . . immediately after the expiration of the term granted by the now existing lease, . . . such new lease to be at the same rental . . . and to contain similar covenants and conditions as are contained in the existing lease," but not containing the name of the person to whom it was addressed, was held to sufficiently identify the existing tenant of the premises (who had that day paid £50 to his landlord) to satisfy the statute.*

Action for specific performance of an agreement to grant a lease.

The defence alleged that the agreement relied on by the plaintiff was not sufficiently clear to satisfy the Statute of Frauds.

The defendant had granted a lease of the Warden Arms, Kentish Town, to Charles Smith for a term of twenty-eight years from the 24th of June, 1885, at a rent of £50.

This lease was assigned to Jayne in 1898.

Jayne negotiated with the defendant for an extension of the lease, and in December, 1895, they agreed together that Jayne should have a further term of twenty-four years for a fine of £50. Jayne paid this sum to the defendant, who thereupon handed him the following memorandum:

"3, Avenue-villas, Cricklewood, London, N.W.,
"Dec. 30, 1898.

"Dear Sir,—In consideration of you having this day paid to me the sum of £50 (fifty pounds), I hereby agree and undertake to grant you and your assigns a further lease of 24 years (twenty-four), 'W. L.,' of the premises known as the Warden Arms, 27, Warden-road, Kentish Town, London, N.W., to run immediately after the expiration of the term granted by the now existing lease dated the 24th of June, 1885, and made between William Lynch and Charles Smith of the premises. Such the new lease to be subject to the same rental, £50 (fifty pounds), and to contain similar covenants and conditions as contained in the now existing lease.

"(Signed) WILLIAM LYNCH.
"Witness—ARTHUR FREDERICK KEEVES JAYNE."

The plaintiff subsequently took an assignment of the existing lease, and the benefit of the extension from Jayne.

The plaintiff was prepared with evidence to prove that Jayne had signed his name intending to be bound by the memorandum, and that signing his name apparently as witness only was done by mistake. The defendant admitted that Jayne had paid him £50, but alleged that the agreement with him was only for an extension for fourteen years, and that the memorandum was not sufficient to satisfy the statute.

*Younger, Q.C.*, and *W. Baker*, for the plaintiff.—The memorandum sufficiently defines Jayne as the proposed lessee, for he is admitted to be the person who paid the £50, and he was then the lessee of the premises, a further lease could therefore only be granted to him or his assigns.

*Ingpen, Q.C.*, and *A. L. Ingpen*, for the defendant.—The description is insufficient, for others might have paid £50 on the 30th of December, 1898, and a "further lease" might be a reversion to anyone. The description is therefore insufficient to identify Jayne as the person to whom the lease was to be granted: *Potter* v. *Duffield*, 22 W. R. 585, L. R. 18 Eq. 4; *Williams* v. *Jordan*, 26 W. R. 230, L. R. 6 Ch. D. 517.

FARWELL, J.—I should be sorry if I had to allow the defendant's plea of the Statute of Frauds to prevail in this case. If the parties are so described that their identity cannot be fairly disputed, the statute is satisfied according to the rule in *Potter* v. *Duffield*. In this case it is plain on the memorandum that the lease is to be granted to the person who paid the £50. This is quite as good a description as the word "proprietor," which was held sufficient in *Sale* v. *Lambert*, 22 W. R. 478, L. R. 18 Eq. 1, and it is admitted in the defence that that person was Jayne. If further authority is wanted there is the recent case of *Plant* v. *Bourne*, 46 W. R. 59, [1897] 2 Ch. 281. *Id certum est quod reddi potest.* A further point, which, by itself, might have been more difficult, is the reference to a "further lease." If, however, I had felt any doubt on the first point, the employment of this phrase would, in this case, have removed it, though apart from the context the phrase might only have pointed to a reversionary lease. The alleged mistake as to the word "witness" might also have been relied on if it had been necessary to hear evidence. But the first is sufficient to dispose of the case, and I give judgment for the plaintiff with costs.

Solicitors, *Williamson, Hill, & Co.; Leggatt, Rubinstein, & Co.*

---

Chan. Div.
Farwell, J. } March 6.

FOAKES v. JACKSON. (a.)

*Settlement—Power of appointment—Transfer of property by all parties interested—Release of power.*

*Any dealing with property subject to a power of appointment which is inconsistent with the exercise of that power, releases the power.*

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

(a.) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

Action, with witnesses, for an account of a trust estate.

By a marriage settlement made in 1858 the *Ipswich Journal* with its appurtenances were settled upon trust for the wife for life for her separate use without power of anticipation, with remainder, as to one moiety, upon trust for F. J. Foakes Jackson, her son by a former marriage, during his life, remainder upon trust for the benefit of his children, and in default of such children upon the trusts of the other moiety, which were for the husband for life, and after his decease for F. J. Jackson and the children or issue of the marriage as the husband and wife should jointly appoint, and in default of such appointment as the survivor should appoint, and in default of such appointment upon certain trusts for the benefit of F. J. Jackson and the children of the marriage.

Only one child of the marriage, a son named W. J. E. Foakes, survived to attain a vested interest under the settlement.

By an indenture dated the 14th of June, 1886, to which the husband and wife, Jackson, and W. J. E. Foakes (the two latter of whom had both attained the age of twenty-one years) were parties, the property subject to the settlement was transferred and assigned to Jackson for his own use and benefit, he covenanting to pay to W. J. E. Foakes (after the death of his mother) one-fourth of the net annual profits.

The plaintiffs, who were the infant children of W. J. E. Foakes, claimed under a subsequent appointment by the husband after the wife's death. The defendants, the trustees of the settlement and Jackson, claimed that the deed of 1886 was an execution of the joint power of appointment, or in the alternative operated as a release of that power, and that consequently the later appointment was ineffectual. This point was argued as a preliminary objection.

*Bramwell Davis, Q.C., Rawlinson, Q.C.*, and *T. T. Method*, for the defendant Jackson, argued that the deed of 1886 showed a clear intention to pass the property to Jackson, and therefore was an exercise of the joint power, and the absence of any allusion to the power was not material.

*P. M. Walters*, for one of the trustees.

*J. G. Wood*, for the other trustee.

*Hamilton, Q.C., Griffith-Jones*, and *M. Griffith-Jones*, for the plaintiffs, contended that the deed did not show on its face that the husband and wife intended to exercise their joint power of appointment. The property was only assigned to Jackson for purposes of management. [FARWELL, J., referred to *In re Lyons and Carroll's Contract*, [1896] 1 I. R. 383.] The deed of 1886 was, therefore, no exercise of the power, and the rights of the surviving donee to exercise the subsequent power in favour of the infant plaintiffs was not thereby affected.

FARWELL, J., after referring to the settlement of 1858 and the deed of 1886, said: In my opinion the deed of 1886 operated either as an appointment under the joint power or as a release of the husband's power. It might have been more difficult to hold that it operated as an appointment if the parties entitled in default of appointment had not concurred; but as they and the donees of the power all joined with the intention of passing the property, which could only pass absolutely indefeasibly by an appointment, the deed would—and I should hold, if it were necessary in order to give full effect to the deed, that it did—operate as an appointment. In *In re Hancock, Malcolm* v. *Burford-Hancock*, 44 W. R. 426, 45, [1896] 2 Ch. 173, a husband who had power to appoint amongst his children, and also a power to appoint by deed one-fourth of the income to his wife for her life, exercised the latter power by two deeds in favour of each of two successive wives, having in the interval between the two deeds irrevocably appointed one-third of the trust funds to each of his three children by the first marriage. It was there held that the appointment in favour of the second wife was ineffectual, and Lindley, L.J. [1896] 2 Ch. at p. 183, approved the rule that any dealing with the estate by the donee of the power inconsistent with the exercise of a power put an end to it. In the present case all the persons interested are parties to the deed, and they intended to transfer the estate to Jackson absolutely, and whether the deed operated by appointment or release the plaintiffs have no title, and their action must be dismissed with costs.

Solicitors, *A. M. Griffith Williams; Walters, Walters, Wood, Walters, Rawlinson, & Deverell; H. O. Soutter.*

---

Chan. Div. Farwell, J. — March 5, 6.

MAY v. PLATT. (*a*.)

*Vendor and purchaser—Construction—"All estate, term, and interest . . . in land coloured red in plan"—Covenant for title—Damages—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-section* 1 (a).

*A conveyance expressed to be supplemental to a "principal agreement," wherein the vendor, "as beneficial owner," assigned and conveyed "all the estate, term, and interest . . . in the said piece of land coloured red in the said plan annexed to the said principal agreement, and a copy of which is annexed hereto," is a covenant by the vendor that he has the interest given to him by the principal agreement in the land coloured red.*

*Where the vendor has not all the land coloured red in the plan, he is liable to make good the damage which the purchaser suffers by the deficiency.*

Action for damages for breach by the defendant of the covenants for title implied by the Conveyancing Act, 1881, s. 7, sub-section 1 (*a*).

By an agreement dated the 13th of June, 1891, between J. A. Brand and the defendant, the defendant was entitled to a lease, on completing certain buildings, of certain pieces of land coloured red and yellow in the plan annexed to the deed. On the plan a certain piece of land lying next to the land coloured yellow, which formed a slipway from the river, was coloured red, and there was nothing to distinguish it from the rest of the land coloured red.

Towards the end of 1891 the defendant agreed to sell the land coloured yellow in the plan. Upon a resurvey the slipway was found to belong to the land coloured yellow, and with the assent of the defendant a lease of the land coloured yellow was granted, including the slipway.

On the 15th of September, 1898, the defendant agreed in writing to sell to the plaintiffs all his estate, term, and interest in the principal agreement of the 13th of June, 1891, in the land coloured red on the said plan annexed thereto.

By an indenture dated the 30th of November, 1898, and made between the defendant of the one part and the plaintiffs of the other part, and expressed to be supplemental to the principal agreement of the 13th of June, 1891, after reciting that the plan annexed to the indenture now in statement was an exact copy

(*a*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

of the plan annexed to the said principal agreement, and the lands coloured red and yellow on the plan annexed to such principal agreement were exactly delineated on the plan annexed to the indenture now in statement, and were therein also coloured red and yellow; and reciting that a lease of the land coloured yellow had been duly granted in respect thereof under the principal agreement; and reciting the agreement of the 15th of September, 1898, it was witnessed that the defendant "as beneficial owner doth hereby assign and convey unto the purchasers, their executors and administrators, all the estate, term, and interest of him the said J. E. Platt under and by virtue of the said principal agreement, in the said piece of land coloured red in the said plan annexed to the said principal agreement, and a copy of which is annexed hereto, and the full benefit of the said principal agreement and all rights, powers, and privileges of him the said J. E. Platt thereunder, to hold the same unto the purchasers, their executors, administrators, and assigns, for ever."

The fact that the slipway had been included in the lease of the land coloured yellow on the map was discovered by the plaintiffs after the conveyance. The defendant admitted that the slipway had been leased with the land coloured yellow, but alleged that the plaintiffs' agent was aware of the fact before the conveyance, that the difference was immaterial, and that the slipway was included in the conveyance by inadvertence and contrary to the true intention of the parties, and counterclaimed for rectification of the conveyance. The plaintiffs denied all these allegations.

*Warmington, Q.C.*, and *MacSwinney*, for the plaintiffs.—The defendant has broken the covenant implied when he conveyed as "beneficial owner." The defendant cannot by parol evidence show that there was something agreed on outside of the written contract. The conveyance and the agreement both agree, and any evidence to show that what was agreed to be conveyed was not all the land coloured red, but that a part is not included, is not admissible: *Davies* v. *Fitton*, 2 Dr. & War. 225; *Cato* v. *Thompson*, 9 Q. B. D. 616; 31 W. R. Dig. 210; *Page* v. *Midland Railway Co.*, 42 W. R. 116, [1894] 1 Ch. 11. The defendant is not entitled to rectify the agreement, for the error is not common to both parties. If the defendant were allowed to rectify it would be allowing him to vary the agreement by parol and then grant him specific performance of the agreement so varied.

*Hughes, Q.C.*, and *Whinney*, for the defendant.—The assignment is of the defendant's "estate, term, and interest . . . of the piece of land coloured red on the plan annexed to the principal agreement." This means "estate, term, and interest, if any." The plaintiffs should have ascertained the nature and extent of the interest: *Delmer* v. *M'Cabe*, 14 Ir. C. L. Rep. 377; *Allen* v. *Holton*, 37 Mass. 458; *Sweet* v. *Brown*, 53 Mass. 175. *Cooke* v. *Founds*, 1 Lev. 40, is distinguishable. The defendant is entitled to rectification on the ground that there was a mistake if the covenant applies at all. If the mistake is not mutual the remedy is rescission with the option of accepting rectification: *Harris* v. *Pepperell*, 16 W. R. 68, L. R. 5 Eq. 1; *Garrard* v. *Frankel*, 30 Beav. 445. [FARWELL, J., referred to Dart on Vendors and Purchasers (6th ed.), 839.]

FARWELL, J.—The plaintiffs ask for a declaration that the defendant is liable to make good the damage they have suffered by the breach on the defendant's part of the covenant for title implied in the conveyance of the 30th of November, 1898. It is said that the covenant is not applicable. That is a question of construction. The conveyance first refers to the principal agreement, under which the defendant held, and then the defendant conveys as beneficial owner all his estate, term, and interest under and by virtue of the principal agreement in the piece of land coloured red in the plan annexed to the principal agreement. It is said that that is equivalent to saying "all such estate and interest, if any," as the defendant may have in the piece of land coloured red, and, inasmuch as he had no interest at all in the slipway, the covenant does not extend to it. In my opinion that is not a sound construction. Several cases have been cited, but the form of this conveyance appears reasonably plain. The words "all the estate, term, and interest" are put in with reference to the principal agreement and show that what is conveyed is not freehold, but the estate limited by the principal agreement. There are two things to consider—namely, the *quantum* of the estate of the assignor and the limits of the property to which that estate applies. The *quantum* of the estate is limited to the estate which the defendant had under the principal agreement and the limits of the property are defined by the part of the plan coloured red. The defendant covenants that he has the interest given to him by the principal agreement in the land coloured red. That is the fair and reasonable construction of the covenant. I treat the American authorities with respect, but they are decisions on the construction of other deeds and do not assist me in the present case. The Irish case of *Delmer* v. *M'Cabe* is also merely a decision on the words of a particular covenant. The point of the decision appears to me to be found on p. 382, where Monaham, C.J., construing the covenant, says: "There is no covenant that the party is seised in fee simple, or of any estate whatever, as is, to say the least of it, generally found in the conveyance of an estate in fee simple; or that he has power to convey a fee simple as for a freehold or any particular estate; but he has good power to convey his estate and interest under the deed of 1841, saying, as I read it, almost in so many words—'I do not know what estate I have under the deed of 1841; whether it is freehold or chattel; but whatever it is, I give it to you as I have got it; I have not done any act to dispose of it or incumber it; and, such as it is, I sell it to you.'"

That is merely a decision on construction, and it is not for me to say whether I agree with it or not. If it were intended as a decision that the generality of the witnessing part of a deed could be limited by reference to the covenant, it would be contrary to the decisions of the Court of Appeal in *Page* v. *Midland Railway Co.* I may observe that *Delmer* v. *McCabe* is referred to in Elphinstone on the Interpretation of Deeds at p. 468, where the old English case of *Cooke* v. *Founds* is cited as a decision to the contrary. On that point, therefore, I am of opinion that the covenant is applicable.

Then it is said that the plaintiffs by their agent knew of the diminution of the land coloured red before the date of the conveyance. I have rejected evidence on that point altogether. First of all, I cannot admit it as a defence in the action, if there is a latent ambiguity in the description of the property conveyed so that the words used are susceptible of two meanings; but where there is, as here, no ambiguity at all, but the property is conveyed by a clear and definite description and plan, parol evidence to contradict the deed is altogether inadmissable. If authority is wanted for that proposition it is supplied by *Cato* v. *Thompson*. *Page* v. *Midland Railway Co.* also shows that the generality of the covenant for title cannot be restricted by proving that the defect was known to

the purchasers—*i.e.*, in this case by showing that the plaintiffs knew that the plan was coloured red beyond the true boundary. If the covenant is clear and refers to the property expressed to be conveyed, evidence is not admissible to contradict it, and even the recital in the conveyance in *Page* v. *Midland Railway Co.* showing the defect was held not admissible for that purpose, that being only an illustration of the principle that clear, unambiguous words in the witnessing part of the deed cannot be contradicted by a recital.

I now come to the consideration of the counterclaim, which asks for rectification. In my opinion, the evidence tended to show there was a mistake is inadmissible for this purpose also. In a suit for rectification parol evidence of material mistake is of course admissible to show that the completed deed is not in accordance with the true agreement between the parties; but when such agreement is itself in writing and is plain and unambiguous and in exact accord with the deed, it is obvious that the person claiming rectification must first rectify the agreement. But what does that involve? In a case like the present, where the vendor counterclaims for rectification only, he necessarily implies that he desires the transaction to stand as rectified; or, in other words, starting *de novo* with the contract, he first asks the court to rectify it, and then grant specific performance of the contract as rectified. This is contrary to the well-settled practice established by cases such as *Woolam* v. *Hearn*, 7 Ves. 211, that a plaintiff cannot obtain specific performance of a written contract with a parol variation. If further authority is wanted it will be found in *Davies* v. *Fitton*, where Lord St. Leonards says: "It is said that there is a mistake in the deed; I, however, cannot see any. The question and the cause is, whether the lease has been prepared in conformity with the agreement? The plaintiffs say that by the agreement I can reform the lease; if this be so, parol evidence is not required, but the parol evidence is tendered to show that the lease is contrary to the spirit of the agreement"—that is, it is not in accordance with the true intention of the parties—"inasmuch as there is something *de novo* the contract agreed upon between the parties which was omitted in the lease. Now, the rule of law is so well settled that it is idle to discuss it. How can I receive parol evidence on the part of a plaintiff to rectify a written agreement of which he seeks a specific execution? I cannot decree a specific performance with a variation of a new term, no matter how inconsiderable that term may be—as, for instance, the payment of taxes—nor how clearly the term may be proved by parol evidence. The court cannot receive the evidence." Then he goes on a little later to say: "If the plaintiff had come here to have the contracts executed, I must have given them the precise lease which actually exists. Can I now reform this lease by that evidence, which if the lease existed *in fieri* would be inadmissible to aid the carrying it into execution? It would be more violent, I think, now to reform this lease by that evidence than formerly to use it for the purpose of executing the contract." That seems to me to be a clear decision that I cannot admit parol evidence to rectify a conveyance made in accordance with a written contract without first rectifying the contract and enforcing it as rectified, and this I have already said I cannot do. Then the defendant has pressed me to admit the evidence on the ground that it would show the parties are not *ad idem*, and the plaintiffs, as defendants to the counterclaim, would be put to their election to accept rectification or submit to rescission. This case does not, I think, really arise for my decision at all, because I am bound to reject the evidence altogether. I would point out, however, that the counterclaim asks only for rectification. In my judgment, in order to get rescission after conveyance the allegations would have had to be very different. I have always understood the law to be that in order to obtain rectification there must be a mistake common to both parties, and if the mistake is only unilateral, there must be fraud or misrepresentation amounting to fraud. It is true that Lord Romilly in *Harris* v. *Pepperell* and *Garrard* v. *Frankel*, and perhaps Bacon, V.C., in *Paget* v. *Marshall*, 33 W. R. 608, appear to have shrunk from stigmatizing the defendant's conduct in terms as fraud, but they treated it as equivalent to fraud, and in my opinion would have had no jurisdiction to grant the relief that they did in the absence of fraud. Rescission after conveyance of land can only be obtained on the ground of unfair dealing: *Brownlee* v. *Campbell*, 5 App. Cas. 925, 29 W. R. Dig. 232 (per Lord Selborne), and *Soper* v. *Arnold* 36 W. R. 207, 37 Ch. D. 96 (Cotton, L.J.). It is only necessary to say this in the present case, in consequence of the defendant's argument: if it were a case of fraud which unravels everything, there would be no difficulty in looking into the evidence to see how the contract was induced, as well as how it was carried out, but in the absence of fraud—of which there is no suggestion—I cannot see how the evidence could be admitted for any purpose whatever; there will therefore be a declaration that the defendant is liable to make good the damage, and an inquiry as to the amount. The defendant must pay the costs of the action, the costs of the inquiry being reserved. The counterclaim will be dismissed with costs.

Solicitors, *Leighton & Savory; Field, Roscoe, & Co.*, for *Wrigley, Claydon, & Trustram*, Oldham.

---

Q. B. Div. (Mathew, J.) — May 25, 28; June 1.

DRIEFONTEIN CONSOLIDATED MINES (LIMITED) *v.* JANSON.

WEST RAND CENTRAL GOLD MINES (LIMITED) *v.* DE ROUGEMONT. (*a.*)

*Insurance—Bullion—Seizure by Government of assured's country—Subsequent declaration of war—Insurance of property of enemy.*

*Gold bullion, the property of a company registered and carrying on business in the Transvaal, was insured at Lloyd's during transit from the mine to the United Kingdom by a policy which covered the usual risks of capture and detention. The gold, while in transit, was seized on the 2nd of October by the orders of the Transvaal Government. At that date it appeared probable that hostilities might shortly break out between this country and the Transvaal, but hope of a peaceful settlement had not been entirely abandoned. On the 11th of October, hostilities commenced. In an action on the policy, it having been agreed that the case was to be dealt with as if the war was over,*

*Held, that, as at the date of the seizure a state of war did not exist, the plaintiffs were not, as alien enemies, disentitled to recover.*

The first of these two cases was an action on a policy of insurance subscribed by the defendant and other underwriters at Lloyd's.

The plaintiffs were a gold mining company incorporated according to the laws of the South

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

African Republic and carrying on business in the Transvaal.

By the policy, certain gold bullion belonging to the plaintiffs was insured during transit from the mine near Johannesburg until its arrival in the United Kingdom. The policy covered the usual risks of capture and detention.

On the 2nd of October gold which was the subject matter of the insurance was seized by agents of the Transvaal Government while in course of transit. Actual hostilities between the governments of the Transvaal and of this country began on the 11th of October.

The plaintiffs alleged that the gold had been lost through perils insured against—viz., by seizure or theft by agents of and for the behalf of the Transvaal Government.

The material points of the defence and the arguments of counsel are fully stated in the judgment.

The second action was also on a policy of insurance on gold, and the claim also arose out of a seizure of gold by the Transvaal Government. The only points of difference between the two cases were, that in this case the plaintiffs were a company registered in England, and that a portion of the gold seized was at the time of seizure—namely, on the 9th of October, in the charge of a bank at Johannesburg, where it had been received from the plaintiffs on the 5th of October.

The defendant alleged as to this portion that it was never in transit, and that the policy never attached; and, alternatively, that there had been a deviation or abandonment or change of voyage relieving the defendant from liability.

*Lawson Walton, Q.C., Carver, Q.C.*, and *Scrutton*, for the plaintiffs.

*Joseph Walton, Q.C., Lord Robert Cecil, Q.C.*, and *J. A. Hamilton*, for the defendants.

The following cases were cited in the course of the arguments: *Reg.* v. *Jameson*, 12 Times L. R. 551, 45 W. R. Dig. 43; *The Herstelder*, 1 C. Rob. 113; *The Boedes Lust*, 5 C. Rob. 233; *Furtado* v. *Rodgers*, 3 Bos. & P. 191; *The Ionian Ships*, Spink's Prize Court Cases, 193; *Kellner* v. *Le Mesurier*, 4 East 396; *Gamba* v. *Le Mesurier*, *ibid.* 407; *Brandon* v. *Curling*, *ibid.* 410; *Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gall. 104; *The Jonge Klassina*, 5 C. Rob. 297; *M'Connell* v. *Hector*, 3 Bos. & P. 113; *Conway* v. *Gray*, 10 East 536; *Aubert* v. *Gray*, 3 B. & S 163; *The Danckebaar Africaan*, 1 C. Rob. 107; *The Success*, 1 Dod. 131; *Campbell* v. *Innes*, 4 B. & Ald. 423; *The Abby*, 5 C. Rob. 251; *The Packet de Bilboa*, 2 C. Rob. 133; *The Hoop*, 1 C. Rob. 196; *Potts* v. *Bell*, 8 T. R. 548.

*Cur. adv. vult.*

June 1.—MATHEW, J.—The first of these two cases was an action brought by the plaintiff company against underwriters at Lloyd's to recover a loss through the capture of gold while in transit from Johannesburg to the United Kingdom. The policy covered the usual risks of capture and detention. The facts were these. The gold was despatched from Johannesburg by train on the 2nd of October, 1899, and while in transit was seized at the frontier of the Transvaal by the orders of the Transvaal Government. On the 9th of October, an ultimatum was issued by the Transvaal Government to the British Government announcing that if certain demands contained therein were not complied with, the conduct of the British Government would be treated as a declaration of war at 5 p.m. on the 11th of October. The gold was taken absolutely out of the control and possession of the plaintiff company, and a demand was made on the underwriters for payment of the amount of the loss, but the underwriters refuse payment on the grounds stated in the points of defence as follows: "The plaintiffs are a limited company incorporated according to the laws of, and domiciled within the territories of, the present South African Republic and are alien enemies of her Majesty, and the loss, if by any peril insured against, was by an arrest, restraint, or detainment by the Government of the present South African Republic incidental to actual or expected hostilities against her Majesty and made for a purpose connected therewith—namely, to supply the said Government with funds with which to levy war upon her Majesty, as they were then proposing, and shortly afterwards proceeded, to do, whereby the plaintiffs' claim herein is for an indemnity which is contrary to public policy and is altogether barred and cannot be maintained." For the purposes of this action it was agreed that the Blue Books issued by the Government of this country should be treated as containing the evidence of all material facts, and it was further agreed that no dilatory plea should be set up based on the fact that the plaintiffs were an alien company, and therefore could not sue in this country while the war lasted. The case, it is agreed, is to be dealt with as if the war was over.

The first point raised on behalf of the defendant in argument was this. It was said that it was shown from what appears in the Blue Books that the Transvaal Government were, on the 2nd of October, resolved to go to war, and that the seizure of the gold was made with the object of obtaining the means of prosecuting the war effectively. The seizure was said, therefore, to be like an attack actually made by a belligerent Power upon enemy's territory. If that contention is right, all the serious consequences of a state of war would have followed from the 2nd of October. If war had then commenced, all commercial relations between the subjects of the two countries should have ceased, and every kind of communication that could relieve the pressure of hostilities was a violation of duty. I am clear that there was no state of war on the 2nd of October. What constitutes a state of war is well described in Hall's International Law (4th ed.), at p. 63: "When differences between States reach a point at which both parties resort to force or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant." There was no evidence before me of the existence on the 2nd of October of an intention to settle the dispute by force, and, in fact, the negotiations for a peaceful settlement continued for several days after that date. Moreover both Governments were aware of the seizure of the gold, and neither treated it as an act of war. There was no evidence of any intention at that date to issue the sudden ultimatum which was eventually delivered on the 9th of October. Under these circumstances it is quite clear that the intention to wage war subsequently cannot be treated as creating an actual state of war. Now, if the seizure was not at the time a hostile act, as is my view, and if there was no other valid defence, the plaintiffs would clearly be entitled to sue and to recover for the loss. But a second point was raised. It was said that when the war did actually break out the seizure of the gold, even assuming it to have been a neutral act before, then acquired a hostile character. The proclamation of war on the 11th of October related back, it was said, to the previous seizure on the 2nd of October, with the same result as if the seizure

had been made after war was declared. In support of this contention the cases of *The Herstelder*, 1 C. Rob. 113, and *The Boedes Lust*, 5 C. Rob. 233, were cited. The case was said to resemble that of an embargo laid on alien ships followed by a declaration of war. In such a case it would seem not to be disputed that the embargo would become a capture, and it is argued that here the seizure of gold ripened into a capture after the declaration of war. There is, however, in my opinion, no analogy between a seizure such as this, which only applies to the owner of the property seized, and an embargo. In the case of an embargo the property remains in the owner's hands, but here the bullion was wholly removed from the control of the plaintiff company by seizure *in invitum*. Again, the cases referred to relate to the acts of a belligerent and throw no light on a case such as this, where the seizure was by the Transvaal Government of the property of a company which is in the position of a subject of that Government. There is no authority for this supposed doctrine of the relation back from the date of the declaration of war to the date of the seizure, creating a state of war which did not in point of fact exist at that time.

Then it was said there was a further ground of defence. It was said that, even if the original seizure was not an act of war, and that a right of action would, therefore, under ordinary circumstances, have arisen as soon as the seizure took place, the subsequent war extinguished the liability of the underwriters. The principle of law contended for was that any contract which operates to protect the enemies' property from the calamities of war is against public policy and illegal. The cases cited in support of this supposed principle were the well-known prize cases decided in the early days of this century—*Furtado* v. *Rogers*, 3 Bos. & P. 191; *Kellner* v. *Le Mesurier*, 4 East 396; *Gamba* v. *Le Mesurier*, *ibid.* 407; *Brandon* v. *Curling*, *ibid.* 410, and the statement of the law in Duer on Insurance, vol. 1, p. 414. No doubt it is the law that insurances by English underwriters against English capture are illegal. In the words of Lord Ellenborough in *Brandon* v. *Curling*: "Where the insurance is upon goods *generally*, a proviso to this effect shall in all cases be considered as engrafted therein—viz., *provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer.* Because during the existence of such hostilities the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other." The ground for this, as stated in the earlier cases, is that to permit such insurance would be obviously repugnant to the interests of the State. Capture is intended to defeat and weaken the resources of the enemy, and a contract of indemnity would frustrate that purpose. It is said that the principle disclosed by these authorities should be developed and extended so as to include this case, and that a further exception should be written into this policy—viz., the exception of capture by a belligerent Government of the property of its own subjects. It is said that to pay during the war the amount of the loss of the assured must increase the resources of the belligerent Power of which the assured is a subject. Without dealing at length with this proposition and without considering how far it could, in fact, be maintained, it is obvious that no such contention can arise when the war is over, and it has been agreed, as I have already said, that this case is to be treated as if the war were at an end. The principle contended for on behalf of the defendant would wholly override the well-known rule of law that, when both the contract of indemnity is entered into and the loss occurs before the commencement of hostilities, the declaration of war only suspends the remedy whilst the war lasts. The authorities for that proposition are to be found in *Flindt* v. *Waters*, 15 East 260, *Alcinous* v. *Nigreu*, 3 W. R. 25, 4 E. & B. 217, and Duer on Insurance, vol. 1, p. 434. I am satisfied that my judgment in the first case must be for the plaintiff company.

A point was argued at considerable length by Mr. Carver in his reply that the plaintiff company was not an alien enemy, on the ground that the majority of the shareholders were French, Germans, and subjects of the Queen, and that a very few were the subjects of the Transvaal Government. In my opinion this trading company, being incorporated under the Transvaal law, must be treated as a Transvaal subject, and it is clear from the decision of Story, J., in the case referred to by Mr. Walton, *Society for the Propagation of the Gospel* v. *Wheeler*, 2 Gall. 104, that a company may be treated as an alien enemy.

In the second action the only material difference is that a point was raised by the defendant that at the time of the loss the goods were not covered by the policy. That is a question of fact. The course of business followed by the plaintiffs was that parcels of bullion were, from time to time, forwarded from the mine to a bank in Johannesburg, in order that they might be sent on to the United Kingdom, and the bank would make advances against the parcels of bullion. On the 5th of October the bullion in question was sent from the mine to the bank, and, according to the terms of the policy, the gold was to be covered at and from the mines to its ultimate destination. The plaintiffs' manager hoped that when the gold reached the bank an advance would be made and the gold would be forwarded to its destination in the usual way; but by that time it had become known that seizures of gold by the Transvaal Government were taking place, and the bank refused to make any advance on the gold, or to take any responsibility in respect of forwarding it. It was thereupon arranged that the gold should remain in the custody of the manager of the bank, and should not be forwarded without further communication from the plaintiffs. It was contended on behalf of the defendant that the gold was never in transit. On the evidence before me I am clearly of opinion that it was. It was also argued that in the circumstances there was a deviation, but I am satisfied that it was the duty of the assured, under the well-known clause of the policy, to take proper steps to safeguard the subject-matter of the insurance, and that the arrangement come to between the plaintiffs' manager and the bank was the best that could be done in the position of the property in question at that time.

My judgment, therefore, in the second case also must be for the plaintiffs for the amount claimed.

*Judgment for the plaintiffs in both actions.*

Solicitors for the plaintiffs, *William A. Crump & Son.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

Prob. Div. & Adm. Div. } Feb. 6.
Divorce. }

MEDWAY v. MEDWAY. (a.)

*Divorce — Practice — Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39)—*Case remitted to justices—Wife's costs.*

*A deed of separation is conclusive evidence on the question whether the husband has neglected to maintain his wife.*

*Where a wife has obtained a decision in her favour under the Summary Jurisdiction (Married Women) Act,* 1895, *and comes to the High Court to support it, she will have her costs.*

Appeal against order of Kent justices, Ashford division, by husband against a separation order and an order to pay to his wife 10s. a week.

The parties were married in 1882 and lived together till July, 1887, when a deed of separation was executed and the wife left for America, where she remained till August, 1899, when she returned, and on going to her husband's house was refused access. She then took out the necessary summons under the Summary Jurisdiction (Married Women) Act, 1895, and on the 27th of December, 1899, the justices, after hearing both the husband and wife, made the order appealed against on the ground of wilful neglect to provide reasonable maintenance for the wife, and by such neglect caused her to leave and live separate and apart from him.

*Barnard*, for the husband, in support of the appeal, submitted (1) that there was no evidence that the appellant had wilfully neglected to provide reasonable maintenance for his wife and by such neglect had caused her to live separate and apart from him; (2) that there was evidence that the appellant and respondent were living apart under an agreement for a separation; (3) and that the complaint had not been made within six calendar months from the time when the matter of complaint arose. The offence of neglect is not a continuing offence (*Ellis* v. *Ellis*, 45 W. R. 144, [1896] P. 251), therefore the six months elapsed before summons. If anything was paid under the separation deed that makes it binding. The deed was evidence of the separation by consent and afterwards the husband was not bound to receive her back.

*Macoun*, for the wife, said the neglect to support began in August, 1899.

*Barnard* in reply.

JEUNE, P.—In this case, to my mind, this marital agreement lies at the root of the whole matter. The only charge is that the appellant wilfully neglected to provide reasonable maintenance for the respondent, and by such neglect caused her to leave and live separately and apart from him. If the charge was intended to be that he did that in 1887, an application founded thereon would be out of time. *Ellis* v. *Ellis* decided that point, and I think rightly. Therefore, unless there was some other occasion upon which the ground of complaint can be justly fixed, the application of the wife must necessarily fail. But that depends upon the memorandum of agreement. If it be the case that the wife left the husband by mutual consent, but only temporarily, if it was not settled between them in 1887 that there was to be a final separation, I do not see why she necessarily forfeited her right, at any time when that temporary arrangement came to an end, to return to him; and when she did return and he shut the door in her face, it might fairly be contended that at the time there was neglect by him to provide maintenance for her, and by such neglect caused her to leave and live separately and apart from him. It all depends upon the agreement. I am reluctant to say that the justices who saw the parties and heard their evidence were wrong in accepting the wife's story, extraordinary though it be, as against that of the husband.

But the justices had not all the evidence before them, they had not the solicitor who attested the document, and whose evidence should be conclusive. If he, being called as a witness, were to say that the consideration money was paid, and if he were to deny, saying that the document was not worth the paper it was written on, that would be conclusive against the wife on this summons. I think, therefore, that this case must be remitted to the justices, with the expression of opinion that the document is conclusive, one way or the other, when the whole available evidence as to it shall have been given. If the document is invalid, then, in my opinion, the wife has a good ground of complaint; if valid, the husband has a complete answer.

BARNES, J.—I am of the same opinion. It is impossible to decide this case properly without knowing whether there is a binding agreement or not. Although the justices have decided upon the evidence of the wife that it is not, it is, in my judgment, desirable that the case should be sent back to them in order that the whole of the evidence on the subject may be given.

*Macoun* asked for the wife's costs.

JEUNE, P.—The rule that we have already laid down and acted upon is that, where a wife has obtained a decision in her favour and comes here to support it, she ought to have her costs. The appellant must, therefore, be ordered to pay the costs of the respondent upon this appeal.

Solicitors for the appellant, *Riddell & Co.*, for *Lewis & Pocock*, Cardiff.

Solicitor for the respondent, *B. Walker Kemp.*

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

---

Prob. Div. & Adm. Div. } Feb. 6.
Divorce. }

WALTON v. WALTON. (a.)

*Practice—Appeal—Notes of proceedings in court below—Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39).

*Upon appeals under the Summary Jurisdiction (Married Women) Act,* 1895, *two copies of the notes of proceedings in the court below ought to be provided for the use of this court by the appellant, and the costs will be allowed on taxation.*

Appeal by the husband from an order made under the Summary Jurisdiction (Married Women) Act, 1895.

*Barnard*, for the appellant.

JEUNE, J.—Only one copy of the notes taken by the clerk in the court below has been supplied for our use. I wish it to be known that in future two copies will be required, and should be furnished in every case by the appellant. The costs thereof will be allowed on taxation.

BARNES, J.—I quite agree two copies should be supplied.

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

The case was ultimately adjourned on other grounds not necessary to report.

Solicitors, *Pitman & Sons.*

---

Prob. Div. & Adm. Div. Admiralty. } May 21.

"THE CRIMDON." (a.)

*Practice — Caveat warrant — Arrest — Personal undertaking to put in bail — Release — Condemnation in damages and costs occasioned by arrest — Rules of the Supreme Court, ord.* 29, *r.* 18.

*The plaintiffs in an action* in rem *against a foreign vessel caused the vessel to be arrested by the marshal, notwithstanding that a* caveat *warrant had been taken out and an undertaking given by the defendants' solicitors to put in bail in the suit or pay money into court within three days of its institution. At the time of the arrest the vessel was not under the arrest of the court in any other action, and was about to leave the port where she was then lying.*

*The defendants, on the day after the arrest, applied to the court for the vessel to be released and that the plaintiffs should be condemned in damages and costs. At the hearing of the application the plaintiffs never objected in any way that the personal security of the defendants' solicitors was inadequate.*

*Held, that the vessel must be released and the plaintiffs condemned in the damages and costs occasioned by the arrest.*

This was an action of salvage instituted on behalf of the owners, master, and crew of *The Helene Woermann in rem* against the foreign steamship *Crimdon*, her cargo and freight.

Previously to the institution of the action a *caveat* warrant had been entered by Messrs. Downing, Bolam, & Co., solicitors for the owners of *The Crimdon*, but notwithstanding this *caveat* the plaintiffs on the 26th of March last took out a warrant of arrest under which *The Crimdon*, her cargo and freight, were arrested on the 27th of March at Plymouth, where she had been brought in after the salvage services proceeded on in the action, and from which, but for the arrest, she would have been removed.

On the 28th of March last the solicitors for the defendants applied to the judge in chambers to order the release of *The Crimdon* and to condemn the plaintiffs in damages and in the costs of and incidental to the arrest, release, and detention of the said vessel, her cargo and freight, and the judge, no objection having been raised by the plaintiffs to the personal security of the defendants' solicitors, who had in due course undertaken, in pursuance of ord. 9, r. 12, of the Rules of the Supreme Court, to enter an appearance in the action and give bail therein in three days after notice in a sum not to exceed the value of *The Crimdon*, her cargo and freight, or to pay such sum into the Admiralty Registry—(see Rules of the Supreme Court, 1883, Appendix A, Part II., Form No. 18)—the judge ordered *The Crimdon*, her cargo and freight, to be released, and directed the rest of the application to stand over until the trial of the action.

Bail having been perfected in accordance with the above undertaking of the defendants' solicitors, the action came on on the 17th of May to be heard before the judge in court (Mr. Justice Barnes), when the court awarded salvage remuneration to the plaintiffs and further adjourned the plaintiffs' application for the condemnation of the defendants in the costs and damages occasioned by the arrest.

May 21.—On this day the adjourned application came on to be heard before the judge in court.

*Aspinall, Q.C.*, and *Noad*, for the defendants, in support of the application.—There was no reason alleged by the plaintiffs for even supposing that the defendants' solicitors would not perform their undertaking or that if they failed in so doing they were not sufficiently solvent to meet any liability they might become subject to by reason of such failure. The defendants cannot therefore show any "good and sufficient reason" within the meaning of the Rules of the Supreme Court, ord. 29, r. 18, for having arrested *The Crimdon*. The wording of the rule is quite wide enough to include cases like the present, where the vessel arrested was not arrested in any other action, and was at the time of the arrest not in a dock or dismantled but ready to proceed on her voyage. The court has a discretion where there has, as in this case, been a disregard of a rule of practice to condemn, not only in costs, but also in damages. In some cases a condemnation in costs would be sufficient (*The Johann Benjamin*, Pritchard's Admiralty Digest, vol. 1, p. 370), here it is submitted there should also be a condemnation in damages.

*Scrutton* and *Chaytor*, for the plaintiffs, *contra*.—Ord. 29, r. 18, cannot extend the jurisdiction of the court to condemn in damages, which jurisdiction is confined to cases where there has been, as has not been the case here, *crassa negligentia*—[They referred to *The Don Ricardo*, 28 W. R. 431, 5 P. D. 121; *The Evangelismos*, Swa. 378; *The Kate*, Br. & Lush. 218, 12 W. R. Adm. Dig. 32; *The Volant*, Br. & Lush. 321; *The Strathnaver*, 1 App. Cas. 58, 24 W. R Dig. 281; *The British South Africa Co.* v. *Campanhia Moçambigue*, [1893] A. C. 628.] A plaintiff who has a claim *in rem* has a right to have the *res* detained under the hand of the law (see *The Corner*, Br. & Lub. 161, 12 W. R. Adm. Dig. 27) until money sufficient to answer the claim has been paid into court or adequate bail by two sureties has been put in. Moreover, in a salvage suit the plaintiff is entitled to have the vessel proceeded against kept under arrest until the nature of the *res* has been ascertained. Ord. 29, r. 5, and the rule as to damages on which the defendants rely ought not to be strained to take away that right. A failure by a solicitor to perform his undertaking may indeed subject him to be attached, but the rules will be construed most strongly in favour of the liberty of the subject, and in all probability a plaintiff who has been compelled to part with the security of the *res* before bail has been perfected may in the result find himself without any security for his claim at all: *The Anna and Bertha*, 7 Asp. Mar. Law Cases, N. S. 31, 39 W. R. Dig. 8; Williams and Bruce's Admiralty Practice (2nd ed.), pp. 281-282.*

---

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

* Ord. 29, r. 18, is a reproduction of one of the Admiralty Court Rules of 1859 to the same effect, and, although general in terms, and capable (as the case of *The Crimdon* shows) of being applied where there has only been the issue of one warrant of arrest, was, it would seem, probably framed merely for the purpose of altering the practice which, up to its introduction, prevailed of a claimant *in rem* being able to insist on his right of arresting the property he proceeded against, notwithstanding that at the time the same property was already under the arrest of the court in other actions: see *The Europa*, 13 Jur. 856.

BARNES, J.—The question is whether the plaintiffs are liable, in the circumstances, to be condemned in costs and damages, under the Rules of the Supreme Court, ord. 29, r. 18, for proceeding to arrest *The Crimdon* after a *caveat* warrant had been filed by the solicitors for the defendants.

The writ in the action was issued against the vessel on the 26th of March in the district registry of Plymouth. On the same day the warrant of arrest was extracted out of the same registry. Before the warrant was issued, the agents of the plaintiffs and the district registrar inquired, in accordance with the practice, whether a *caveat* had been filed against the arrest of *The Crimdon*; and the principal registry communicated by telegram the fact that there had been a *caveat* against the arrest already entered. It appears that on the same day, the 26th of March, Messrs. Downing, Bolam, & Co. filed the usual undertaking, which is termed the *præcipe* for *caveat* warrant. It was signed by Messrs. Downing, Bolam, & Co. without any qualification. The plaintiffs, however, according to the correspondence, were not satisfied with the undertaking of the solicitors—although their own solicitors appear to have been satisfied with it—and decided that the ship should be arrested. The ship was arrested on the following day, the 27th, and she remained under arrest until the evening of the 28th of March. In the meantime, on the 28th of March, on an application made to me to direct the ship to be released from arrest, I ordered that the warrant should be discharged, and *The Crimdon* was accordingly released. At the time, according to my recollection, no objection was made to the solicitors who had signed the undertaking. Then the question comes to this, whether for the day's detention, from the 27th to the 28th of March, which has been proved to have involved the defendants in expenses amounting to about £18 and costs, the plaintiffs ought to be held responsible.

Counsel for the plaintiffs raised an objection to the form of the undertaking, and argued that the solicitor does not render himself personally liable by signing such a document; but there is no substance in the objection to the form of the undertaking, which is in accordance with the rules, and my opinion is that if a solicitor himself signs an undertaking of this kind, without any qualification, he is personally responsible to see that it is carried out.

The next point taken on behalf of the plaintiffs is that it is not unreasonable to object to the substitution of a personal undertaking for the security of the ship, and that the plaintiffs were, therefore, entitled to insist upon the arrest. On this point rule 18 of order 29 of the Rules of the Supreme Court is material. It provides as follows:

"Nothing in this order shall prevent a solicitor taking out a warrant for the arrest of any property notwithstanding the entry of a *caveat* in the '*Caveat* Warrant Book,' but the party at whose instance any property in respect of which a *caveat* is entered shall be arrested shall be liable to have the warrant discharged and to be condemned in costs and damages unless he shall show to the satisfaction of the judge good and sufficient reason for having so done."

Now, "the good and sufficient reason" referred to in that rule, which the plaintiffs have to show to my satisfaction, is stated by them to be that they were not bound to accept a solicitor's undertaking, and were entitled to arrest the ship. I think that that is an erroneous position to take up, having regard to the rules and practice of this court. It seems to me that the position arrived at by these rules is analogous to that of bail being tendered. In the case of bail tendered names have to be given, and the other party has twenty-four hours to consider whether he will object to the bail or not, and if he objects to the bail he can do so; but I think he objects more or less at his peril, for in the case of *The Corner*, after objection had been taken and found to be unfounded, the party objecting was held liable in damages. It seems to me that a similar class of considerations comes in in this case. There is an undertaking and the object of it is to prevent a ship being arrested by providing other adequate security.

If the undertaking is given it appears to me that the opposite party is to have a reasonable opportunity of seeing whether he ought to accept or not; and if he does not accept and shows to the satisfaction of the court good and sufficient reason for objecting, then he will not be condemned in the costs and damages.

I think in this case if the plaintiffs had said, "We have not time to act," or "We are not satisfied on some grounds that there is adequate security," the point would have been a perfectly good one to take; but neither of those points were raised. The plaintiffs themselves—not their solicitors—said, "No; we will not have this undertaking at all, we will have the security of the ship," and they never raised any question as to requiring time to investigate. The only ground really taken now is that the plaintiffs are entitled to have the security of the ship; but the rules say, "No; if you have adequate security otherwise." That is the real principle, and I think it is right from a business point of view. The whole object of the rules and of the practice in this court is to facilitate business, and if a solicitor can give an undertaking which is satisfactory, then business will proceed easily and satisfactorily. On the other hand, if no facilities of this kind are to be allowed, the rules are rendered practically nugatory, and the argument put forward on behalf of the plaintiffs is that the rules are practically useless. To my mind, however, there was reasonable time—because there was practically a day—and if the point had been taken and inquiry made into the standing of the parties it would have been found that there was no reason for arresting the vessel.

It seems to me that no ground has been shown for objecting to this undertaking, and, therefore, that the plaintiffs are liable for the costs and damages occasioned by the arrest. So far as the damages are concerned, I think that they ought to be fixed at £18, and the costs must be a matter for taxation.

Solicitors for the plaintiffs, *Botterell & Roche*.

Solicitors for the defendants, *Downing, Bolam, & Co.*

## Court of Appeal.

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — July 2, 3.

LADY BATEMAN v. FABER AND OTHERS. (a.)

*Settlement — Construction — Meaning of "income"— Tithes—Rent-charges under the Improvement of Land Act,* 1864 (27 & 28 *Vict. c.* 114)—*Voluntary abatements to tenants—Unlet property—Personal occupation of unlet property.*

*In calculating the amount of "income"—as the word is used in a popular sense—actually derived from landed estates for any particular year, it is right to deduct from the gross receipts sums payable by way of tithe and of rent-charges under the Improvement of Land Act,* 1864, *created by the predecessor in title of the person whose "income" is being calculated; and also such voluntary abatements of rent to tenants as are fairly necessitated by the circumstances of the case. The owner of the "income" is not to be credited with rent for any part of the property which happens to be unlet during the particular year.*

*Decision of* Kekewich, J. (ante, *p.* 165), *affirmed.*

Appeal from a decision of Kekewich, J., (*ante*, p. 165).

By an indenture dated the 26th of June, 1867, and made between Lord Bateman of the one part and Sir Edward C. Kerrison and R. Ellice of the other part, after certain recitals from which it appeared that Sir Edward C. Kerrison and R. Ellice had agreed to lend Lord Bateman the sum of £11,430 on the condition (*inter alia*) that the provision thereinafter appearing should be made for Lady Bateman, Lord Bateman, in consideration of the said loan, conveyed to Sir Edward C. Kerrison and R. Ellice his life interest in certain freehold estates upon trust as a security for the due performance by him of certain covenants relating to the loan, and subject thereto upon further trust to pay the rents and profits of the said estate to Lady Bateman for the term of her life. The deed, however, contained a proviso that if at any time Lady Bateman should "succeed to an income in her own right of £8,000 or more per annum for her separate use, then, and in such case, the trust" thereinbefore declared on her behalf should "absolutely cease and determine." After such determination of the said trust the property was to be held in trust for Lord Bateman. Lord Bateman subsequently mortgaged his interest in the estates to one Andrew Montagu, who died on the 8th of October, 1895, leaving the defendant, G. D. Faber, his sole executor and residuary legatee.

Sir Edward C. Kerrison died in 1886, and on his death Lady Bateman became entitled to a life estate in certain properties in Norfolk, Suffolk, and Middlesex. A question having arisen as to whether Lady Bateman, after her succession to these estates, had not become entitled to an income in her own right and for her separate use of £8,000 or more per annum, the present action was commenced by her against G. D. Faber and others, claiming (*inter alia*) a declaration that she had not at any time since the execution of the indenture of 1867 succeeded to an "income" of £8,000 or more per annum.

On the trial of the action before Kekewich, J., on the 24th of June, 1897, it was ordered that an inquiry should be held in chambers as to whether the plaintiff had at any time since the 31st of December, 1885, succeeded to an income of £8,000 or more a year, and the further consideration of the action was reserved. An inquiry having been held in chambers, the master found that in no year subsequent to the said 31st of December, 1885, had Lady Bateman's income from the Kerrison estates exceeded the sum of £8,000. He found, however, that her income for the single year from the 11th of October, 1886, to the 11th of October, 1887 (which had been agreed on by the parties for taking the account), had amounted to £7,750 12s. The defendants thereupon issued a summons to vary the master's certificate on the grounds that in calculating the lady's income for the year in question the master had wrongly deducted from the gross amount received by her—(1) certain payments for tithe; (2) certain rent-charges made by a predecessor in title under the Improvement of Land Act, 1864; and also (3) certain voluntary abatements of rent made by her to tenants. The master had also failed (4) with respect to certain property called Oakley Hall, which had been unlet during a portion of the year in question, to credit Lady Bateman with the estimated rental value during the unlet period; and had further neglected (5) to credit her with an adequate occupation rent for Broome Hall, which she had personally occupied during the whole year in question, though he had, in fact, credited her with an occupation rent calculated on the basis of six months' occupation only. He had also (6) taken account only of copyhold fines actually received by her during the particular year. It would have been fairer to have taken an average for the past eleven years.

Kekewich, J., on the 29th of November, refused, however, to vary the master's certificate, and from this decision the defendants now appealed.

*Swinfen Eady, Q.C.*, *Butcher, Q.C.*, and *Brabant*, for the appellants, used arguments generally similar to those employed in the court below.

The only authority cited by them was *Reg.* v. *Commissioners of Southampton*, 18 W. R. 1171, L. R. 4 H. L. 449.

*Warrington, Q.C.*, and *Beaumont*, for the respondents, were not called upon.

Lord ALVERSTONE, M.R.—First of all with regard to tithe, the deduction of which is objected to. I cannot see that there is any reasonable doubt about it. Whether you regard the tithe as payable by the landlord instead of by the tenant under the Act of 1890, or whether you regard it as a right against the land which the clergy have, I think it is impossible, in the construction which we must put upon this covenant, to assume that Lady Bateman succeeded to an "income" in respect of the £1,000 that she has had to hand over for tithe during the year in question. In the same way with regard to the charges under the Improvement of Land Act, 1864. They were not created by Lady Bateman herself, or else very different considerations might possibly arise. They were created by her predecessor, and lasted for a number of years, and when she came into the enjoyment of these estates the income was already charged by statute with these annual payments. It is said that we ought to dissect these payments, and see how much was principal and how much interest; and it is said that to the extent that they were principal the property was gradually getting richer. That may be perfectly true; and it may very possibly anticipate or accelerate the time when Lady Bateman will succeed to an income of £8,000 a year; but I cannot consider that we are entitled in the year when these particular charges were paid to assume that she was in receipt

(a.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

of them as income, because part of the charges would improve and benefit the estate.

I now come to Oakley Hall; and I confess that, if we were dealing with Oakley Hall upon an average of years, I should have felt a very great difficulty in the matter, because it does seem to me there is very substantial evidence that Oakley Hall, with the shooting, is worth a considerable sum of money—£900 or £1,000 a year—and in this particular year £250 only is credited for it. But that really depends upon the basis upon which this year has been selected, and in the year which was taken it is not really disputed that all that Lady Bateman received was this proportionate amount of rent, £250. Therefore, adopting the principle of treating this year as being the best year for the defendants' purpose, I do not think we shall be justified in setting aside the master's finding that £250 was the amount of income that year, because she was possessed of a house and shooting which could be let in other years for a larger sum.

I have had some difficulty, speaking for myself, about Broome Hall; and if I could see any substantial evidence that the correction with respect to Broome Hall alone would turn the scale, I should desire to hear what counsel for the respondent had to say on the subject, but I think, for reasons which I will shortly explain, that it will not really avail the defendants. It appears that the master has only allowed £125 as representing six months' occupation rent, whereas there is no doubt that Lady Bateman was in occupation for the whole twelve months; and I am not prepared to say that, if the account even for that year were taken in the strictest way, you ought not to charge another £125. But that, of course, will not be enough for the defendants. They would still require £225 to make up the required total. Can we increase—have we materials on which we should be justified in increasing—the annual amount which has been allowed for Broome Hall? I think we have not. There was evidence, upon which the master may have acted, that the cheapest thing for Lady Bateman to do was to go into that house herself. It is said we ought to act upon an advertisement in which they had asked £500 a year for the house and shooting. I think we ought not to act upon a mere expectation, when the question is upon this basis, what was the income to which Lady Bateman actually succeeded? I really think we have not the materials before us, and I do not think we ought to disturb such a finding as that of the master. With regard to the allowances, it would be idle to suggest that allowances made in this class of tenancy are really charitable or gifts of bounty. If there had been an occasion of a son coming of age, and every tenant had been allowed a quarter of a year's rent; or if there had been a deduction of 10 per cent. in consequence of some great victory; or if a beneficent landlord had returned to his tenants a certain sum of money; nobody would contend, I suppose, that payments such as these would not have been a part of the income that the landlord enjoyed. But in the present case it is clearly established that, in the case of a large estate which it is not suggested has been improperly managed, these payments were simply ordinary allowances made off rents fixed some time beforehand in order to maintain good relations between landlord and tenant; and I think it would be extremely wrong to take the view that Lady Bateman, because she might have distrained in law, or because she might have brought an action for recovery of arrears of rent, must therefore be assumed to have made a voluntary gift out of her own income in respect of money which never came into her pocket at all.

With regard to the copyhold fines, the question stands or falls upon the basis of taking the average of years or the single year.

For these reasons I have come to the conclusion that we cannot overrule the judgment of Kekewich, J., or vary the master's certificate.

RIGBY, L.J.—I cannot think that this is a question of gross income. Lady Bateman is to receive the income in her own right and for her separate use. Take the case of tithes. Did she receive that part of the income which was necessarily paid away for the tithe rent-charge due to the parson for her separate use? I do not think she received it in that sense at all; and I think we must take a reasonable view and satisfy ourselves as to whether the lady ever had a spending income of £8,000. If we do this the items of tithe rent-charge must, of course, be deducted, as also the items of the other charges upon the property which were created, not by her, but by her predecessor, and were at the time payable.

But there is a more formidable question, What is meant by an income of £8,000 a year? That does not *primâ facie* mean an income of £8,000 for one year; it is "per annum," and there might very well be in the first year in which Lady Bateman came into the enjoyment of the property a smaller receipt for her separate use than in subsequent years; and if the defendants had claimed to have an average taken, I am not at all sure that they would not have done rightly. It would have been rather difficult to say over how many years such an average should go; but it would be very plausible and probably right to say that at any rate a fair average should be taken. But for reasons best known to themselves the defendants have chosen to go upon the first year; and I understood their counsel to explain that they thought that that was the best year for their purpose. That at once does away with all idea of charging Lady Bateman with any income that she did not actually receive, on the ground that in subsequent years she might have received something. Even if the Oakley Park property might have been let in subsequent years, yet *non constat* that all the farms which are now reckoned at the rate they were paying in that first year would have been let in other years for the same rents. In fact we know nothing about it. We have nothing to go upon except the items of the receipts and disbursements for that first year which the parties have treated as binding.

Now, with regard to Broome Hall we have not heard the argument on the other side. We do not know what might have been said. It appears *primâ facie* perfectly correct that Lady Bateman should be charged with an occupation rent of certain properties, but we do not know what might have been said to the contrary effect. I shall, however, assume, without deciding it, that an occupation rent of some kind was payable in cases where there was occupation. Now, Broome Hall is such a case; and, if it were made out that so much extra occupation rent ought to be charged against Lady Bateman in respect of that property as would bring her income over £8,000 a year, I should have considered that at any rate we should call upon counsel for the respondent, but I am also satisfied that that result cannot be reasonably expected. I will assume, although we have not heard the argument, that it would be reasonable to charge Lady Bateman for a whole year, she having practically been in actual occupation for the whole of that period. Sir Edward Kerrison died on the 12th of July. When precisely this lady went into occupation has not been called to our attention, but assuming she went into possession at once, and assuming further that, by virtue of that

entry into possession and subsequent occupation during the whole time she was chargeable with the year's rent, yet even that fact would only make the charge, according to the master's view of the evidence, £250 instead of £125, and that would not alter the merits of the case between the parties. I do not see in any of the evidence a sufficient *primâ facie* reason for charging Lady Bateman with as much money as would bring the total amount of her income up to £8,000 a year. Therefore, I concur, and having read very carefully the judgment of Kekewich, J., I say that I concur generally with all that he says, and I have only been left in doubt upon this question of Broome Hall, which I do not think can be, upon the evidence the parties have given, the basis of a judgment making the charge by way of occupation rent so large as to bring Lady Bateman's income above the total of £8,000 a year.

COLLINS, L.J.—Concurring, as I do in all points, with the judgment of Kekewich, J., I have nothing to add to the judgments which have been already given.

*Appeal dismissed.*

Solicitors, *Greenfield & Cracknall; Hudson, Matthews, & Co.*

---

App. Bankruptcy.
(Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) June 29.

*In re* WENHAM.
*Ex parte* BATTAMS. (*a.*)

*Bankruptcy — Practice — Partnership — Dissolution of partnership—Judgment against dissolved partnership —Bankruptcy notice addressed to dissolved partnership — Petition against late partners separately— Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 4 (1) (*g*), 115, 143—*Bankruptcy Rules, rr.* 136, 262— *Bankruptcy Forms, Form* 6—*Rules of the Supreme Court, ord.* 48a, *rr.* 1, 4.

*A creditor issued a writ for the recovery of a sum of money against a recently-dissolved firm of partners. The writ was served personally on each of the late partners, and judgment was obtained against the late firm. The creditor subsequently served a bankruptcy notice addressed to the late firm on each of the two former partners, but neither of them complied with its terms, and he thereupon presented separate petitions against them, addressed to each in his individual name.*

*Held, that, even if the bankruptcy notice was technically incorrect and insufficient, yet that this was a case in which the court might overlook the defect under the terms of section* 143 *of the Bankruptcy Act,* 1883; *but*

*Held* (Collins, L.J., *dissenting*) *that the bankruptcy notice was, as a matter of fact, technically correct and sufficient within the terms of section* 115 *of the Bankruptcy Act,* 1883.

Per Rigby, L.J.—*The general rule of law or equity embodied in order* 48a, *though not the order itself, is applicable in bankruptcy.*

*Decision of the* Divisional Court (Wright *and* Darling, JJ.) (44 SOLICITORS' JOURNAL, 468) *affirmed.*

Appeal from the decision of a Divisional Court (Wright and Darling, JJ.), reported in 44 SOLICITORS' JOURNAL, 468.

The debtor, John Wenham, and his brother, T. R. Wenham, formerly traded in partnership, under the style of "Wenham Brothers," as butchers, at Woking and elsewhere, down to the 18th of November, 1899, when the partnership was dissolved by an order of the Chancery Division.

On the 8th of December the petitioning creditors, Battams & Co., issued a writ against "Wenham Brothers" for goods supplied to the firm during the currency of the partnership. This writ was personally served on both John and T. R. Wenham, but they entered no appearance, and allowed judgment to be given against them by default on the 30th of December.

On the 8th of January Battams & Co. issued a bankruptcy notice founded on the judgment, and addressed to "Wenham Brothers." This notice was served personally on both the brothers on the 9th of January. Neither of them complied with its requirements; and on the 30th of January Battams & Co. presented separate petitions against the brothers Wenham addressed to each of them in his own name, alleging as the act of bankruptcy relied on their respective non-compliance with the requirements of the bankruptcy notice addressed to "Wenham Brothers."

The petitions came on for hearing on the 20th of March, when T. R. Wenham consented to a receiving order being made against him; but John Wenham took the technical objection that he had not committed any act of bankruptcy by non-compliance with a bankruptcy notice addressed to "Wenham Brothers."

The registrar of the county court of Guildford accordingly dismissed the petition; but his decision was reversed by the Divisional Court on the 14th of May.

From this decision of the Divisional Court John Wenham now appealed.

*Cooper Willis* and *Tyndal Davies*, for the appellant.—Even assuming that the judgment recovered against "Wenham Brothers" is good as against "John Wenham" under ord. 48, rr. 1 and 3, and that he is consequently liable to execution under ord. 48, r. 8, yet bankruptcy is governed by a code of its own (*In re Gyll, Ex parte The Board of Trade*, 37 W. R. 164, 5 Morr. 272), and the Rules of the Supreme Court do not apply. This petition could only be presented against John Wenham under the terms of section 115 of the Bankruptcy Act, 1883, and those terms have not been complied with, having regard to the terms of rule 262 of the Bankruptcy Rules, which must be read in close connection with the section: *Ex parte Young, In re Young*, 30 W. R. 330, 19 Ch. D. 124; *In re Howes, Ex parte Hughes*, 40 W. R. 647, [1892] 2 Q. B. 628; *In re Collier, Ex parte Dan Rylands* (*Limited*), 8 Morr. 80. Technical defects such as this are insuperable in bankruptcy, especially in the initiation of the proceedings. The only course now open to the respondent is to commence proceedings over again and to recover judgment against John Wenham under his own name. *Jackson* v. *Litchfield*, 30 W. R. 531, 8 Q. B. D. 474, and *Ex parte Ide, In re Ide*, 35 W. R. 20, 17 Q. B. D. 755, are distinguishable cases.

*George Wallace* and *H. C. Davenport*, for the respondent.—These proceedings are valid within the conditions laid down by section 4 (1) (*g*) of the Bankruptcy Act, 1883. A number of cases collected in Lindley's Partnership in a note on p. 217 (5th ed., 1888)—*e.g.*, *Ex parte Williams*, 11 Ves. 3; *Crawshay* v. *Collins*, 15 Ves. 218; and *Butchart* v. *Dresser*, 4 De G. M. & G. 542, show that the dissolution of a partnership cannot get rid of obligations incurred during its continuance. This principle was codified by section 38 of the Partnership Act, 1890. Anyhow, any formal defect is covered by section 143 of the Bankruptcy Act, 1883.

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

*Cooper Willis*, in reply.—Section 143 of the Bankruptcy Act, 1883, was never meant to cure a defect so radical as this.

Lord ALVERSTONE, M.R.—Upon the first point in this case—namely, as to whether or not there was a good judgment against John Wenham, there really is no doubt. Ord. 48*a*, rr. 1 and 4, establish to my mind perfectly clearly that where you have served a partner and obtained judgment after proper service, or where he has appeared in person, then judgment against the firm is a judgment which can be enforced against the partner. Then there remains the perhaps more important point, whether or not there was a defect in the bankruptcy notice, founded on the judgment, which prevents the bankruptcy proceedings from being good. Speaking for myself, I have no doubt that these proceedings are strictly in order, in accordance with the true and real meaning of section 115. I think that the words of that section, "being partners," are intended to mean "those who have carried on business in partnership for the purpose of the liability which is sought to be enforced." I do not think that any dissolution would enable partners to get rid of the liability to have proceedings taken against them under that section when such proceedings are intended to enforce against them, and against the members of the firm, a partnership debt. For this purpose, I think the true meaning of section 115 is this—that if persons are partners in a business, then bankruptcy proceedings can be taken against them in the partnership name. It is said that that is not the meaning of the section because of rule 262, which provides that a receiving order made against a firm shall operate as though it were made against each of the partners who at the date of the order was a partner in that firm. I think that is not the effect of the rule, and that it does not lead to the conclusion which is now contended for. Rule 262 is an enabling rule, enabling you to get a separate receiving order against individual partners. I think it cannot be held to cut down the rights and liabilities which arise from the language of section 115. Therefore, so far as these proceedings are concerned, I think that there is no objection to their having been headed, or directed, to "Wenham Brothers," although as a matter of fact at the time when the notice was issued "Wenham Brothers" no longer existed. It does not matter for this purpose whether the creditors were aware of that fact or not; though it would be a strange thing if any private dissolution could put an end to their rights. The claim was against the debtors while they were partners, "being partners" meaning "being in partnership for the purpose of their liability to have bankruptcy proceedings taken against them." Then we come for one moment to the preceding section (section 4, subsection 1 (*g*), of the Bankruptcy Act, 1883), under which the bankruptcy notice was issued. It is true that there has been a practice that the notice should follow the judgment, but it has not been sufficiently borne in mind that under the terms of rule 136 a bankruptcy notice ought to be in accordance with Form 6 in the Appendix, with such variations as circumstances may require. If we turn to Form 6 we find that it may be addressed to "A. B. or A. B. & Co.," and that it then provides that it shall be stated that judgment has been obtained. I can see no reason why it should not be indicated, if necessary, on the face of the bankruptcy notice, that it is directed to the members of the firm by name, although the body of it must, of course, follow the judgment. I should have thought that that was possibly the variation contemplated by the rules. It is quite clear, however, that, so far as the following out of this form is concerned, there is no substance in the objection now taken, because the judgment in the bankruptcy notice was in this case a judgment which had been actually obtained, and because it was a judgment which, as I have already pointed out, could be enforced against John Wenham. The only point about the notice which, it is suggested, might possibly be misleading is a point in connection with its heading, where it is addressed to "Wenham Brothers." It was served personally, and, if the view I take of section 115 is incorrect, counsel for the appellant is driven to contend there ought to have been separate proceedings on a separate notice, possibly involving a separate action and judgment, and that no person having properly obtained the judgment against "Wenham Brothers," although it was binding against individual partners, could lodge a bankruptcy notice addressed to the individual. In one breath he says, "You must follow the judgment; yet you must not make it clear that the judgment is going to be enforced against the individual." I also think that, under the circumstances of the case, this was a defect, if defect indeed it be, which could have been cured under section 143. There was a liability by John Wenham to satisfy this judgment. He was personally served. He was told it was in respect of a debt incurred whilst he was a partner of "Wenham Brothers." In the language of section 143 no "substantial injustice has been caused by the defect or irregularity complained of." Under all these circumstances I see no reason why the heading (if that is the proper designation to be given to the words) should not be amended. I think, however, that there is no substance in the technical objection raised; and I think that the Divisional Court was right in the decision to which they came.

RIGBY, L.J.—From the first I have been unable to see what ground of complaint John Wenham could possibly have under the circumstances of this case, meaning by "ground of complaint" any difficulty or perplexity or trouble in which he might possibly be involved. There have, of course, been general suggestions, but I have not heard a particular difficulty explained in a manner that I can understand. It is easy, it is true, to imagine cases in which, though there might be no solid ground of complaint, yet it would be quite enough under certain circumstances if you could show that the provisions of the Bankruptcy Act, and the rules made under it, had not been complied with. But that is not the case here. Technically, no doubt, an objection of a sort is open to John Wenham here. But what does it amount to when we look at its substance? Persons who carry on business under the name of a firm hold out in effect to those with whom they deal, "You can have your rights against us enforced on the basis of the firm." It has under many circumstances been held that they are not at liberty by a dissolution effectually to alter that state of things. I need only refer here to that particular rule 48*a*, which does not appear to lay down anything new, but to recognize effectually what was well known law before—*i.e.*, that people cannot alter in substance their relations to their creditors on the ground that they have dissolved partnership. That is a general principle of law as I understand it. Rule 48*a* is, no doubt, a particular application of it for the purposes of the High Court, and I quite agree with counsel for the appellant that, *qua* rule, it cannot be introduced into bankruptcy. It was not intended for that purpose. Bankruptcy has its own rules of procedure; but the rule which is the foundation, and I may say, in a sense, the justification, of order 48*a*, is a rule of equity—at any rate, a rule of general law—and general rules of law and

of equity are perpetually dealt with in bankruptcy though not repeated in the Bankruptcy Acts or in any of the bankruptcy rules. Now, we are justified in saying that the judgment against "Wenham Brothers" operated under the circumstances to charge John Wenham separately. Why, then, there should not be a bankruptcy notice founded on that judgment I am unable to see. For my part I think that counsel for the appellant is right in saying that we must follow the judgment. It would not be wise, or perhaps even permissible, to vary so much from the judgment as to include in the notice the individual names of the partners, but I think it must be right to issue a notice to "Wenham Brothers" and to call upon "Wenham Brothers" to defend that notice in such a way as is pointed out by the notice itself and by the decisions upon it. I am unable myself to see that there is any technical difficulty when the matter is thoroughly considered, and, therefore, I am constrained to say that in my opinion the judgment of the court below is quite right, and that this appeal fails.

COLLINS, L.J.—I cannot say that I feel so clear upon the question of the technical difficulty as do my learned brothers It seems to me there is a *primâ facie* technical difficulty; but I think it is one which comes within the amending section, and I think that obviously no sort of injustice will be done by using that section against John Wenham. But, apart from that, I have not altogether got over my misgivings as to the technical difficulty itself. In my opinion there was a perfectly good judgment obtained under the rules against John Wenham and his brother, they having been members of a firm which was subsequently dissolved. But then, when we come to the bankruptcy proceedings, we get into a new code. We leave the old rules of procedure behind us, and we are governed thenceforth by whatever principle the statute has thought proper to prescribe. We find the bankruptcy statute dealing with the case of a desire on the part of partners to make another person bankrupt; or on the part of somebody else to make partners bankrupt. The statute provides certain machinery for effecting this purpose; and without that machinery you cannot accomplish that end. It must be done under the machinery of the Bankruptcy Act, or it cannot be done at all. It seems to me that the machinery of section 115, whether by oversight or not, only contemplates proceedings by or against those who are partners at the time of the proceedings. Rule 262, again, contemplates proceedings only against persons who are partners at the time. It is only by putting some slight strain on the words of section 115 that you can get it to mean "persons who are partners at one time, but who are not at the time the proceedings were taken." But whether this is so or not, I think that this is obviously a case in which the court should exercise the power of amendment, if it has that power. It seems to me that section 143 amply covers this particular case. Therefore, for these reasons, I agree with my learned brothers that this decision must be affirmed with costs.

*Appeal dismissed.*

*Solicitors, Mann & Crimp; H. J. V. Philpott.*

---

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — June 26, 27.

RICE v. NOAKES & CO. (a.)

*Mortgage—Public-house—Leasehold—"Tied house"—Clogging redemption—Once a mortgage always a mortgage.*

*The principle of equity that nothing in a mortgage transaction will be permitted to clog, fetter, or impede the borrower's right to redeem is still valid and unimpaired.*

*A covenant in a mortgage of a leasehold public-house that the mortgagor shall, during the continuance of the lease, buy his beer only from the mortgagees, is a clog on the equity of redemption, inasmuch as it prevents the mortgagor from getting back the property unimpaired. The mortgagor is therefore entitled on redemption to an assignment of the premises free from the covenant.*

Santley v. Wilde, ante, p. 90, [1899] 2 *Ch.* 474, *distinguished.*

This was an appeal from a decision of Cozens-Hardy, J. (reported *ante*, p. 110).

In 1897 the plaintiff, a licensed victualler, purchased the lease of a public-house, known as the King's Arms, Camberwell, from the second mortgagees for £6,800. The term created by the lease would expire Christmas 1923.

The defendants, who were brewers, were first mortgagees under a mortgage which contained provisions almost identical with those of the mortgage next mentioned.

The defendants released their security to enable the sale to the purchaser to be made.

On the sale the plaintiff borrowed £4,850 of the purchase-money from the defendants upon the security of a first mortgage of the premises, dated the 7th of October, 1897.

By the mortgage deed the plaintiff demised the leasehold premises and fixtures and the goodwill of the business and benefit of the licences to the defendants, subject to the proviso for redemption.

The proviso for redemption declared that if the plaintiff should, either on demand by the defendants left at the demised messuage, or without such demand, pay to them the principal and interest to be then due on the security, then the defendants would at the request of the plaintiff surrender or reconvey the premises to the plaintiff or as he should direct; and the plaintiff covenanted to pay the principal sum and interest, and all further sums due for money advanced, and for goods sold and delivered by the defendants to the plaintiff. And the deed also contained the following provision: "And for the considerations aforesaid the mortgagor, so as to charge the premises hereby demised, into whosesoever possession the same may come, whether by act of the party or by operation of law or by any other ways or means however, and to the further intent that the obligation of this covenant may run with the land, doth hereby covenant with the company that the mortgagor shall not, nor will at any time during the continuance of the term aforesaid, and whether any principal moneys or interest shall or shall not be owing upon the security of these presents, use or sell, or permit to be used or sold, in, upon, or about the said demised premises any malt liquors except such as shall be *bonâ fide* purchased by the mortgagor of the company. And, further, that if and whenever there shall be a breach of the said covenant, he, the mortgagor, shall and will pay to the said company

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the sum of £1,000 as and for ascertained liquidated damages for each such breach, and will sell all such malt liquors pure, unadulterated, and unmixed, and of the like strength, character, and quality in all respects as the same shall be supplied to him." It was also declared that the words "the mortgagor" and "the company," except when otherwise controlled by the context, should, throughout the deed, include all persons deriving title under them respectively.

The plaintiff was willing to pay off all moneys due to the defendants under the mortgage, and required them, on payment being made, to reconvey the leasehold property to him, and to release him from the covenant by which the house purported to be "tied" to the defendants during the whole currency of the lease, or to transfer the mortgage to him and the benefit of the covenant to his nominee. The defendants were willing to reconvey or transfer the property but not to release or assign the covenant. The present action was brought that the plaintiff might obtain a declaration that he was entitled, not only to a reconveyance or transfer of the property, but also to a release or re-assignment of the covenant.

Cozens-Hardy, J., held that the "tie," though valid during the continuance of the security, could not be maintained after payment of all moneys due on the security, and granted the declaration asked for.

The defendants appealed.

*Haldane, Q.C., Eve, Q.C.*, and *Stanley Fisher*, for the appeal.—The two early rules of equity are—(1) There must be no clog on equity of redemption; (2) a mortgagee must not stipulate for collateral advantage to himself. Our contention is that we have here two quite separate transactions, though both are put on a single piece of paper. Hence not within the mischief of above two rules. Point still open, though some recent cases come near it: *Biggs* v. *Hoddinott*, 47 W. R. 84, [1898] 2 Ch. 307. [Lord ALVERSTONE, M.R.—Since *Mainland* v. *Upjohn*, 37 W. R. 411, 41 Ch. D. 126, it is no longer possible to say you may not stipulate for a bonus.] Yes, that case shows that collateral stipulation is now bad only if unconscionable. [Lord ALVERSTONE, M.R.—But how if collateral advantage continue after mortgage is paid off?] That is immaterial if the bargain not unconscionable. Here the "clog" is not on the equity of redemption, but on the property itself. This case is exactly covered by *Santley* v. *Wilde, ante*, p. 90, [1899] 2 Ch. 474, but is more in the favour of the mortgagor. The old doctrine of clogging has been cut down. The thin edge of the wedge was inserted in *Mainland* v. *Upjohn*. Since that case it has been open to the parties to make any bargain they like, provided it is not unconscionable. Prior to that, I admit, it was not open to a mortgagee to get more than his principal, interest, and costs.

They also referred to *Teevan* v. *Smith*, 30 W. R. 716, 20 Ch. D. 724.

*Astbury, Q.C.*, and *Beaumont, contra.* — *Salt* v. *Marquis of Northampton*, 40 W. R. 529, [1892] A. C. 1, shows that it is wrong to say that interest could be raised now, though it could not have been before *Mainland* v. *Upjohn*. In *Santley* v. *Wilde* two of the judges were under the impression that they were following *Biggs* v. *Hoddinott*, but *Santley* v. *Wilde* is distinguishable. In *Jennings* v. *Ward*, 2 Vern. 520, there was no very atrocious hardship, but the decision, it is submitted, was right. The rule as to clogging the equity of redemption has never been "blown upon" in *Santley* v. *Wilde* or any other case. There used to be three old rules: (1) There must be no clog on the equity; (2) there must be no collateral advantage; (3) no larger sum must be recoverable than principal and interest. Of these three rules 2 and 3 are undoubtedly gone. But there is no authority whatever for saying that 1 is gone.

*Haldane, Q.C.*, replied.

Lord ALVERSTONE, M.R.—This case is one of very great importance, and I am glad to think that the parties have such an interest and are in such a position that in all probability we shall have the guidance of the House of Lords in future upon it.

Having regard to one argument addressed to us, it is, I think, desirable that I should very briefly state the facts. [His lordship stated the facts, and continued:] The question is whether or not the covenant not to use malt liquors except those purchased from the defendants in this mortgage deed can stand. I have endeavoured to make myself acquainted with what I may call the history of the matter, and, speaking for myself, it seems to me quite impossible to say that this doctrine, which has been spoken of as "clogging the equity," is one which can be disregarded by the courts in the present day, or which has disappeared in consequence of any decisions. It is fair to say that the defendants did not contend that. The main argument is that this covenant was not a clog on the equity, but for the purposes of my judgment I will read the way in which the rule as to clogging was expressed by a great common law judge (Bowen, L.J.), who was the dissentient judge in the case of *Marquis of Northampton* v. *Pollock*, 39 W. R. 66, 45 Ch. D. 190, but whose expression of the rule was approved of by the House of Lords when the same case was before them under the title of *Salt* v. *Marquis of Northampton*. He said: "Whenever a transaction is in reality one of mortgage equity regards the mortgaged property as security only for money and will permit of no attempt to clog, fetter, or impede the borrower's right to redeem and to rescue what was and still remains in equity his own." I could not, of course, hope to express the proposition more clearly. I understand it to mean that the mortgagor is entitled to have back what he mortgaged, and that anything which would prevent his getting back what he mortgaged when the obligation as mortgagor is fulfilled will not be allowed to be good upon the ground that it fetters or impedes his right to redeem. It has been pointed out in the course of the argument that that language of Bowen, L.J., is expressly approved by Lord Bramwell, who stated the same proposition in somewhat different language, and therefore I need not quote the expressions that he used, but it is most important to observe that in *Salt* v. *Marquis of Northampton* no doubt whatever is thrown upon the general principle, and so much is it taken for granted that Lord Selborne in his judgment practically does not discuss it at all, and the whole discussion seems to have proceeded upon the question whether or not under the very peculiar and special circumstances of that case the rule did apply. Therefore I approach the consideration of this case from the point of view that the rule as stated by Bowen, L.J., still applies.

Now, in this case is it true that this covenant does not impair the property which the mortgagor is entitled to have back? If I may venture to use the expression, Does it or does it not clog the equity? What is the position? I should think in all probability, upon the authorities, it was a stipulation or a covenant that would run with the land in ordinary circumstances; but, in any event, if it is held to be binding, it provides that up to 1923—and assuming the money to be now paid off, that is for a period of twenty-four years—the owner of the property is not to be able to use it as a public-house,

obtaining beer in the best market, but he is to be bound to obtain beer from the mortgagees. However you regard it, it seems to me impossible to come to the conclusion that that is not a stipulation which diminishes the property which was originally mortgaged and which is intended to be reconveyed on repayment of the mortgage money. Whatever may be the proper mode of expressing it, in my opinion it is something which impairs or affects the property so that the mortgagor does not get it back. It is something which impedes the borrower's right to redeem and rescue that which was his own at the time that he mortgaged it. Now, that being so, apart from any alteration of the rule by any special case which has been decided by some authority binding upon us, I should have thought that the case was fairly clear. I will note in passing that as far as I can gather from the notes to *Howard* v. *Harris*, 2 Wh. & Tu. L. C. 11, there are a number of other cases in which this principle has been applied, so that I think it would be very difficult, even if there were not the judgment of the House of Lords as recently as the year 1892, to contend that that principle does not still apply.

Now, it is said that a course of decisions ending with *Santley* v. *Wilde* has laid down certain rules binding upon us which show that this particular contract is not one which affects the equity of redemption, but must be regarded as a collateral bargain, and therefore one which could be enforced. I think I may dismiss with a word the case of *Mainland* v. *Upjohn*, as to which I do not really know whether in early days such a stipulation would have been held to be legal. Probably before the usury laws were abolished it would not, and I am not sure that the courts of equity would many years ago have decided all these cases exactly as they have been decided. But I do not consider, taking these cases and seeing what they do decide, that I am in any way departing from those decisions. *Mainland* v. *Upjohn* was a case in which the mortgagee obtained further advantages in the shape of commissions and bonuses out of the property or out of the dealings with the property which was mortgaged to him, and is clearly distinguishable on the ground that it was a further money consideration in respect of the transactions of mortgage. *Biggs* v. *Hoddinott*, it has been suggested, carried the matter further. I doubt myself whether it did. There the stipulation was that the money should not be called in for four or five years. Again, whether or not that provision would have been considered in old days to be one which could be inserted, I do not think it is worth while stopping to consider. The Court of Appeal have decided that such a stipulation is good, and I should, speaking for myself, in that case see no reason at all to express the slightest dissent. It was a perfectly reasonable bargain that there should be a term fixed within which the money should not be called in, and during that time it was perfectly proper that the mortgagor should agree to purchase his beer from the mortgagee during the continuance of the mortgage, but if I have correctly stated the facts of the case, it is obvious that it was not a contract which affected the property when redeemed, or which could in any way be said to clog the equity of redemption or to interfere with the rights of the mortgagor.

Now, when we come to *Santley* v. *Wilde*, I admit it is very much more difficult, and if *Santley* v. *Wilde* had decided that such a contract as this did not clog the equity of redemption, of course we should be bound by it. Speaking for myself, I do not know that I should have come to the same decision as the Court of Appeal in *Santley* v. *Wilde* on the facts there without some difficulty. But for the purposes of to-day it is only important that we should see that we are not departing from any rule or material principle laid down in *Santley* v. *Wilde*, because it, of course, is binding upon us, and if we could have protected ourselves under that judgment it would have been a very easy way of disposing of this case. But when that judgment of the Court of Appeal is understood, certainly it did not purport to, and I do not think it did infringe in any way on the doctrine laid down by the House of Lords in *Salt* v. *Marquis of Northampton*. In that case Miss Santley, who was going to open a theatre, by the terms of her mortgage agreed that she would pay the principal amount back by instalments running over five years and would give a certain share of the profits for the remaining five years, the total term being ten years. There is no doubt that the profits would issue or might issue out of the property after the time when the mortgage money had been repaid, but it is clear that the Court of Appeal, as I read that judgment, considered that that was not in any way something which issued out of the equity of redemption, but they thought it was a term of the mortgage that the property should be mortgaged as security for the profits as well as for the £2,000. Lindley, M.R., says: "The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law." After referring to the terms of the agreement in that case, he says: "That means that this lease is granted or assigned by the mortgagor to the mortgagee as security not only for the payment of the £2,000 and interest, but also for the payment of the one-third of the net profit rents to the end of the term. If I am right in the principles I have laid down, that does not clog the right of redemption upon the performance of the obligation for which the security was given." The declaration—which I confess at first, until I had studied the case, I did not immediately understand—was that the defendant was entitled to hold the mortgage during the residue of the term notwithstanding all the principal and interest had been paid, or, in other words, the court has construed that contract as a contract that the property should be charged for a period of ten years with an obligation to pay the profits as well as the security. Now, if that be so, one sees at once that there was no attempt there to infringe or to do away with the main principle, and that Lindley, M.R., came to the conclusion that on the face of that contract the lease was intended to be security for the profits, but he did not intend to say that, the mortgagor having discharged all her obligation, the property could still be held for the benefit of the mortgagee. That that is the correct view of the case is made clear, at any rate so far as the other two members of the court, Sir F. Jeune and Romer, L.J., are concerned, because they both decided that they were following *Biggs* v. *Hoddinott*, which, as I have already pointed out, was a case in which the collateral privilege given to the mortgagee was only to enure during the term of the mortgage. This distinction is a distinction which my brother Cozens-Hardy, J., has pointed out. He says at the end of his reference to *Santley* v. *Wilde*, "If I rightly understand the judgment of the Court of Appeal, it established that a mortgage of leasehold property expressed to be a security for the due discharge of future recurring obligations cannot be redeemed before those obligations have matured, even though the period covered by the obligations may

or must exceed the duration of the lease. I do not think any other or larger principle can be extracted from that case." That is the learned judge's view of what the principle of the decision was in *Santley* v. *Wilde*, which I have endeavoured to express from my own point of view, of course somewhat differently in language though not in principle. In my judgment *Santley* v. *Wilde*, rightly understood, does not afford any authority to the appellants here, for the proposition that such a contract as this, which, as I have already said, in my opinion does affect the equity of redemption and prevent the mortgagor getting his property back, is one which can stand having regard to the principle which the House of Lords so emphatically recognized in *Salt* v. *Marquis of Northampton*.

It remains only to say one word upon the point which at one time seemed to me to create some difficulty. It was said that this was really a tied house all the time, and that the substance of the transaction is that Rice, having bought a tied house, only mortgaged a tied house, and, therefore, only got back, or was entitled to get back, a tied house. On the face of the deed it is treated as being a free property, but I do not think this contention would help the defendants in this case, because even assuming that there had been this original contract, and the defendants were entitled to refer to it, if I am right it was a stipulation which could have been got rid of by the original mortgagor. I do not think that, that being the nature of the stipulation, the defendants are entitled to say Rice is to be considered as having taken the property subject to a restriction that he could not get rid of, and, therefore, I do not think the defendants' position would be better even assuming that they are entitled to go to a certain extent behind the terms of the deed, and say it must be considered to be a tied house all the time, and to be mortgaged as a tied house.

I need scarcely say that, dealing with a subject with which I am not and do not pretend to be very familiar, and having to deal with principles which I have not often had to apply, and with authorities which I have not often had to consider, I express my judgment with some doubt—not doubt as to the decision but doubt as to whether I have properly appreciated all the arguments put forward before us, but I do come to a very clear opinion in the end that the doctrine as to clogging the equity still stands, and this clause would be an infringement of it, and that the judgment of Cozens-Hardy, J., was right, and that this appeal ought to be dismissed.

RIGBY, L.J.—I agree entirely with what the Master of the Rolls has said, which to me appears in substance to recognize and affirm what has been said by Cozens-Hardy, J. I will not go into detail at all. I will only say something to indicate the principles which I conceive to be underlying this and similar cases. I would say first that the maxim, Once a mortgage always a mortgage, has not been in any degree infringed upon. Of course a maxim of that sort is a convenient thing to refer to, but it must be applied very carefully to the facts in each case. That maxim no doubt came indirectly under review in *Salt* v. *Marquis of Northampton*, and I venture to say, after reading the report again to remind myself of what actually took place, that the only branch of that maxim which was under discussion really was whether the transaction in that case was once a mortgage, and the majority of the judges, Lord Hannen dissenting, came to the conclusion that it was *ab initio* a mortgage. The other maxim, that it was always a mortgage, was taken for granted by everybody, and therefore I consider *Salt* v. *Marquis of Northampton* is a clear recognition and an undoubted enforcement of that maxim. There is another way of expressing the same principle that you shall not clog the redemption. Again, the maxim requires expansion, and is not always easy of application, but when you say you shall not clog the redemption, I think that you must understand that there shall be a redemption of the property in substance which was mortgaged, and that the property that comes back to you shall not be worse than it was when it was mortgaged, and that the mortgagee shall not, either by express language or by implication, reserve to himself any hold upon that property after the time for redemption has arrived, and the redemption has been put in force.

Now, if—and I do not entertain a doubt about it—those maxims are still in force to their full extent, it would be idle, for instance, to talk about not clogging the redemption when the property is taken back as a tied house when it had been a free house. The redemption is clogged to an extent which it would be almost impossible to exaggerate in the case of a public-house in London. The difference of value approaches very nearly to the whole value of the property, because if a man cannot borrow money from a brewer upon it upon the terms that it shall be a tied house during the existence of the security there is very little he can do and the property is next door to valueless. I take it, therefore, that if we can treat the property as a free house before the mortgage it must come back as a free and not as a tied house. The argument, however, was raised—that it was a tied house *ab initio*. I do not think that that argument can be maintained upon the facts. No doubt there was a tie upon the whole term in the hands of the preceding tenant. If our judgment in this case is correct, though the tie existed it was illegal, and might have been satisfied. Supposing that Rice had gone to the former tenant and bargained with her, as he might have done, that she should transfer the mortgage and the property, I do not see how, consistently with the judgment that we are giving, there could be any doubt that he would have been able to get rid of the covenant tieing the property during the term exactly as he seeks now to do; and I do not think the fact that the transaction was carried out somewhat differently as a matter of conveyancing can possibly make any difference in favour of the brewers. I think, then, that the property is to be treated as having been free at the time of the mortgage, and has been, by means of terms introduced into the mortgage, rendered a tied house possibly for many years after the mortgage would come to an end, and that therefore we cannot support that tie for all that time without doing violence to the two maxims that I have referred to.

It was said, and I do not quarrel with the statement, that unless there is something unconscionable a collateral bargain is perfectly legal. I must say I was very much struck with the argument of Mr. Beaumont on that point. This is deliberately made a mortgage on demand. It was a mortgage on demand—not an unusual mortgage with brewers, I should think, but I do not know. At any rate, I am not going to suggest that the defendants would have done a shabby thing and that they would have turned the man out and used their money to get a similar tie upon another house. It would have been shabby, but I think it would have been quite within their power and quite within what they bargained for, and if we had had to decide whether or not this is an unconscionable collateral advantage, though I do not think it is necessary to decide that point, I do not know that we should have been in favour of the brewers.

COLLINS, L.J.—I am of the same opinion. I think

the question is comparatively simple when the facts are understood. Nothing, so far as I see, has been said in any of the authorities which have dealt with collateral bargains as between mortgagor and mortgagee which has altered the rule compendiously stated by Cozens-Hardy, J., which is this: "'Once a mortgage always a mortgage' is still a sound maxim. Anything which is comprised in a mortgage security must, when the debt is paid or the obligation is discharged, be returned to the mortgagor. It must be returned in its entirety. No part of it can be retained by the mortgagee." Now, the principle is quite unaffected by those cases in which the point was what was secured by the mortgage; for instance, in the case—last and most important—of *Santley* v. *Wilde* the real decision was that the profits likely to accrue or capable of accruing during the whole term were secured by the mortgage quite as much as the lump sum advanced of £2,000. That was the ground upon which Lindley, M.R., distinctly rests his judgment. After reading the terms of the deed, he says: "That means this, that this lease is granted or assigned by the mortgagor to the mortgagee as security, not only for the payment of the £2,000 and interest, but also for the payment of the one-third of the net profit rents to the end of the term. If I am right in the principle which I have laid down that does not clog the right of redemption upon the performance of the obligation for which the security was given."

Now, that term in itself constituting these rents as part of the security certainly could not be a clog upon that which by its contemplation could not come into existence until those rents as well as the lump sum were paid. It is true that incidentally the effect was in the circumstances of that particular case that there could never be a right of redemption, but that only arose just as it might arise from a stipulation defining the time within which the redemption could not be asked for. It is not a clog on the equity of redemption, and that is made clear because the equity of redemption could only be exercised upon payment of the sum charged on the security. It was a mere collateral incident that the amount for which the property granted did stand as security could not be ascertained until an event which would be coterminous with the expiration of the interest of the mortgagor in the term. That is merely a collateral incident of the case, and it does not in the slightest degree affect the only matter we have to decide now—namely, whether or not there was anything between the parties which on payment of all that was secured would debar the mortgagors from getting back the whole subject-matter of the security. Those decisions as to collateral contracts which have been considered both in *Santley* v. *Wilde* and in *Biggs* v. *Hoddinott* appear to me not to be very relevant to the decision in this case, nor to impair in the slightest degree the principle stated by Cozens-Hardy, J. Therefore it seems to me that when you come to deal with this case the one and only question in it is, what was that which was secured by the mortgage, and what was granted as security? Now, what was granted? It seems to me when you look at the mortgage deed that which was granted was the unincumbered term—a term less one day, which the mortgagor was possessed of. That is what he grants. What he grants it as a security for is the advance of money. Therefore it follows when the money is repaid that which stood as security for it was to be handed over unimpaired. Now, in that deed there is a contract which imposes a tie upon the covenant—not a personal tie upon the mortgagor. The result is that if I am right in saying that what was the subject-matter of the security was the unincumbered term this covenant which is introduced puts it out of the power of the mortgagee to assign back to the mortgagor that which he was bound to assign to him—namely, the unincumbered term. The mortgagee can only assign back a term which in a sense is not an unincumbered term, but a term that would be bound in the hands of everyone to whom it comes during its existence by this equitable obligation imposed by the covenant. Therefore it comes back to this question: Aye or no, was the thing granted as a security a term with the tie, or a term without the tie? It is contended that the only thing granted was the term with the tie, but the defendants were obliged to say that because in one and the same deed by the terms of which without any qualifications the term unincumbered is made the mortgage security you find a covenant which is intended to be a clog on the term itself, you must assume that the contract of mortgage is one coming after and independently of and collateral to this covenant, so that the thing mortgaged is not the term without the covenant, but the term with the covenant. It seems to me impossible to isolate that transaction of the covenant from the transaction of the mortgage. It seems to me that it is one and the same transaction and that the mortgage is what the deed purports, a mortgage of the unincumbered term with the superadded provision which has the effect (whether it was contemplated or not) of making it impossible to comply with the rule laid down by Cozens-Hardy, J., that "no part of it"—that is, the mortgage security—"can be retained by the mortgagee. It must be returned in its entirety." I give this opinion treating the rule laid down by Cozens-Hardy, J., as being a rule by which I am bound. I do not think anything in any of the cases in the slightest degree, so far as I see, impairs it, and it is the basis of the decision in the case in the House of Lords which has been so much referred to. Whether or not it ought ever to have been brought into existence is a matter which I am not competent to pronounce an opinion upon. I take it as it is, and taking it as it is, I am bound to apply it to this case unless I could arrive at the conclusion that what was mortgaged was the term with the tie and not the term without the tie.

It was also suggested that we might look behind the deed itself, and might look at the whole transaction from its inception. The transaction at its inception found a publican holding a term which was mortgaged and tied. If the transaction of mortgage had purported to be one mortgaging the tenant's interest as it then stood, I do not feel quite clear whether as between the parties to such a mortgage, where both thought they were dealing with and intended to deal with the term as it stood, such a mortgage would be effectual to give to the mortgagee the tie he thought he had or not. If that was the subject-matter of the bargain and the subsequent transaction was between the parties to that bargain who intended to mortgage that and nothing else, I am not quite sure whether the argument might not have been sound that the mortgagee would not have been bound to return to the mortgagor more than as between him and the mortgagee it was intended he should return, but I do not think that that question arises here to-day because the transaction was such at the inception of the matter as between these two parties that the term was untied and free, and it is the free and untied term that was made subject to the tie.

Therefore for the reasons I have given I think this appeal must be dismissed.

Solicitors, *Fishers; Sandilands & Co.*

App. Bankruptcy.
(Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) June 15, 22.

*In re* PLUMMER.
*Ex parte* THE TRUSTEE. (*a.*)

*Bankruptcy—Voluntary settlement—Fluctuating business—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

*A gift of money does not constitute a "settlement" within the meaning of section* 47 *of the Bankruptcy Act,* 1883, *unless it is the intention of the giver that the money shall be invested in some form which will enable it subsequently to be traced.*

*The decision in* In re Player, 15 *Q. B. D.* 682, 34 *W. R. Dig.* 170, *discussed and approved.*

*Where a father released certain debts and securities due to him from a trading company as a part of the consideration received by the company for the sale of their business to his son, and it appeared that, at the time of the father's subsequent bankruptcy, the stock-in-trade of the business as it came to the son had been entirely altered, with a few trifling exceptions,*

*Held, that there was no gift to the son with the intention that what was given him should be invested in some form which would enable it subsequently to be traced.*

*Decision of* Wright, J., *affirmed.*

Appeal from a decision of Wright, J., given on the 30th of April, 1900.

The bankrupt William Plummer formerly carried on business as a draper at Lewisham, in Kent; and on the 20th of May, 1896, he converted his business into a limited company under the style of Plummer's Stores (Limited).

The company issued a series of 160 debentures of the value of £50 each; and of these debentures, at the time of the transaction which it was now sought to set aside, 100 were registered in the company's books in the name of William Plummer, whilst 60 others had been deposited by him with Messrs. Barclay & Co., the bankers, as security for certain advances, amounting in all to the sum of £3,500, made by them to the company. In the event of the sum not being repaid to the bank, William Plummer would become a creditor of the company to that amount.

The company was unsuccessful in its trading, and on the 26th of May, 1898, a debenture-holder's action was commenced against it, and a receiver was appointed, at the suit of William Plummer.

On the 3rd of June the company passed a resolution for voluntary winding up.

On the 13th of July the company agreed to sell its undertaking to Frederick G. Plummer, the son of William Plummer, as from the 25th of June, 1898, for the consideration that the said Frederick G. Plummer should pay the company £13,000 in manner therein more particularly provided, and should pay the trade creditors of the company the further sum of £5,700; that William Plummer should surrender to the company 60 of the 100 debentures already mentioned as registered in his name, and should release the company from all claims against them in respect of the sum of £3,500 already referred to, and in respect of a further sum of £688 then actually owing to him by the company; and that William and Frederick G. Plummer should together undertake the the joint payment of any trade debts owing by the company, but unknown at the time to its receiver and liquidator. This arrangement was duly carried out by a deed of covenant and indemnity executed on the 15th of August, 1898.

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

It was admitted that William Plummer, in making these releases and in undertaking this joint liability, was partly actuated, apart altogether from any desire to establish his son in business, by anxiety to save his own credit and reputation as an otherwise successful trader, and to escape from being involved in the downfall of a company which was unable to pay even its debts.

On the 25th of March, 1899, William Plummer filed his petition in bankruptcy; and on the 28th of February, 1900, his trustee moved before Wright, J., for (1) a declaration that the transfer of the business of the company to Frederick G. Plummer, and the payments made, and releases given, by the bankrupt for the purpose of effecting the same, constituted a voluntary "settlement" within the meaning of section 47 of the Bankruptcy Act, 1883; or (2) in the alternative, for a declaration that all gifts and payments made, and all claims released, by the bankrupt to or for the benefit of his son Frederick G. Plummer were void as against the trustee.

Section 47 of the Bankruptcy Act, 1883, enacts that: "(1) Any settlement of property, not being a settlement made before or in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

"(3) 'Settlement' shall for the purposes of this section include any conveyance or transfer of property."

It was admitted that all the stock-in-trade of the business, as it came to Frederick G. Plummer on the 25th of June, 1898, had since been sold, with the exception of a few insignificant items; and that the existing stock had been subsequently purchased in the usual course of business.

On the 30th of April, 1900, Wright, J., came to the conclusion that the consideration received by William Plummer in respect of which he surrendered his debentures was not so fictitious or unreal as to make the transaction one that could be impeached under section 47.

From this decision the trustee now appealed.

*Younger, Q.C.,* and *A. H. Dennis,* for the appellant.—The release of the debentures was made without consideration, and is accordingly a voluntary settlement on his son by the bankrupt under section 47 of the Bankruptcy Act, 1883: *In re Vansittart, Ex parte Brown,* 41 W. R. 32, [1893] 1 Q. B. 181. The only difficulty in the way of this contention is the decision in *In re Player, Ex parte Harvey,* 15 Q. B. D. 682, 34 W. R. Dig. 170, in which it was held that, in order to constitute a settlement under section 47, it is necessary that the retention of the property should be contemplated, and not its immediate alienation or consumption. The authority of that case, however, is much diminished by certain observations of Lindley, L.J., in *In re Farnham,* [1895] 2 Ch. 799, at the bottom of p. 807, 44 W. R. Dig. 98, as was

pointed out by Wright, J., in *In re Tankard, Ex parte Official Receiver*, 47 W. R. 624, [1899] 2 Q. B. 57. Similarly, in *In re Carter and Kenderdine's Contract*, 45 W. R. 484, [1897] 1 Ch. 776, Lindley, L.J., again remarks on p. 485 (45 W. R.): "This section 47, according to its terms, limits a conveyance or transfer of property of any sort." The decision in *In re Player* ought now to be definitely overruled by the Court of Appeal.

*Herbert Reed, Q.C.*, and *Muir Mackenzie*, for the respondents.—The settlement was made for valuable consideration: *Hance* v. *Harding*, 36 W. R. 629, 20 Q. B. D. 732. But even supposing this were not the case, the stock-in-trade has long since been sold, and the principle in *In re Player* is applicable. That case is good law. In *Ex parte Bishop, In re Tönnies*, 21 W. R. 716, L. R. 8 Ch. App. 718, it was held that a covenant for payment of a sum of money not specifically ear-marked was not a "settlement" within the meaning of section 91 of the Bankruptcy Act, 1869. Similarly it has been held that money, not being a subject of conveyance, was not within the meaning of section 126 of the Bankruptcy Act, 1849: Griffith and Holmes on Bankruptcy, 1867, at p. 438.

*Younger, Q.C.*, in reply.—If this settlement were made for valuable consideration at all, the consideration was clearly inadequate, and this has been held sufficient to upset a transaction under statute 13 Elizabeth, c. 5: *Matthews* v. *Feaver*, 1 Cox Ch. Cas. 278. Similarly, it was sufficient to avoid a settlement under section 91 of the Bankruptcy Act, 1869: *Ex parte Hillman, In re Pumfrey*, 27 W. R. 567, 10 Ch. D. 622. The release of the debentures was clearly made by William Plummer for the benefit of his son; *Christy* v. *Courtenay*, 13 Beav. 96; *Wray* v. *Steele*, 2 Ves. & B. 388. As to the alteration in the nature of the settled property, there is no such change as to hinder the trustee from following it: *In re Mouat, Kingston Cotton Mills Co.* v. *Mouat*, 47 W. R. 506, [1899] 1 Ch. 831; *Dowse* v. *Gorton*, 40 W. R. 17, [1891] A. C. 190.

Lord ALVERSTONE, M.R.—In this case we have received much assistance from the arguments of counsel. The question is whether certain transactions are void as against the trustee in bankruptcy on the ground that they constituted "a settlement" within section 47 of the Bankruptcy Act, 1883. Before dealing with the facts it will perhaps be convenient to state my view on the law. It seems that there have always been two classes of cases both under the old statutes and under section 47 of the Act of 1883. (1) If a gift were intended to be invested in something that could be traced it remained the property of the trustee and constituted "a settlement." On the other hand, we have a class of cases in which we have a gift of money which was not intended to be invested in something that could be traced; and in such cases the gift of money has not been held to be "a settlement." The two separate cases entitled *In re Player* happen to illustrate both these classes—the case reported in 15 Q. B. D. at p. 682 illustrating a gift which does not constitute "a settlement"; that reported in 2 Morrell at p. 261 illustrating a gift which does. I think that Vaughan Williams, J., in *In re Vansittart* and Wright, J., in *In re Tankard*, expressed the same principle in different words. I could not myself use better language than that of Wright, J., in *In re Tankard*, at p. 625 (47 W. R.). "I conceive," he says, "though there seems to be no authority on the point, that neither the original alienee, nor the transferee from him, could be required to restore money which he has spent or property which he has aliened before the bankruptcy, and without notice of any act of bankruptcy (or, perhaps, without knowledge of insolvency), though the alienee probably is liable to account for any proceeds which remain in his hands at the time of the bankruptcy—at any rate, if the acquisition by him of those proceeds was an object of the gift to him so that the proceeds can properly be said to represent the gift." It seems to me, then, that there are two clear classes of cases—two distinct lines of thought running through them all. Having thus stated my view as to the principles of law, it will now be convenient if, at this point, I briefly summarize the facts. [His lordship summarized them briefly.] Now in the first place it is admitted that, from beginning to end, the whole basis of this action lies in the fact that there was nothing improper or fraudulent in these transactions. The whole question is whether, William Plummer having since become bankrupt, these transactions are accordingly void under section 47. It is not argued that any money passed from the father to the son. But it is said that the result of the father surrendering his debentures and withdrawing his claim for the £688, for which he was a simple contract creditor, was to improve the position of the son. I am not myself disposed to dispute that result. I am not concerned to dispute that these transactions may have resulted in the son getting some greater benefit than he might otherwise have got. But I do not think that that fact is by itself enough. The learned judge in the court below found that he was "quite unable to say that the consideration received by the father in respect of which he made his contribution—*i.e.*, the son undertaking the paying of creditors—was so fictitious or unreal as to make the transaction one that should be impeached on that ground." In my opinion also the son was a purchaser for adequate value, and I think he must therefore be deemed a purchaser for the purposes of section 47. But secondly, even if this were not so, there still remains the question whether the transaction could properly be called a "settlement." We are asked by the appellant to say that the trustee is entitled, at any rate to the extent to which these releases were made by the father in favour of his son, to claim this business on behalf of the bankrupt's estate. It is not disputed, however, that there is no authority on the construction of the Bankruptcy Act, 1883, for the application of the principle of section 47 to a fluctuating business such as this. All those authorities in which moneys have been accounted for are cases in which gifts have been given in the shape of investment or mortgage—are cases in which there was something which could justly be thought to represent the actual proceeds of the present. That, however, is not the case here.

RIGBY, L.J.—I am of the same opinion. I accept as adequate and correct the statement of facts made by the Master of the Rolls, and I arrive from them at the same conclusion. All I wish to add is that I do not think that the authority of *In re Player* has been successfully impeached. The judgments in that case, both of Mathew and Cave, JJ., proceeded on the very intelligible principle that a gift of money which was not hedged about with conditions to the effect that it was to be invested and kept in a certain state could not be called "a settlement" within the meaning of section 47. Some of the criticisms of that judgment in the present case were based on a misunderstanding. It was not there pretended that money could never be settled, but it was said that section 47 could never have been intended to cover a case such as this. The authority of that case has not been impeached by any of the

other authorities referred to. As to the other point of the present case, my short opinion is this: that though William Plummer certainly released his debentures to the company, yet he did not do it with any view of making a settlement on, or assignment to, his son, though he undoubtedly did effect that his son should become a purchaser on terms which would have been impossible had he himself insisted on his strict rights. Indeed, had he insisted on them I doubt whether the sale would ever have taken place at all.

COLLINS, L.J.—I am of the same opinion. The point, I think, is one of fact. I should be sorry to say that when a father buys a business for a son it might not be a settlement under section 47. I think it would depend on the character of the business. But when it is impossible to trace the business afterwards, it is clear that it is not a settlement of the kind which the Legislature intended to include in the section in question.

*Appeal dismissed.*

Solicitors. *Marshall & Pridham*, for *Cripps, Son, & Daish*, Tunbridge Wells; *Phelps, Sidgwick, & Biddle.*

---

## High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } May 31.

METROPOLITAN BANK OF ENGLAND AND WALES (LIMITED) *v.* H. H. VIVIAN & CO. (LIMITED). (*a.*)

*Company—Debentures—Floating security—Sale of part of the securities—Injunction.*

*The holders of debentures in a company had a floating security over the property of the company, which consisted of a business carried on in three distinct branches. Power was reserved to the company in the trust deed to sell the business carried on at one of the three branches, and to take shares in other similar companies.*

*Held, that the debenture-holders could not restrain the company from getting rid of one of the three businesses, as it was being done in good faith and for the benefit of the company.*

This was a motion on behalf of the Metropolitan Bank of England and Wales, suing for itself and the other debenture-holders for an injunction to restrain the defendant company, Messrs. H. H. Vivian & Co. (Limited), from selling to the Anglo-French Nickel Co. (Limited), or otherwise disposing of the business of the defendant company carried on at Swansea, without first making due provision for the payment of outstanding debentures issued by the defendant company, and secured by an indenture dated the 24th of June, 1898.

H. H. Vivian & Co. was formed in 1882 to carry on a smelting business in three distinct branches, two of which were at Birmingham, and one at Swansea.

In 1890 the Metropolitan Bank advanced the sum of £80,000 on the security of debentures, and this charge was intended to be a floating security.

The company reserved a power in the trust deed to lease the Swansea premises for three years and by the articles and memorandum of association it had power to sell the property and to take shares in other similar companies.

The Swansea business not being a success, the company proposed to dispose of it to the Anglo-French Nickel Co. for the sum of £25,000 in shares, and to lease the hereditaments to the same company for three years at a rent of £1,000 a year.

The shareholders in Messrs. H. H. Vivian & Co. passed a resolution agreeing to the proposed sale on the 5th of April, but the consent of the plaintiff bank to the sale had not been obtained.

The Anglo-French Nickel Co. (Limited) intended, so it appeared, to raise £25,000 by the issue of debentures on the Swansea business, which formed part of the security of the plaintiff bank.

*Eve, Q.C.*, and *W. R. Sheldon*, for plaintiffs, contended that if the sale took place there would be a discontinuance of the business which the company had covenanted to carry on, and that it was not in the ordinary course of the company's business to promote the sale: *In re Borax Co.*, [1899] 2 Ch. 130, 47 W. R. Dig. 29.

*Macnaghten, Q.C.*, and *G. P. Lawrence*, for defendants, referred to *Hubbuck* v. *Helms*, 35 W. R. 574.

*Martelli*, for trustees of the covering deed.

COZENS-HARDY, J.—I think this motion fails. The plaintiffs have a floating security. What are the rights of the holders of debentures in that class of securities? It cannot be more accurately described than in the words of Lord Macnaghten in the case of *The Government Stock and Other Securities Investment Co. (Limited)* v. *The Manila Railway Co. (Limited)*, 45 W. R. 353, [1897] A. C. 81: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may, of course, be suspended by agreement. But if there is no agreement for suspension he may exercise his right whenever he pleases after default." It is said there are three businesses but only one undertaking. What is the business of the company? It consists of three branches, all parts of one business, carried on by a company as covenanted by the trust deed. Is it consistent with the carrying on of the business to dispose of the stock-in-trade of one branch? The directors have come to the conclusion that it is to their interest to get rid of the Swansea property. They propose to sell it to the Anglo-French Nickel Co. The company had power to sell and also to invest in the shares of another company, and there is nothing in the debentures or in the trust deed to prevent the directors from doing what they now propose to do in good faith and for the benefit of the company. No doubt it is depriving the debenture-holders of part of their security, but they have not guarded against this. I think the motion is wrong, and dismiss it with costs.

Solicitors for the plaintiffs, *Burton, Yeates, & Hart*, for *Johnson, Barclay, & Lowe*, Birmingham.

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

---

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Chan. Div. Buckley, J. } June 28, 29; July 3.

BUCKLAND v. BUCKLAND. (a.)

*Married woman—Infant—Marriage settlement—Implied covenant by husband—Married Women's Property Act,* 1882, *s.* 19.

*An ante-nuptial settlement entered into in* 1891 *by the intending wife (an infant), the intending husband, and trustees, recited that it was agreed that a legacy to which the lady was entitled, but not given for her separate use, should be settled upon the trusts thereinafter declared. The testatum was that, in pursuance of the agreement, the lady, with the privity and approbation of the intending husband, declared that the legacy should be held upon certain trusts. There was not any express agreement by the husband. The lady repudiated the settlement when of age.*

*Held, that a covenant would be implied on the part of the husband to do what was necessary to give effect to the settlement, and that therefore the instrument would have barred the marital right of the husband if the Married Women's Property Act,* 1882, *had not been passed, and was a settlement under section* 19 *of that Act, and consequently remained unaffected.*

James Cockle, who died in 1875, by his will, after appointing his wife and the defendants Cockle and Blackett his executors, bequeathed (among others) a legacy of £1,000 and some shares in a company to his daughter, the plaintiff Jeanette E. Buckland, then Jeanette E. Cockle, and he directed his trustees to invest the legacies of the females who were under twenty-one years or unmarried, and apply the income for their maintenance until twenty-one years or marriage.

There was no direction that the legacy should be for the separate use of the daughter.

In 1891, Miss Buckland, still an infant of about eighteen years, married the plaintiff, Felix Buckland.

Prior to the marriage, an indenture was made between Miss Cockle of the first part, Mr. Buckland of the second part, and the defendants Cockle and Blackett of the third part, and executed by all parties, which recited the will of James Cockle, that Miss Cockle was an infant, and that a marriage was intended between Miss Cockle and Mr. Buckland, and that upon the treaty for the intended marriage it had been agreed that the legacy should be settled upon the trusts thereinafter declared. The *testatum* was that in pursuance of the said agreement, and in consideration of the said intended marriage the lady, with the privity and approbation of Mr. Buckland, declared that the trustees of the will of James Cockle should stand possessed of the legacy upon trust after the marriage for the lady for life for her separate use without power of anticipation, and after her death upon the usual trusts for the children of the marriage and for other persons in default of such children.

Upon attaining twenty-one Mrs. Buckland repudiated the settlement and claimed the legacy as her own freed from the trusts. She later desired the trustees to pay the legacy over to her, but they refused to do so without the authority of the court.

This action was thereupon brought by Mr. and Mrs. Buckland against the trustees and the two children of the marriage, asking a declaration that the settlement was not binding upon the plaintiffs, and that the legacy should be paid to the wife. The question was as to the effect of section 19 of the Married Women's Property Act, 1882, which says: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman."

*Attwater*, for the plaintiffs.—As Mrs. Buckland repudiated the settlement the legacy became her separate property under the Married Women's Property Act, 1882, and nothing that the husband could do would affect it. This case is distinguishable from *Hancock* v. *Hancock*, 36 W. R. 417, 38 Ch. D. 78, as there was a subsisting settlement there, and so also in *Stevens* v. *Trevor-Garrick*, 41 W. R. 412, [1893] 2 Ch. 307, and the question was as to its effect. Here, since the repudiation there is no settlement. I rely on *In re Queade's Trusts*, 33 W. R. 816, upon which see observations in Wolstenholme's Settled Land Acts (8th ed.), pp. 286, 287. The only agreement in the settlement was between all three parties. There was none between the husband and the trustees. The husband only joined to show his consent, and negative allegation of fraud on his marital right. It thus neither bound the husband nor the wife, and has no effect.

*St. John Clerke*, for the defendants.—The case is covered by *Stevens* v. *Trevor-Garrick*. There have been a series of cases, from *In re Stonor's Trusts*, 24 Ch. D. 195, 31 W. R. Dig. 169, and *In re Whitaker*, 35 W. R. 217, 34 Ch. D. 227, to that case, showing that section 19 applies whenever the wife's property would have been affected if the Act had not been passed. Here that would be the case, for the husband is bound by the recital. In *Dawes* v. *Tredwell*, 29 W. R. 793, 18 Ch. D. 354, and in *Young* v. *Smith*, L. R. 1 Eq. 180, 14 W. R. Ch. Dig. 44, there were express covenants by the husband. Here, there being none, a covenant on his part will be implied.

The following cases were also cited: *In re Armstrong, Ex parte Boyd*, 36 W. R. 772, 21 Q. B. D. 264; *In re Lumley*, 45 W. R. 147, [1896] 2 Ch. 690; and *Pimm* v. *Insall*, 1 Mac. & G. 449.

*Cur. adv. vult.*

July 3.—BUCKLEY, J.—In *In re Queade's Trusts* the settlement was a post-nuptial settlement made in the year 1847 between the wife, who was an infant, the husband, and the trustees. It contained an agreement and declaration by the parties, and a covenant by the husband, that all future property by the wife should be settled. In 1883—that is to say, after the passing of the Married Women's Property Act, 1882—the wife became entitled as one of next-of-kin to a share of undisposed-of residuary estate. There, as here, the wife was at the date of the deed an infant, and there was, therefore, no settlement by her. Chitty, J., held that section 5 of the Act of 1882 was operative in those circumstances, and that the wife was entitled. In *Hancock* v. *Hancock* that case was disapproved. The Court of Appeal held that according to its true construction the 19th section of the Act of 1882 prevents section 5 from interfering with any settlement which would have bound the property if the Act had not been passed. The argument that "settlement" in section 19 must mean a settlement which is binding upon the wife was advanced and failed. The settlement in that case did not contain any covenant by the wife or any joint declaration or agreement. Subsequently in *Stevens* v. *Trevor-Garrick* Chitty, J., held that in a case where not section 5 of the Act but section 2 was the relevant section, the principle of the decision of the Court of Appeal was equally applicable. In this state of things it appears to me that the decision in *In re Queade's Trusts* is gone altogether, and that it cannot be maintained, as was argued before me, that the effect of section 19 is

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

merely to provide that the construction of the settlement is not to be affected and that the Act does not apply except where the wife is bound by or has assented to the settlement. I conceive that I must deal with the present case upon the footing that section 2 is not to interfere with the settlement, if it be a settlement which would have bound the property if the Act of 1882 had not been passed. What then would have been the effect of the settlement of the 8th of December, 1891, if the Married Women's Property Act, 1882, had not been passed? At the date of the marriage in December, 1891, the lady was entitled to a legacy of £1,000 under the will of her father, who had died in 1875. It was not given for her separate use. It was therefore a sum to which the husband would after the marriage have been entitled by virtue of his marital right upon reducing it into possession. In that state of things a deed was executed to which the lady (then an infant), the intended husband, and certain trustees were parties. Now, seeing that the lady was at this date an infant, the agreement recited in this deed cannot have been with her. It must have been an agreement between the intended husband and the trustees for the beneficiaries, including the children of the marriage if there should be such. In pursuance therefore of this agreement between the intended husband and the trustees, the intended wife with the privity of the intended husband declares that the legacy shall be held upon certain trusts. As a declaration by the infant this of course had no effect at all, so that, unless the recital of the agreement is to be operative as between the parties who are recited to have agreed, the instrument will have been wholly inoperative as to the property purporting to be settled. The case therefore seems to me parallel with that of *Hollis* v. *Carr*, 2 Freem. 3, 3 Swanst. 638, referred to by Lord Romilly in *Young* v. *Smith*. There is a plain recital of an agreement that the legacy shall be settled upon trusts which are in the instrument after declared, and no subsequent operative part to give effect to that agreement, unless it be found in implying a covenant on the part of the husband to do such things as are necessary to give effect to the settlement which the infant purports to make with his privity and approbation. Under these circumstances it appears to me that there is in this instrument an agreement by the husband which binds the marital right which is his upon the footing that the Married Women's Property Act, 1882, has not been passed. In other words, I think that, as in *Hancock* v. *Hancock*, the agreement by the husband to settle, although unaccompanied by any obligation binding the infant wife, is an agreement which would have bound the property if the Act of 1882 had not been passed, and that upon the true construction of that Act section 19 prevents section 2 from interfering with it. I may add that, as a matter of fact, it is plain from the evidence which was given before me that the guardian of the lady, who was one of the trustees, stipulated for the execution of the settlement as a condition of approving the marriage, and that there was in fact an agreement as between the husband and Mr. H. F. Cockle, the trustee, that the property should be settled as appears by the instrument of the 8th of December, 1891.

*Action dismissed.*

Solicitor for all parties, *C. N. Dodd*, Lewisham.

---

(1901) A.C. 505.

Q. B. Div.
(Bigham and Phillimore, JJ.) June 16, 21.

BOOTS' CASH CHEMISTS (LANCASHIRE) (LIMITED) AND OTHERS v. GRUNDY AND ANOTHER.

*Action, cause of—Trade combination—Circular—Interference with business—Inducing persons not to deal with the plaintiffs.*

*A statement of claim in effect stated that the defendants, in combination with others, had maliciously interfered with the plaintiffs in carrying on their business by issuing a circular asking persons not to deal with them.*

*It was alleged that the intention of the defendants and other signatories to the circular was to induce printsellers to refrain altogether from dealing with any print publisher who might sell any goods to the plaintiffs, and to coerce printsellers into refusing to supply the plaintiffs with any goods; that the defendants had so coerced the majority of the printsellers in this country, and that the plaintiffs had suffered damage in consequence.*

*Held*, by Bigham, J. (Phillimore, J., *dissenting*), *that, as an action would not lie against persons who, for their own benefit, combined to induce others to refrain from dealing with a particular person, the plaintiffs' statement of claim disclosed no cause of action, since the acts complained of, if done by an individual, would have been lawful, and they did not become tortious because they were done by several in combination.*

This was a motion by the defendants to have the action dismissed on the ground that the statement of claim disclosed no cause of action.

The plaintiffs and the defendants both sold etchings and engravings, and the plaintiffs in their statement of claim alleged that the defendants in combination with others had maliciously and without just cause or excuse interfered with them in carrying on their business by inducing customers not to deal with them by issuing a circular which was in these terms:

"In view of the combination of several of the London publishers, it is time that all *bonâ fide* printsellers throughout the provinces became united to defend themselves. It is known that two or three firms have admitted that they supply Boots & Co., stores, drapers, and others (who are non-subscribers to the Printsellers' Association) at half-price, and we think it very unfair, when they know that these people want them to sell to the public at 25 per cent. off the published price, and advertise the fact. If the provincial trade will all agree not to order any goods from travellers representing houses whose publications are systematically shown and offered by these notorious undersellers, then their reports and non-success would show their principals how very seriously we take it; and although the measured proposal at the general meeting of the Printsellers' Association will not go to the root of the evil, we feel sure it is bringing the aggressors into a smaller radius, and will to some extent mitigate the pernicious system of underselling. This matter is becoming so serious throughout the provinces that we venture to bring this suggestion before your notice in the hope that by your assistance it will have the desired effect.—We are, yours faithfully."

Then followed the names of twenty-one signatories.

The defendants and the signatories were all members of the Printsellers' Association.

The plaintiffs alleged that the intention of the defendants and the signatories was to induce printsellers to refrain altogether from dealing with any printseller who might sell any goods to the

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

plaintiffs, and to coerce printsellers into refusing altogether to supply the plaintiffs with any goods at all. That the defendants had coerced the majority of printsellers in this country into refusing to sell any of their publications or any goods at all to the plaintiffs, and that the plaintiffs had suffered damage through their acts.

The plaintiffs accordingly claimed an injunction to restrain the defendants from wrongfully and maliciously interfering with the plaintiffs in the free conduct of their business, and from continuing to do so by repeating the acts complained of.

They also claimed damages.

*Rufus Isaacs, Q.C.*, and *T. E. Scrutton*, for the defendants.—The issue of this circular by a trade combination is not an actionable conspiracy, for even if the defendants by means which are not unlawful succeed in inducing others to do an act injurious to the plaintiffs, no action will lie against them. All that the circular alleged against the plaintiffs is that they compete unfairly with other sellers, and it asks those who take that view of the way the plaintiffs trade not to assist them in their unfair dealing. That is a perfectly lawful act: *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 40 W. R. 337, 23 Q. B. D. 598, [1892] A. C. 25. This would not become unlawful if done by one person with a malicious motive (*Allen* v. *Flood*, 46 W. R. 258, [1898] A. C. 1), nor yet if done by many: *Kearney* v. *Lloyd*, 26 L. R. Ir. 268; *Huttley* v. *Simmons*, [1898] 1 Q. B. 181, 46 W. R. Dig. 35; *Scottish Co-operative Society (Limited)* v. *Glasgow Fleshers' Association*, 35 Scottish Law Reporter 645. A mere combination to do an innocent act only becomes an unlawful combination if the act done is done by illegal means.

They also cited *Reg.* v *Warburton*, 19 W. R. 165, L. R. 1 C. C. R. 274; *Reg.* v *Aspinall*, 25 W. R. 283, 2 Q. B. D. 48; *Rex.* v. *Turner*, 13 East 228; *Temperton* v. *Russell*, 41 W. R. 565, [1893] 1 Q. B. 715.

*Joseph Walton, Q.C.*, and *Arthur Colefax*, for the plaintiffs. — The statement of claim discloses a perfectly good cause of action since it alleges a trade conspiracy to injure the plaintiffs in their trading. An act done by an individual which would be innocent may well become illegal if done in combination by many. *Allen* v. *Flood* does not deal with this class of act, but it was recognized as actionable in the *Mogul Steamship Co.* v. *McGregor*, [1892] A. C. 25, and Lord Halsbury deals with it at p. 38 and Lord Bramwell at p. 45. This is a far stronger case than that of the plaintiffs in the *Mogul case*, and the action should be allowed to go to trial.

*Rufus Isaacs*, in reply, cited *Tarleton* v. *M'Gawley*, 1 Peake N. P. C. 270. The court cannot examine the reasonableness of a trade competition, and that is what the court is asked to do here by the plaintiffs, for they say that nothing short of a tort in attaining a legal object would make its attainment unlawful.

*Cur. adv. vult.*

June 21.—THE COURT differed in opinion.

PHILLIMORE, J.—The motion before us is to strike out the statement of claim as disclosing no cause of action, and the only cause of action upon which in the argument before us the plaintiffs placed reliance may be summed up in these words. The plaintiffs complain that the defendants have combined with others to prevent them from carrying on their trade by effectually inducing third parties not to sell to them, and that they have done this maliciously without just cause or excuse. The words "maliciously without just cause or excuse" probably add nothing to the strength of the plaintiffs' complaint; but they anticipate, and by anticipation repel, that which, if alleged and proved, would be a sufficient defence—namely, that the acts of the defendants were acts of trade competition and in furtherance of their own trade: see *Mogul Steamship Co.* v. *McGregor*. When regard is had to the detailed allegations with which this framework of complaint is clothed in the statement of claim, it seems not improbable that the defendants would, if the case went to trial, prove this defence and win the cause. But for the moment we have not to consider this. The question for us appears to be whether a combination by several against one, not for their own advantage, but for the purpose of depriving him of his trade or doing him some other pecuniary injury, gives to the person so injured a cause of action against the confederates. That any single person can use his utmost endeavour to prevent third persons from dealing with another man, and thus deprive him of his trade and even of his means of livelihood, is settled by the decision of the House of Lords in *Allen* v. *Flood*, and I presume that what one could do any number of persons acting separately and without concert could equally do. But the effectual strength of one, or even of a number acting separately, is as nothing compared with the force of a combination which may be irresistible. If in such a case the injured person has no cause of action either for damages or an injunction he is without remedy; for if the combination be not actionable, it certainly is not criminal, and, conversely, wherever an act is criminal the person injured has (subject to the rule of public policy which postpones civil proceedings for a felony) a right of action for the civil injury. Now there are certainly some injurious acts which one person may do towards another without committing a crime, and which when done by several persons in combination become criminal. The books give several classes of indictable conspiracy. Some of them may be obsolete, or may, upon a more careful analysis, appear to be not substantive crimes, but only modes of looking at other crimes, or the evidence of an attempt to commit crimes. But when all deduction is made there remain some cases of conspiracy which are criminal solely because of the combination. Knowingly to charge a man falsely with the commission of a crime is cruel and wicked, but if the accuser avoids giving evidence and committing perjury he will escape the criminal laws. The combination, however, of several to charge an innocent person with a crime is laid down to be an indictable conspiracy. The books also say that a combination to injure a man by fraud is an indictable conspiracy; and, though it seems difficult to say, with the modern improvements in our criminal law, that there are many cases in which a single person can injure another by fraud without committing a crime, still there are some, and at one time there were more, and to them, when done in combination, the law of conspiracy was applied. *Reg.* v. *Robinson*, 1 Leach, 37, is a case in point; and in the more modern case of *Reg.* v. *Warburton*, the Court for Crown Cases Reserved assumed that for the act charged at the time it was committed an individual would have been scatheless, but held confederates liable. If and where the practice of boycotting "maliciously and without just cause or excuse" was carried on to such an extent as to deprive a man or woman of the means of livelihood it would be a blot upon our law if the confederate boycotters could not be punished. In these instances, therefore, confederacy would be indictable and therefore actionable. Now that the case of *Rex.* v. *Turner*, has been disapproved, and the authority of it, I think, destroyed by *Reg.* v. *Rowlands*, 17

Q. B. 671, I should hold that all confederacies to injure a man by committing torts, which would be actionable against individuals committing them separately, become indictable by reason of the combination. It seems, further, that confederacies to injure without committing actionable torts, but by doing acts punishable only in the Ecclesiastical Court, are also indictable conspiracies: *Reg.* v. *Best*, 2 Ld. Raym. 1167; *Rex.* v. *Lord Grey*, 9 St. Tr. 127. It remains to consider whether a confederacy to injure, which can be carried out without the commission of any tort actionable against an individual and without any breach of the old ecclesiastical law, may not, nevertheless, be a conspiracy. I say the old ecclesiastical law because it may be that the abolition of the ecclesiastical jurisdiction in defamation has made what was relied upon in *Reg.* v. *Best* as an ecclesiastical offence one no longer. It is true that the language of the judges who charged the jury in *Reg.* v. *Parnell*, 14 Cox C. C. 508, is, with regard to their third division of the crime of conspiracy, hesitating and varying, and even the same might be said of the judgment of Bowen, L.J., in *The Mogul Steamship Co.* v. *McGregor*, 37 W. R. 756, 23 Q. B. D. 598. Sometimes the learned judges speak in the most general language of any combination to do any form of injury, and sometimes they seem to speak of combinations to commit actionable wrongs. But the observations of Lords Bramwell, Hannen, and Field when deciding the last-named case in the House of Lords, and the reservation of Lords Herschell and Macnaghten when giving their decision in *Allen* v. *Flood*, lead me to conclude that they recognized the wider view of conspiracy taken in the older cases. I do not see that in *Reg.* v. *Robinson* there was any actionable wrong, or that in *Reg.* v. *Warburton* the injured partner would have had any civil remedy except in the Court of Chancery. I have made my observation on *Reg.* v. *Best*, and I can see that in a conspiracy falsely to charge a man with crime some at least of the conspirators might take an effectual share without uttering slander or committing any actionable wrong. I think, therefore, that if the confederacy in this case for the motives and purposes alleged in the statement of claim were proved as laid it would be indictable, and at least equally, if not *a fortiori*, actionable. In other words, given the confederacy, the motive and purpose make all the difference. If a number of persons, because of political or religious hatred, or from a spirit of revenge for previous real or fancied injury, combine to oppress a man and deprive him of his means of livelihood for the mere purpose of so-called punishment, I think the sufferer has his remedy. If the combination be to further their own prosperity, if it be constructive, or destructive only as a means to being constructive, the case is otherwise.

BIGHAM, J., read the following judgment: It is necessary to read this statement of claim with care in order to ascertain its true legal effect. It begins by alleging that the plaintiffs and the defendants are both engaged in the trade of printsellers, and it proceeds to state that the defendants "with others" (which I take to mean with the co-operation of others) issued to a number of persons in the trade, both printsellers and print publishers, the circular set out in paragraph 2. The pleader then goes on to impute to the defendants and to the other signatories of the circular an intention in issuing the circular "to induce printsellers to refrain altogether from dealing with any print publisher who might sell any goods to the plaintiffs, and to coerce print publishers into refusing altogether to supply the plaintiffs with any goods at all." This intention is alleged to be expressed in the circular itself, but for my part I do not find it there. The only intention I find is an intention to induce printsellers to refrain from dealing with publishers who continue to supply the plaintiffs on such terms or at such prices as will enable the latter to resell at the low prices objected to, and in that way, and to that extent only, to coerce such publishers to refuse to supply the plaintiffs. No intention is expressed in the circular to coerce publishers to refuse altogether to supply the plaintiffs. I do not, however, rely on this distinction for the purpose of my judgment. The fifth paragraph alleges that the defendants have, by means of the said circular, in concert with the other signatories, induced persons not to buy from publishers willing to sell to the plaintiffs, and have thereby "coerced" the publishers into refusing altogether to sell any publications at all to the plaintiffs, to the damage of the plaintiffs in their business. The only meaning of this paragraph is that the object with which the circular was issued has been attained, and that loss has resulted to the plaintiffs. It is not suggested that the defendants have done more than issue the circular and abstain themselves from buying of the offending publishers; and, if it be true (as for the present purpose I must assume) that the publishers have refrained altogether from dealing with the plaintiffs, I doubt if such action on their part can be said to flow naturally from the acts of the defendants. So far the statement of claim amounts to nothing more than a charge against the defendants of requesting a particular body of traders not to give orders for goods to another body of traders—the "provincial trade" is requested not to give orders to those publishers who supply the plaintiffs—and an allegation that the request has been followed by compliance. In my opinion, the charge amounts to nothing which can be described as a wrong done to the plaintiffs. If true it does not violate any right of the plaintiffs, and, therefore, it affords them no cause of action, for one man is entitled as against all the world to ask another to refrain from doing an act which that other may lawfully omit to do. But it is said that the defendants' acts were calculated to damage and were done with the intention of damaging the plaintiffs in their business, and, further, that they were unlawful and in restraint of the plaintiffs' right to trade freely, and were done maliciously and without just cause or excuse. These allegations do not better the plaintiffs' position. The intention is immaterial if the acts themselves are not wrongful, and merely to say they are unlawful does not make them so. That they resulted in loss to the plaintiffs or in a restriction of their trade is equally immaterial, for no one is responsible to another for the consequence of a lawful act. It is useless to say that lawful acts are malicious or are done without just cause or excuse, for no lawful act can be malicious in a legal sense nor does it require to be defended by any just cause or excuse. It carries its just cause or excuse with it. Causes of action arise out of acts done, not out of intentions, nor out of consequences; and though morally a man may be blameable for exercising his rights for the mere purpose of hurting his neighbour, it is better, in my view, that he should be condemned in the tribunal of public opinion than that his intention should be the subject of inquiry in a court of law. With reference to the intention with which the acts charged against the defendants were done, I notice that the statement of claim does not allege that it was merely to damage the plaintiffs. The allegation of intention is consistent with a concurrent intention to benefit the defendants' own trade. I draw attention to this, not because I think it makes any differ-

ence in point of law, but because it has in some cases been said (I think erroneously) that when a right is exercised for the mere purpose of damaging another the act may become a tort. It was, however, upon the concluding words of paragraph 6 of the statement of claim that the plaintiffs really relied. Those words are as follows: "Further, the defendants have, as the aforesaid acts show, maliciously combined with one another and with others to induce the publishers of engravings not to enter into contracts or deal with the plaintiffs, and to induce others not to deal (except upon terms which did not allow the plaintiffs to do profitable business) with the plaintiffs. Such combination was unlawful, without just cause or excuse, and has occasioned damage to the plaintiffs." The plaintiffs' counsel admitted that upon the authorities the statement of claim probably disclosed no cause of action apart from the allegations of combination and conspiracy. It remains, therefore, only to consider whether in the present case the acts, being lawful if done by one, become tortious if done by several in combination. It is necessary, in my opinion, to define the word "conspiracy." A conspiracy exists when two or more combine to do an unlawful act, or to do a lawful act by unlawful means. No conspiracy is, in my opinion, known to the law which has not for its object the accomplishment of an unlawful act (not necessarily a criminal act), or which does not involve the use of unlawful means. This, I think, is the result of the judgments in *Kearney* v. *Lloyd* and *Mogul Steamship Co.* v. *McGregor*. Further, I think that, though probably all conspiracies, as I define them, are criminal, and therefore indictable, no conspiracy can give rise to a civil action unless it violates, or threatens to violate, the rights of an individual as distinguished from the rights of the public at large. If it does violate the rights of an individual, he may sue for damages; if it threatens such a violation, he may sue for an injunction. But before any action can lie a right in the individual must be violated or threatened. To use the words of Lord Halsbury in *Mogul Steamship Co.* v. *McGregor*, [1892] A. C., at p. 38: "If no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons." In the same case Lord Watson says, at p. 41, speaking of the combined action of the defendants: "I apprehend that in order to substantiate their claim the plaintiffs must show either that the object of the agreement was unlawful or that illegal methods were resorted to in its prosecution. If neither the end contemplated by the agreement nor the means used for its attainment were contrary to law, the loss suffered by the plaintiffs was *damnum sine injuria*." I ought, I think, to refer to the judgment of Lord Hannen in the same case. He says, at p. 59: "I arrive at the conclusion, therefore, that the objects sought and the means used by the defendants did not exceed the limits of allowable trade competition, and I know of no restriction imposed by law on competition by one trader with another with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one—viz., to injure the plaintiffs, whether the defendants should be benefited or not. That is a question on which it is unnecessary to express an opinion." As to this part of the judgment, I think, for reasons which will be found in Lord Herschell's judgment in *Allen* v. *Flood*—first, that the fact that the case was one of trade competition is of no significance; and, secondly, that the acts complained of being lawful the object with which they were done could in no case be material. In the present case I can find no act alleged against the defendants which amounts to a violation of any right in the plaintiffs nor can I find any act alleged against the defendants which is unlawful as against any other individual or against the public at large, and I come, therefore, to the conclusion that the statement of claim discloses no cause of action. I am, moreover, quite satisfied that to allow such an action as this to go to trial would merely cause unnecessary loss to the parties and a waste of public time.

As their lordships differed, Phillimore, J., withdrew his judgment, and accordingly the action was ordered to be dismissed.

*Leave to appeal was granted.*

Solicitor for the defendants, *Lewis W. Taylor*.

Solicitors for the plaintiffs, *Tyrrell Lewis, Lewis, & Broadbent*.

---

## Court of Appeal.

From Q. B. Div.
(Earl of Halsbury, L.C., and A. L. Smith and Vaughan Williams, L.JJ.) — July 24.

BARON v. PORTSLADE-BY-SEA URBAN DISTRICT COUNCIL. (*a*.)

*Local government—Sewers—Neglect to cleanse sewers—Nuisance—Action against local authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 19, 299.

*Where a local authority has neglected to perform the duty imposed upon them by section* 19 *of the Public Health Act*, 1875, *of properly cleansing the sewers vested in them, and damage is thereby caused to an individual, an action will lie against the local authority at the suit of the person injured.*

Appeal from the judgment of Mathew, J., after the trial of the action with a jury.

The action was brought to recover damages for a nuisance.

The plaintiff was the occupier of land in the defendants' district. An open sewer ran through the plaintiffs' land, the sewer having been made by a private individual for the purpose of draining a brewery and some cottages not on the plaintiff's land.

The sewer became vested in the defendants under the Public Health Act, 1875.

Formerly by arrangement between the plaintiff and the defendants the sewer was cleaned out periodically, and the defendants paid for the expense thereof.

In 1898 a dispute arose between the plaintiff and the defendants, and the result was that the sewer was not cleaned out. In consequence thereof quantities of sewage and filth overflowed on to the plaintiff's land and caused a nuisance and damage to him. The defendants contended that the plaintiff's only remedy was by complaint to the Local Government Board under section 299 of the Public Health Act, 1875.

At the trial the jury assessed the damages at £75. The learned judge held that an action would lie for neglect of the duty imposed on the defendants by section 19 of the Public Health Act, 1875, of properly cleansing the sewer, and he accordingly gave judgment for the plaintiff.

The defendants appealed.

*Macmorran, Q.C.*, and *Thorn Drury*, for the

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

defendants.—The plaintiff's sole remedy for the neglect by the defendants of the duty of properly cleansing the sewer imposed upon them by section 19 of the Public Health Act, 1875, is by complaint to the Local Government Board under section 299: *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387, 46 W. R. Dig. 107; *Robinson* v. *Workington Corporation*, 45 W. R. 453, [1897] 1 Q. B. 619. The cases of *Bateman* v. *Poplar District Board of Works*, 36 W. R. 501, 37 Ch. D. 272; and *Hammond* v. *St. Pancras Vestry*, 22 W. R. 826, L. R. 9 C. P. 316, are not in point, as there is no section in the Metropolis Management Acts similar to section 299 of the Public Health Act, 1875. Further, the defendants, as they did not make the sewer, have only been guilty of nonfeasance, for which no action will lie: *Attorney-General* v. *Dorking Union*, 30 W. R. 579, 20 Ch. D. 595; *Brown* v. *Dunstable Corporation*, 47 W. R. 538, [1899] 2 Ch. 378; *Dent* v. *Bournemouth Corporation*, 66 L. J. Q. B. 395, 45 W. R. Dig. 90.

*J. G. Witt, Q.C.*, and *Sinclair Cox*, for the plaintiff, were not called upon.

Earl of HALSBURY, L.C.—I entirely adopt the law laid down in the various cases which have been cited, but in my opinion they are all beside the present question. The sewer in question is vested in the defendants, and according to the practice previously followed it was cleansed at stated intervals, with the result that no nuisance was created. The defendants, however, discontinued that ordinary and natural mode of dealing with the sewer, and thereby a nuisance was created which occasioned damage to the land of a private citizen. There is all the difference possible between the jurisdiction to call upon a local authority to make new sewers or a new system of drainage, and the jurisdiction to call upon them to deal with the existing sewers in a reasonable and proper manner. There is no question in the present case of making a new sewer. The plaintiff's complaint is, that the sewer, which is vested in the defendants, and which the defendants have hitherto dealt with in a reasonable and proper manner, has been allowed by the defendants to become a nuisance by reason of the neglect of the duty imposed upon them by section 19 of the Public Health Act, 1875. I fail to see why that obligation should not be enforced by action. The earlier words of section 299 of the Act of 1875, which speak of default in providing the district with sufficient sewers, manifestly have reference to the creation of new works. The only difficulty arises with reference to the succeeding words, as to default in the maintenance of existing sewers. But when one looks at the context with which those words are associated, it seems to me that they refer to default in the performance of a duty of a kind somewhat similar to that dealt with in the preceding words. The section does not mean that every time a local authority neglect to use proper diligence in the management of existing sewers, the only remedy to the person injured thereby is by complaint to the Local Government Board. Where there is neglect by the local authority in the management of existing sewers, and damage results therefrom to a private citizen, there is nothing in the statute which takes away the ordinary common law right of action. The judgment of the learned judge was therefore right.

A. L. SMITH, L.J.—I am of the same opinion. Section 19 of the Public Health Act, 1875, imposes the duty on the local authority of keeping the sewers belonging to them so as not to be a nuisance or injurious to health, and of properly cleansing and emptying them. Why has not the person injured by the neglect of that duty a cause of action? None of the authorities cited go anywhere near saying that when a local authority does not properly cleanse their sewers, the only remedy is by complaint to the Local Government Board under section 299.

VAUGHAN WILLIAMS, L.J., agreed.

*Appeal allowed.*

Solicitors for the plaintiff, *Rodgers & Gilbert.*

Solicitors for the defendants, *Biggs-Roche, Sawyer, & Co.*, for *Buckwell & Berkeley*, Brighton.

---

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) July 17.

COHEN v. TANNAR. (a.)

*Landlord and tenant—Lease—Underlease—Covenant for quiet enjoyment—"Without any interruption by the landlord or any person claiming through him"—Original lease with covenant not to assign or underlet—Grant of underlease in breach of covenant—Subsequent assignment of reversion—Action of ejectment by assignees of reversion—Consent of underlessor to judgment.*

*The defendant, being the lessee of a shop which he covenanted not to assign or underlet without the approval of the landlord, let the premises to the plaintiff for the residue of the term without having obtained such approval. The sub-lease contained a covenant by the defendant that the plaintiff should hold and enjoy the premises without any interruption by the defendant or any person lawfully claiming through him. Subsequently the superior landlord assigned the reversion, and the assignees brought an action of ejectment against the defendant, on the ground that he had forfeited his lease by breach of covenant. The defendant consented to judgment being signed against him, and the plaintiff was obliged to go out of possession. In an action by the plaintiff against the defendant for breach of covenant for quiet enjoyment, Ridley, J., gave judgment for the plaintiff.*

*Held, on appeal, that there was evidence that the interruption of the plaintiff's tenancy was caused by the act of the defendant in consenting to a judgment being signed against him which he might have resisted; and that, therefore, the appeal must be dismissed.*

Appeal from the judgment of Ridley, J., on further consideration after the trial of an action with a jury.

The action was brought by a tenant against his landlord to recover damages for breach of a covenant for quiet enjoyment.

By an agreement dated the 7th of September, 1897, George Cunningham Smith let a shop in Cheapside in the City of London, to the defendant for a term of three years from the 29th of September, 1897. The defendant agreed, *inter alia*, not to assign, underlet, or part with the possession of the premises without the written approval of the landlord. The agreement contained a condition for re-entry on breach of any covenant by the defendant.

By an agreement dated the 16th of November, 1898, the defendant, without obtaining the approval of his landlord, let the said premises to the plaintiff for the residue of the term. This agreement contained the following clause: "The landlord agrees that the tenant paying the rent hereby reserved and performing and observing the conditions of this agreement on the part of the tenant herein contained may peaceably hold and enjoy the said premises

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

during the tenancy without any interruption by the landlord or any person lawfully claiming through him."

On the 25th of November, 1898, the superior landlord, George Cunningham Smith, assigned the reversion to Ezekiel Levy and Henry Franks.

On the 16th of December, 1898, Levy and Franks served on the defendant a notice that he had forfeited his lease by parting with the possession of the premises without the written approval of the landlords.

On the 10th of January, 1899, Levy and Franks commenced an action against the defendant to recover possession of the premises, and on the 1st of February the defendant's solicitor signed a consent to judgment in that action being signed against the defendant, and judgment was signed accordingly; and, a writ of possession having been directed to the sheriff, the plaintiff was obliged to go out of possession.

The plaintiff thereupon commenced this action for breach of covenant for quiet enjoyment.

At the trial the jury assessed the damages at £160, and Ridley, J., on further consideration, gave judgment for the plaintiff for that amount.

The defendant appealed.

*Rawlinson, Q.C.*, and *F. Shewell Cooper*, for the defendant.—There has been no breach of the covenant for quiet enjoyment. The interruption which the plaintiff has suffered was not the act of the defendant or of any person claiming through him, but was the act of the superior landlord: see *Kelly* v. *Rogers*, 40 W. R. 516, [1892] 1 Q. B. 910.

*Robert Wallace, Q.C.*, and *H. S. Simmons*, for the plaintiff.

A. L. SMITH, L.J.—It is clear that Levy and Franks were not entitled to bring an action of ejectment against the defendant. The defendant's breach of his covenant against assignment happened before the reversion was assigned to Levy and Franks; and there was therefore no breach of covenant conferring on them a right of re-entry. But the defendant consented to judgment for possession being signed against him, and in consequence of that the plaintiff had to go out. Ridley, J., thought that the interruption of the plaintiff's tenancy was caused by the act of the defendant in consenting to a judgment being signed against him, which he might have resisted. I am of opinion that there was evidence on which the learned judge might so find, and therefore I think that the appeal must be dismissed.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the plaintiff, *Nordon & De Frece.*

Solicitors for the defendant, *Swann, Green, & Co.*

---

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) June 21, 22.

BURGER v. INDEMNITY MUTUAL MARINE ASSURANCE CO. (LIMITED). (a.)

*Insurance, marine—Collision clause—"Injury to the other ship or vessel itself"—Wreck—Cost of removal.*

*A policy of marine insurance on hull and machinery contained a collision clause which covered sums paid by the assured in the event of a collision with another vessel "in respect of injury to the other ship or vessel itself." The insured ship came into collision with a tug in a river and sank it. The wreck of the tug was removed by a conservancy board under their statutory powers, and the cost of doing so was paid to the board by the owners of the tug and recovered by them from the assured in a collision action.*

*Held, that the cost of removing the wreck was not recoverable by the assured under the policy.*

Appeal of the defendants from the judgment of Mathew, J., in an action tried without a jury in the Commercial Court.

The action was brought on a policy of marine insurance granted by the defendants and dated the 1st of April, 1897, for £3,500 on the hull and machinery of the plaintiff's steamship *Durward* for twelve months from the 1st of April, 1897.

The policy contained the following clause: "Collision clause.—Cross-liability.—And we further agree that if the ship hereby assured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof be found liable to pay, and shall pay, any sums (not exceeding the value of the ship hereby assured) in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel, we will severally pay the assured such proportion of three-fourth parts of said sums as our respective subscriptions hereto bear to the value of the ship hereby assured. . . . But this agreement is in no case to be construed as extending to any sums the assured may become liable to pay, or shall pay, in respect to loss of life or personal injury to individuals from any cause whatever."

On the 25th of November, 1897, *The Durward* came into collision with, and sank, the tug *Victory* in the River Tees, and *The Victory* became a wreck, which was subsequently dispersed by the River Tees Conservancy Board acting under their statutory powers.

The costs of dispersing the wreck, £1,178 19s. 10d., were claimed by the board under their statutory powers, and were duly paid by the owners of *The Victory*.

In an action arising out of the collision, brought in the Admiralty Court, *The Durward* was held alone to blame, and her owner was found liable to pay, and did pay, to the owners of *The Victory* the sum of £1,178 19s. 10d.

The plaintiff claimed from the defendants their proportion of that sum. The defendants pleaded that the payment was not a sum paid in respect of injury to *The Victory* itself within the meaning of the collision clause.

Mathew, J., gave judgment for the plaintiffs.

The defendants appealed.

*Carver, Q.C.*, and *Scrutton*, for the defendants.—The cost of removing the wreck was not an injury to the tug itself within the meaning of the clause in the policy. The clause clearly does not cover all the damages recoverable in a collision action, because in such an action freight to be earned can be recovered (*The Argentino*, 37 W. R. 210, 14 App. Cas. 519), whereas this clause only covers freight being earned at the time of the collision. But if the clause covers the cost of removing the wreck, it would also cover freight then being earned, and the express stipulation as to freight would be unnecessary. The use of the word "itself" after the word "vessel" shows that the underwriter's liability is to be limited: *The North Britain*, 42 W. R. 243; *The Engineer*, 46 W. R. 530, [1898] A. C. 382. The proviso excluding liability to pay for loss of life or personal injury is not inconsistent with this view. That proviso was inserted

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

because of the conflict of opinion between England and Scotland as to whether damages for loss of life or personal injuries could be recovered in a collision action: *Taylor* v. *Dewar*, 12 W. R. 579, 5 B. & S. 58; *Coey* v. *Smith*, 22 Court of Sess. Cas. (2nd series) 955.

*Joseph Walton, Q.C.*, and *J. A. Hamilton*, for the plaintiff.—The decision of Mathew, J., was right. The word "itself" is used in contradistinction to the words "goods and effects on board" and "the freight then being earned," and has not the effect of limiting the underwriter's liability to the cost of repairing the vessel, as contended for by the defendants. If "vessel itself" means the vessel, and nothing but the vessel, the proviso as to loss of life and personal injury was not required.

A. L. SMITH, L.J.—In this case I dissent with diffidence from the judgment of Mathew, J. The facts are as follows: The owner of *The Durward* insured his vessel in a policy containing the clause in question. That vessel collided with the tug *Victory* and sent it to the bottom, the collision being due entirely to the negligence of *The Durward*, whose owner has paid all the damages, some £3,330, which the owner of *The Victory* sustained. The wreck being in the fairway of the River Tees Navigation, the conservators under their statutory powers dispersed it by explosives at a cost of £1,178, which they claimed from the owners of the tug. They in their turn claimed and received the same amount from the owner of *The Durward*, who in this action claims a proportion of that sum from the underwriters contending that his liability is covered by the collision clause. The whole question is whether it is covered or not. Mathew, J., has held that it is, and the underwriters appeal from his judgment. Now, the clause in question runs thus: [His lordship read the collision clause set out above.] Thus the obligation of the underwriters is limited to three subject-matters—(*a*) in respect of injury to the other ship or vessel itself, (*b*) in respect of injury to goods and effects on board thereof, (*c*) for loss of freight then being earned by such other ship or vessel. Those are the three subject-matters. The underwriters have to pay such proportion of three-fourths of the amount paid in respect of them as their several subscriptions bear to the value of *The Durward*, the ship insured. Now, pausing there, with all deference to Mathew, J., I think the construction of this clause is reasonably clear. I am not disposed to alter the words "in respect of" into "in consequence of," as suggested in the argument on behalf of the respondents, or into any other words. The words are "in respect of injury to such other ship or vessel itself." The word "itself" is, I think, strongly in favour of the appellants' contention. The sums paid by the owner of *The Durward* in respect of injury to *The Victory* itself have already been paid by the underwriters. The £1,178 paid for clearing away the wreck is not, in my opinion, a sum paid in respect of injury to the tug itself. It is contended for the respondent that the third heading, "loss of freight then being earned by such other ship or vessel," does not create a liability on the underwriters, but limits an existing liability wide enough to cover it. However that may be, it does not conclude the question. But it is said in addition there is the proviso, "This agreement shall in no case be construed as extending to any sums the assured may become liable to pay in respect to loss of life or personal injury to individuals from any cause whatever." It is contended that this proviso limits a liability, which, but for the proviso, the clause would have imposed upon the underwriters. But that is not, in my opinion, the real object of the proviso. The underwriters have not inserted a clause imposing a liability to pay in the widest sense all sums paid by the assured consequent upon any injury to the other vessel, and then excepted from such liability any sums paid in respect to loss of life or personal injury to individuals. The proviso is, in my opinion, added *ex abundanti cautelâ*. This argument of the respondent is not strong enough to induce me to hold that the earlier part of the clause imposes a liability to pay the sums claimed in this action. The appeal will therefore be allowed.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. The assured has been obliged to pay to the owners of *The Victory* the expenses of dispersing the wreck. He now claims to recover those expenses from the underwriters. Whether he can do so depends on the construction of the words "in respect of injury to such other ship or vessel itself or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel." Those words seem to me so clear as to require no explanation whatever. They catalogue the injuries in respect of which the underwriters undertake to pay the assured if the assured has to pay. *Primâ facie* it is impossible to say that the sum of money which the assured paid for clearing the tideway of the River Tees was a sum paid "in respect of injury to such other ship or vessel itself." But we are invited to put that meaning on those words because of the proviso that "this agreement shall in no case be construed as extending to any sums the assured may become liable to pay in respect to loss of life or personal injury to individuals from any cause whatever." If the words defining the subject-matter of the insurance are clear one cannot alter them because of a proviso which is in its very nature one which a prudent underwriter might think it advisable to introduce into every policy. I do not think Mathew, J., relied much on this proviso. His judgment was based on the construction of the earlier part of the clause, and I cannot agree with the view he took of its meaning.

ROMER, L.J.—I agree. One thing is clear—viz., that the collision clause was not intended to make the underwriters liable to pay money for every injury or loss in consequence of a collision. Their liability is limited to three heads—injury to the vessel, injury to goods, and loss of freight. The last proviso with regard to loss of life is, in my opinion, quite useless, and is only added out of superabundant caution; but a mere addition, however useless, is not enough to alter the natural construction. If the construction proposed by the respondent is adopted, if, that is, "in respect of" is to be read as "in consequence of," there is this additional difficulty, that there would then be no use in adding "injury to goods" or "loss of freight." For there could hardly be an injury to goods or a loss of freight, through a collision, which would not be in consequence of an injury to the ship itself. So that the same difficulty which arises on the appellants' construction would arise on the respondent's also, except that there would be two useless clauses instead of one.

*Appeal allowed.*

Solicitors for the plaintiff, *William A. Crump & Son.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

## High Court of Justice.

Chan. Div. } Stirling, J. } June 19; July 12.

*In re* DE WILTON.
DE WILTON *v.* MONTEFIORE. (*a.*)

*Married woman—Marriage—Capacity—Uncle and niece—Celebration abroad—Domicil—Jews—Marriage Act,* 1836 (6 *&* 7 *Will.* 4, *c.* 85), *s.* 2—*Marriage Act,* 1840 (3 *&* 4 *Vict. c.* 72), *s.* 5—*Marriage Act,* 1835 (5 *&* 6 *Will.* 4, *c.* 54).

*A marriage between a niece and an uncle, who are members of the Jewish faith and domiciled British subjects, is invalid, although celebrated abroad where such a marriage would be legal.*

This was a summons raising a question as to the shares into which, in the events which had happened, the residuary estate of the testatrix, Mrs. Laura Judith De Wilton, was divisible.

This involved a further question as to the validity of a marriage contracted between a daughter of the testatrix and her maternal uncle, both of the parties being of the Jewish faith and the marriage having been solemnized according to the rights and usages of the Jews at Wiesbaden, where such a marriage would have been legal.

The testatrix by her will dated the 30th of July, 1889, gave certain stocks and securities to her trustees upon trust to divide the same into three equal shares, and declared that her trustees should stand possessed of one of such shares upon trust to pay the income thereof to her daughter, Consueloe, during her life, and after her death to stand possessed of such share in trust for the children or remoter issue of such daughter born or to be born during her life, or within twenty-one years after her death, as the daughter should appoint, and in default of appointment in trust for all the children of the daughter, who being sons should attain twenty-one or being daughters should attain that age or marry. And if there should be no child or other issue of such daughter who should attain twenty-one, or being daughters should marry, then after the death of the daughter and default or failure of children or issue, the testatrix declared that the said share of the trust fund should accrue to the shares of any other daughter or daughters who should be living at her death in equal shares. And the testatrix further declared that the trustees should stand possessed of another of such one-third shares upon the like trusts in favour of her daughter Eugenie and her issue.

After disposing of the remaining one-third share the testatrix gave her residuary estate to the trustees in trust for all her children, including any who might have died in her lifetime leaving issue living at the death of the testatrix, and so that the share of any child who might have died in her lifetime leaving issue as aforesaid should devolve on his or her representatives in the same manner as if he or she had survived the testatrix and died immediately after her. And she directed that the trustees should retain the share of each daughter in the residuary trust fund and hold the same upon the like trusts in favour of each such daughter, her children, or issue, as were thereinbefore declared of and concerning their said respective one-third share of the before-mentioned trust fund.

By a codicil dated the 12th of June, 1893, the testatrix, after reciting that her daughter Eugenie had recently died, revoked the trusts in favour of Eugenie and her issue, of and concerning the one-third share of the first-mentioned trust fund, and disposed of it otherwise, and in all other respects she confirmed her will. She afterwards made further codicils, which did not affect the present question.

On the 30th of January, 1899, the testatrix died.

The question arose as to the share which would have come to the daughter Eugenie if she had survived her mother. Mrs. De Wilton was by birth a Jewess, but married a Christian in accordance with the rites of the Church of England. Her daughter Eugenie was brought up as a Christian. In 1876 Eugene De Wilton became engaged to be married to her maternal uncle, Joseph Gompertz Montefiore. Both were British subjects domiciled in England. Mr. Montefiore was an adherent of the Jewish faith. Miss De Wilton was desirous of being admitted to the same faith, but could not be so admitted according to the rules of the synagogue to which Mr. Montefiore belonged, nor could she be married. They therefore went to Wiesbaden, in Germany, where, on the 20th of August, 1876, they went through the form of civil marriage, and afterwards of marriage according to the custom and practice of the Jews. At that time Miss De Wilton had not been formally admitted into the Jewish faith, but she was so admitted at Paris on the 17th of September, 1876; and afterwards, on the same day, she there went through the form of marriage with Mr. Montefiore according to the Jewish custom and practice. The evidence showed that such a marriage was valid according to the law in force at Wiesbaden. There were issue of the marriage five children, of whom four were still living. The testatrix appeared in her lifetime to have recognized them as children of her daughter. The question was whether the testatrix's daughter Eugenie left children or issue within the meaning of the will of the testatrix.

*Dicey, Q.C.*, and *B. Cohen*, appeared for the children of the daughter.

*Henriques*, for other parties.

STIRLING, J., after stating the facts, said that two contentions were raised on behalf of the children—(1) that the marriage was valid; if so, they were children of the testatrix's daughter according to the strictest construction of the word; and (2) that, even if the marriage were invalid, the language of the will was such as to include them under the designation "children" as used in the will of the testatrix. Considering the second point first, it was based on the doctrine laid down by Lord Cairns in *Hill* v. *Crook*, 22 W. R. 137, L. R. 6 H. L. 265, and by the Court of Appeal in *In re Jodrell*, 38 W. R. 721, 44 Ch. D. 590—viz., that the will was to be taken as a dictionary to find the meaning of the terms used by the testatrix. If, for example, the testatrix had referred to her daughter Eugenie as the wife of Mr. Montefiore (as she had done with respect to her two sisters), there would have been no difficulty in holding that the children of Eugenie must include those who had sprung from the union referred to. Unfortunately, nothing of the kind was found in the testamentary dispositions of the testatrix. What were relied on were the expressions found in the codicil, and particularly the confirmation of the will found in it. If in the will or codicil anything had been found showing an indication in the will that the testatrix regarded her daughter Eugenie as having left children or issue her surviving, I would willingly have applied the rule to which I have referred; but after careful examination of those instruments I have failed to find anything which satisfies me that the testatrix used the word "issue" or "children" otherwise than in their proper legal meaning, and I am

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

unable to decide on that ground in favour of the children.

I have now to consider the first point—viz., the validity of the marriage. It was not disputed that the marriage of an uncle and niece, being British subjects domiciled in England, was void under the statute 5 & 6 Will. 4, c. 54. That depended on the enactments contained in 32 Hen. 8, c. 38, as judicially interpreted, the leading authorities being Coke's 2nd Inst., p. 683; *Reg.* v. *Chadwick*, 11 Q. B. 173; and *Brook* v. *Brook*, 9 W. R. 461, 9 H. L. Cas. 193. The last-mentioned case established that such a marriage was void although celebrated in a country where it would be legal as between persons domiciled there. It was said, however, that none of those statutes had any application to Jews, and it was contended that two such persons, if of the Jewish persuasion, might according to English law contract a valid marriage. There was no decision to that effect. The argument was based on the language of Lord Stowell in the case of *Lindo* v. *Belisario*, 1 Hagg. Cons. 216, and on that of the Legislature in various Acts of Parliament dealing with the subject of marriage. The history of the Jews in this country, so far as it was material to the present question, was given in a note to the report of *Lindo* v. *Belisario*, 1 Hagg. Cons. 217. From that time forward (1673) the Jews appeared to have been permitted to reside in England and to practise the rites of their religion, and in particular to solemnize marriages according to their own usages. For a long time no legislative provision was made on the subject of their marriages; but by section 18 of Lord Hardwicke's Act (26 Geo. 2, c. 33), intituled "An Act for the better preventing of clandestine marriages," it was enacted that "nothing in this Act contained shall extend to that part of Great Britain called Scotland, nor to any marriages among the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion respectively, nor to any marriages solemnized beyond the seas." In that state of things the case of *Lindo* v. *Belisario* was decided. It was the first case in which the validity of a Jewish marriage was considered by an ecclesiastical court. In dealing with it Lord Stowell used language which would not have been inappropriate if the question before him had related to the capacity of the contracting parties as well as to the formalities of the marriage. In fact, however, the question related to the formalities only; it was one of intricacy and difficulty, and I am unable to find anything in the judgments which indicated that the observations to which I have referred were directed to anything beyond that which the learned judge was called on to decide; certainly I cannot look on them as an authority for the proposition that the capacity of members of the Jewish faith to contract marriage was regulated by their own law and not by the law of this country. The question in *Reg.* v. *Millis*, 10 Cl. & Fin. 534, was also one of form, and to it the remarks of Lord Brougham (see p. 736) and Lord Campbell (see p. 794), cited in argument, appear to have been addressed.

I now turn to the language of the statutes. Reliance was chiefly placed on that found in 6 & 7 Will. 4, c. 85, s. 2, and 3 & 4 Vict. c. 72, s. 5, where it was enacted that persons professing the Jewish religion may continue to contract and solemnize marriage according to the usages of the said persons. It was contended that, inasmuch as contract was spoken of in addition to solemnization, it must be taken that the Legislature had treated as valid, marriages contracted in accordance with the rules of the Jewish law, not merely as regards the form of marriage, but also as to the capacity of the contracting parties. I am unable to arrive at that conclusion. In the first place, the word "usages" was more apt with regard to matters of form than in relation to capacity of parties. Next, both these statutes (like 26 Geo. 2, c. 33) dealt with the formalities of marriage, and an enactment with respect to capacity was, *primâ facie* at least, beyond the purview of them. Again, in the statute 10 & 11 Vict. c. 58, passed for the express purpose of removing doubts as to the validity of the marriages of Quakers and Jews "solemnized according to the usages of those denominations respectively," it was declared and enacted "that all marriages so solemnized as aforesaid were and are good in law to all intents and purposes whatsoever"; that declaration and enactment related to form only. It was further to be remarked that, although in the statutes just mentioned, as in many others relating to formalities of marriage (as, for example, 4 Geo. 4, c. 76; 19 & 20 Vict. c. 119; and 61 & 62 Vict. c. 58), there was found an express exception of Jewish marriages, there was no such exception in 5 & 6 Will. 4, c. 54, which dealt with capacity. In my opinion, therefore, the marriage in question was not valid according to the law of England, and the fund must be distributed on the footing of the testatrix's daughter Eugenie having died in her lifetime without leaving issue.

Solicitors, *Emanuel & Simmonds.*

---

Chan. Div.
Cozens-Hardy, J. } May 29; June 1.

*In re* CHANT.
CHANT *v.* LEMON. (*a.*)

*Will—Construction—"Die unmarried"—Secondary meaning.*

*Testatrix by her will directed her trustees to divide a certain fund between two beneficiaries if her brother "shall die unmarried and without leaving any children or a child who shall attain twenty-one years." The brother died leaving a widow, but no child, surviving him.*

*Held, that, in this case, the words "die unmarried" meant "die without leaving a wife," and that there was, therefore, an intestacy.*

Summons.

The testatrix A. M. Chant by her will gave a life interest in her residuary real and personal estate (subject to the discretion of trustees) to her brother Frederick Chant, and after his death for his children, "but if he shall die unmarried and without leaving any children or a child who shall attain twenty-one years," then the trust fund was to be divided between Kitty Lemon and Sarah Hawkins. Frederick Chant, who survived the testatrix, died leaving a widow but never having had a child.

The question to be decided was whether there was an intestacy or whether Kitty Lemon and Sarah Hawkins were entitled to the contingent gift.

*R. J. Parker*, for next-of-kin.—It is clear that the meaning of the words "die unmarried" here is "die without having a wife at the time of death." By adopting this reading only can the phrase be made intelligible.

He referred to the cases of *Doe* v. *Cooke*, 7 East 269;

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

*Doe* v. *Rawding*, 2 B. & Ald. 441; *In re Sander's Trusts*, 14 W. R. 576, L. R. 1 Eq. 675.

*Ingle Joyce*, for the representative of Kitty Lemon.

*Lightwood*, for the representative of Sarah Hawkins.—The primary meaning of "die unmarried" is "die without having been married." This case is covered by *Maberley* v. *Strode*, 3 Ves. 450; *Bell* v. *Phyn*, 7 Ves. 453; *In re Sergeant*, 32 W. R. 987, 26 Ch. D. 575; *Grey* v. *Pearson*, 5 W. R. 454, 6 H. L. Cas. 61.

COZENS-HARDY, J.—Two meanings might be attached to the words "die unmarried." The primary meaning was "die having never been married." That meaning did not fit in with the context in the will before the court. The secondary meaning was "die without leaving a wife." This appeared to be the correct reading in the present case, as it made clear the meaning of all the words in the clause. There was, therefore, an intestacy, and there must be a declaration accordingly.

Solicitors for the applicants, *Geare, Son, & Pease.*

Solicitors for the respondents, *Rowcliffes, Rawle, & Co.; Sole, Turner, & Knight*, for *Blake, Reed, & Lapthorn*, Portsmouth.

---

Q. B. Div.
(Grantham and Channell, JJ.) June 14.

BENNETT (*Appellant*) v. HARDING (*Respondent*). (*a.*)

*Metropolis — Public health — Sanitary conveniences — Stableyard — "Workplace" — Persons "in attendance" — Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 38.

*Section* 38 *of the Public Health (London) Act*, 1891, *provides that every factory, workshop, and workplace shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, regard being had to the number of persons employed in or in attendance at such building.*

*Held, that the stable-yard and stables of a cab proprietor, where a number of men were employed as horse-keepers and cab-cleaners, and where cabdrivers were daily in attendance for the hiring of cabs and horses, constituted a "workplace" within the meaning of the section, and that the cabdrivers were "in attendance" at the premises, and that sanitary conveniences must be provided for the persons employed in the premises and for the cabdrivers who came there to hire cabs.*

Case stated by Mr. Bros, metropolitan police magistrate sitting at Clerkenwell police-court.

The respondent Harding was summoned to answer the complaint made by the appellant Bennett, sanitary inspector to the Holborn District Board of Works, which charged that the respondent, being the occupier or owner of the premises 9, 10, 16, 17, 18, 27, 35, 38, and 44, Ormond-yard, within the district of the board, did, on the 1st of January, 1900, unlawfully fail to provide sufficient and suitable accommodation in the way of sanitary conveniences for the persons employed in or in attendance at the above-mentioned premises, contrary to the provisions of section 38 of the Public Health (London) Act, 1891.

The magistrate dismissed the complaint, but without costs.

Section 38 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), is as follows: "Every factory, workshop, and workplace, whether erected before or after the passing of this Act, shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, regard being had to the number of persons employed in or in attendance at such building . . ."

(2) "Where it appears to a sanitary authority that this section is not complied with in the case of any factory, workshop, or workplace, the sanitary authority shall, by notice served on the owner or occupier of such factory, workshop, or workplace, require him to make the alterations and additions necessary to secure such compliance, and if the person served with such notice fails to comply therewith he shall be liable to a fine not exceeding twenty pounds, and to a fine not exceeding forty shillings for every day after conviction during which the non-compliance continues."

At the hearing of the complaint the following facts were proved or admitted:

That the appellant was the sanitary inspector to the Holborn Board of Works.

That the board of works was the sanitary authority for the Holborn district, and had duly authorized the appellant to serve a notice as required by section 38 (2) of the Public Health (London) Act, 1891, upon the respondent, and to make the complaint.

That the premises consisted of ten stables and a stable-yard, and were in the occupation of the respondent, who is a cab proprietor in a large way of business.

That the respondent kept upon these premises 110 horses and a large number of cabs of which he was the owner.

That the respondent employed upon the premises a number of men as horse-keepers and cab-cleaners for the purpose of attending to the horses and cabs.

That the business of the respondent consisted in letting out these cabs and horses by the day to drivers, and that the cabdrivers were daily in attendance at the premises for the purpose of hiring the horses and cabs, changing horses and returning the horses and cabs after use.

That the horse-keepers and cab-cleaners when not at work lived with their respective families in different rooms having sanitary conveniences, situate over different portions of the premises.

That in the stables and stable-yard there was no accommodation in the way of sanitary conveniences for the horse-keepers and cab-cleaners employed therein.

That many complaints of the want of sanitary conveniences had been made to the appellant and to the board.

It was contended before the magistrate on behalf of the appellant (*a*) that the premises were a "workplace" within the meaning of section 38 (1) of the Public Health (London) Act, 1891; and (*b*) that as the respondent had after receiving the notice required by section 38 (2) failed to comply therewith, or to provide any accommodation at the premises for the use of persons employed in, or in attendance thereat, he was liable to the penalties imposed by section 38 (2) of the Act.

It was contended on behalf of the respondent (*a*) that the premises were not a "workplace" within the meaning of the Act; and (*b*) that if, contrary to the respondent's contention, the premises were a "workplace" within the meaning of the Act, then that the cabdrivers were not "in attendance" at the premises within the meaning of the Act.

The magistrate dismissed the complaint, as he was of opinion that the premises were not a "workplace" *ejusdem generis* with factory or workshop; and further, that cabdrivers were only in attendance as customers, and there was no duty thrown upon the

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

respondent to provide sanitary conveniences for them.

The questions for the opinion of the court were: first, whether the stables and stable-yard were a "workplace" within the meaning of the Act; and, secondly, whether cabdrivers were persons "in attendance at such building" within the meaning of the Act.

The arguments were similar to those before the magistrate.

*Courthope Munroe* (*W. Leese* with him), for the appellant.

*Macmorran, Q.C.* (*Ellis Griffiths* with him), for the respondent.

GRANTHAM, J.—In my judgment the learned magistrate was wrong as to the meaning of the expression "workplace," and as to those "in attendance" there. We think he ought to have convicted the respondent. The magistrate has found in the case that these cabdrivers were daily in attendance at the premises. We all know that a business of this kind does not consist merely in the cabdriver taking out one horse and one cab in the morning and not coming back with the horse and cab till the night. The cabdriver requires a change of horses during the day. He goes in the morning, goes back again during the day, and returns in the evening, and so on. I cannot suggest any class of men who would be more likely to need this accommodation than these cabdrivers while waiting about in the stable-yard. I think they were in attendance there, and I think the magistrate was right in so holding, but I think he was wrong when he said that because they were in attendance as customers they were not in attendance within the meaning of the Act. They were in attendance there, and sanitary conveniences ought to have been provided for them. The other question is whether this was a "workplace" or not. I think it was, and I cannot imagine a word more suitable to describe this place than the term "workplace." Horse-keepers and cab-cleaners come there and work there all day, and the work is all done in a limited area. In my opinion this was no ground for saying that to be a workplace it must be *ejusdem generis* with the two things before it—namely, factory and workshop, and that it must be a place where something is manufactured. To adopt that view would be to largely take away the value of the section. In my judgment these premises were a workplace, and the cabdrivers were in attendance there within the meaning of this section. The respondent ought therefore to have been convicted.

CHANNELL, J.—I am of the same opinion. The first question is whether this stable-yard is a workplace. Even assuming that the doctrine of *ejusdem generis* applies—and I do not feel sure that it does apply—but assuming that it does apply, that does not mean a similarity with a factory or workshop in the work that is done there, but it must mean a similarity with reference to the objects of the Act of Parliament, a similarity in keeping persons employed on the premises for a considerable length of time, but not a similarity in respect of the work done in a factory or workshop. A workplace must be a place where work is done permanently and where persons assemble together to do work permanently. That being so, these stables are, as it seems to me, a workplace within the meaning of this section. Then someone or other—it is not clear from the Act whether it is to be the magistrate or the sanitary authority—has to judge of the sufficiency of the accommodation in the way of these sanitary conveniences. He has, in the first place, to take into account all the persons who are employed there, and when he has considered the sufficiency of the accommodation for those employed there, then he has to consider the number of those who are in attendance there, and who are likely to be there for a considerable length of time, so as to be likely to use these conveniences. Those "in attendance" mean persons who are in fact upon the premises for a considerable length of time, and they are not the less in attendance because they are there as customers. The purpose or object for which they are on the premises does not seem to me to affect the question whether they are in attendance there or not. I had some doubt as to whether the case finds that these cabdrivers were on the premises for a sufficient length of time to entitle us to say that they were in attendance, but the purpose of their being there as customers does not prevent them from being in attendance if they otherwise would be so. I think, therefore, that the magistrate ought to have convicted the respondent.

*Appeal allowed. Case remitted to the magistrate.*

Solicitor for the appellant, *Matthew H. Hale.*

Solicitors for the respondent, *Marpole & Marpole.*

---

Q. B. Div.
(Grantham and Channell, JJ.) June 12.

MACKRELL AND ANOTHER v. JUSTICES OF BRENTFORD DIVISION OF MIDDLESEX. (a.)

*Licensing law—Beerhouse—Licence—Privileged house—No beer sold in beerhouse—Application to renew licence—Jurisdiction of justices to refuse renewal—Wine and Beerhouse Act,* 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19.

*A beerhouse was licensed prior to May,* 1869, *and remained continuously licensed down to* 1898, *but no beer had been sold in the house for many years. A new tenant, who had become the occupier of the premises and who intended to carry on the business of the beerhouse, but to whom a transfer of the licence had been refused, applied at the annual licensing meeting for a renewal of the licence.*

*Held, that the justices had no jurisdiction to refuse the renewal on the ground that no beer had been sold in the house or that the house was not required by the neighbourhood, but that they were limited by section* 19 *of the Wine and Beerhouse Act,* 1869, *to the four grounds specified in section* 8 *of that Act.*

Case stated by the court of quarter sessions for the county of Middlesex.

An appeal was heard by the court of quarter sessions against a refusal of the licensing justices for the Brentford Division to grant by way of renewal a beerhouse certificate in respect of the Brittania Tap beerhouse, Twickenham, to one Shepherd, the occupier of the premises. On this appeal Mackrell, the owner of the premises, and Shepherd, the occupier, were the appellants, and the licensing justices of the Brentford division were the respondents.

The following facts were proved or admitted:

The premises were premises in respect of which a beerhouse licence for the sale by retail of beer and cider to be consumed on the premises was in force on the 1st of May, 1869, and such licence had been (within the meaning of section 7 of the Wine and Beerhouse Act, 1870) continuously renewed from time to time down to and including the year

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

1898, but, notwithstanding such constant renewals, no beer had been sold on the premises for at least twenty-eight years. No signboard was exhibited, nor was there any indication of a licence except that the words "Licensed, &c.," were printed in small letters over the door. The premises were thirty yards back from the high road in an enclosed yard, and there were no fittings on the premises for the sale of beer.

The licence for the premises had from the year 1895 been held by one Harbor, the then resident occupier, but no beer had been sold there by Harbor, nor had any beer been sold by retail for many years before. He was not expected to trade there and had no instructions to do so, but he acted as manager for his employers, who were brewers of Twickenham.

Harbor sought to transfer his licence to one Shepherd in January, 1899, at special transfer sessions, and the licensing justices then first became aware that the licensee (Harbor) had failed to exercise his rights as to the sale of beer on the premises. The transfer was refused as not coming within section 4 of the Alehouse Act, 1828, by which the justices are to licence such persons intending to keep inns theretofore kept by other persons being about to remove from such inns."

The occupation of the premises by Harbor was as tenant to the lessees of the premises, who were brewers, and for whom he acted as manager. These brewers were the owners of other licensed premises, and the Britannia Tap beerhouse was for many years used only as a residence for their managers, and since 1895 as the sole residence of Harbor, and as a wholesale store for beer of his employers. No information was ever given to the justices of these facts, and the renewals were granted in ignorance of the fact that no trade was carried on.

In 1898 the lease of the brewers expired, and the appellant Mackrell became by purchase the owner of the premises; and on the 4th of January, 1899, Mackrell let the premises at the rent of £30 per annum upon a yearly tenancy to the appellant Shepherd, who entered into occupation of the premises (which were vacated by Harbor) under the lease, and was at the time of the refusal of the certificate, and still is, the occupier.

In January, 1899, an application for the transfer of the licence was made, and on the above facts being known, was refused, on the authority of *Reg.* v. *Cotham*, 46 W. R. 512, [1898] 1 Q. B. 802.

At the general annual licensing meeting for the Brentford division on the 7th of March, 1899, the appellant Shepherd applied for a renewal to himself, as real resident holder and occupier of the premises, of the certificate previously granted to and held by Harbor.

Notice of objection to such renewal was given by direction of the justices on the grounds that no beer had been sold on the premises for many years, and that the beerhouse was not required for the needs of the neighbourhood.

No objection was made on any of the four grounds applicable under the Wine and Beerhouse Act, 1869, s. 8, to beerhouse licences granted prior to the year 1869.

The application for the renewal was refused by the licensing justices at their adjourned meeting on the 30th of March, and the appellants appealed to the quarter sessions against the refusal of the renewal of the certificate.

It was contended by the respondents (1) that the application of Shepherd, being one for the renewal of the certificate, the appellant or his predecessor must be a person "keeping" an inn within section 1 of the Alehouse Act, 1828, and that this applicant was not such a person; (2) that the matter was governed by the case of *Reg.* v. *Cotham*; (3) that as no beer had been sold upon the premises by the previous occupiers, there was no jurisdiction under the Alehouse Act, 1828, or under the Wine and Beerhouse Act, 1869, to grant to the appellant Shepherd a renewal of the certificate; (4) that the previous renewal purporting to be granted under section 1 of the Alehouse Act, 1828, at the annual licensing sessions in 1898, was a void and empty form, and in law could not be renewed in 1899; (5) that there must be some actual keeping or user, without which the licensing justices had no jurisdiction to exercise their powers under the Licensing Act, and that it was against public policy to renew the form of a certificate to exercise a privileged trade when it was not intended to be exercised.

It was contended for the appellants that the premises were a privileged beerhouse within the meaning of sections 8 and 19 of the Wine and Beerhouse Act, 1869, and section 7 of the Wine and Beerhouse Act, 1870, and that a renewal could only be lawfully refused on one or more of the four grounds mentioned in section 8 of the Wine and Beerhouse Act, 1869; that the case of *Reg.* v. *Cotham* was not applicable, as there the application was made, not for a renewal under section 1 of the Alehouse Act, 1828, but for a transfer under section 4 of that Act, which requires a transferor to have been a person about to remove from premises kept as licensed premises, and in the case of *Reg* v. *Cotham* the transferor had not lived in the licensed premises for many years, such premises being kept by other persons as a draper's shop.

The appellants therefore alleged that the present application was distinguishable from the above case as made under a different section of the Act of 1828, and by a person duly qualified by residence.

The justices found as a fact that no beer had been sold by retail, and that the successive licensees had not carried on, nor had they the intention, nor could they have, carried on an inn on the premises as licensed, and that such licence was merely colourable.

The justices were of opinion that *Reg.* v. *Cotham* was, notwithstanding the difference as to occupation, in principle applicable to this case, and they held that as no beer had been sold on the premises under previous certificates for so long a time, such premises had not been kept as a beerhouse, that no use had been made of the licence, that the successive transferees had not intended to keep, and had not kept, an inn, and that therefore there was no jurisdiction to grant a certificate by way of renewal to the applicant Shepherd, notwithstanding that he was the occupier of the premises at the time of the application.

The quarter sessions, therefore, dismissed the appeal.

The question for the court was whether the justices were right in so holding, or whether they were limited in refusing the renewal of the certificate to the four grounds specified in section 8 of the Wine and Beerhouse Act, 1869, or whether they were justified in law in dismissing the appeal.

*Bruce Williamson*, for the appellants.—The quarter sessions decided the case entirely on *Reg.* v. *Cotham*. They were wrong in so doing, as that case has no application at all to a case like the present. In *Reg.* v. *Cotham* the application was made, not for a renewal as in the present case, but for a transfer under section 4 of the Act of 1828, and the licence had previously been held in the name of a person who had not resided in the premises for ten years; so that the previous holder of the licence did not reside on the premises at all, so as to bring his case within section 4. The present is a totally different case, as the applicant is the resident occupier, and the application is not for a transfer,

but for a renewal. It is made by a person to whom a transfer was refused. He was not the holder of the previous licence, and it is not necessary that he should be so. He was the tenant and occupier, and as such he was entitled to apply for a renewal though he was not the licensed person and though a transfer had been refused to him: *Symons* v. *Wedmore*, 42 W. R. 301, [1894] 1 Q. B. 401. This was a privileged beerhouse, so that section 19 of the Act of 1869 applies, and the justices therefore have no option, but are bound to renew the licence unless on one or more of the four grounds specified in section 8. Not selling beer on the premises is not one of those grounds, and is therefore not a ground on which the renewal can be refused. The case clearly comes within *Symons* v. *Wedmore*, which shows that Shepherd was entitled to the renewal although he was not the holder of the licence, and a transfer to him had been refused.

The respondent justices did not appear.

GRANTHAM, J.—In this case it is strange that the licensing laws should have left altogether out of sight a case of this kind, whether the licensing justices are bound to renew a beerhouse licence year after year, although no beer is sold on the premises, and although the holder of the licence may not intend to sell beer there. That, however, is not exactly this case, and we have to determine this case upon its own particular facts. The question is, when a house has been licensed as a beerhouse in 1869, and has been continuously licensed ever since, and a person applies for the renewal of the licence who *bonâ fide* intends to carry on the business there, whether or not the justices have power to go outside the four grounds specified in section 8 of the Wine and Beerhouse Act, 1869, and refuse the renewal because no beer has been sold there for a long period, or because the house is not required for the needs of the neighbourhood. In my judgment they have no power to refuse the renewal on any such grounds. Section 19 is clear to show that in the case of these privileged beerhouses the renewals cannot be refused except on one or more of the four grounds. I refer to the case to see the grounds on which this licence was refused. It says: "Notice of objection to such renewal was given by the direction of the justices on the grounds that no beer had been sold on the premises for many years, and that the beerhouse was not required for the needs of the neighbourhood. No objection was made on any of the four grounds applicable under the Wine and Beerhouse Act, 1869, s. 8." Suppose that only one year, or even a few months only, had elapsed since the sale of beer on the premises, could the justices have refused the licence on that ground? I think it would not have been a ground for refusing, and they have weakened their case by saying that the house was not required by the neighbourhood. That is not a reason which they can properly take into account. I think the case comes under section 19, and that we are bound by section 19. That section has created a class of privileged houses, and I see no reason for holding that this house has forfeited that privilege. I think, therefore, that both the licensing justices and the quarter sessions were wrong in refusing this licence. They ought to have granted the renewal, and this appeal will therefore be allowed.

CHANNELL, J.—I have come to the same conclusion. It seems to me that the applicants are entitled, by section 19 of the Wine and Beerhouse Act, 1869, to have the renewal. That section provided that in the case of these beerhouses the renewal should not be refused except on the four grounds mentioned in section 8. That section preserved those rights for one year only, but in the following year the Wine and Beerhouse Act, 1870, in section 7, applies the provisions of section 19 to cases where the licences have been continuously renewed from year to year. Since that Act it seems to me that a person who has got a privileged licence under the Act of 1869, which has been continuously renewed, can come and ask for a renewal, and that such renewal can only be refused on one or more of the four grounds. The fact that no beer has been sold on the premises for a long period is not one of those grounds, and is not a ground for refusing the renewal. On the authority of *Symons* v. *Wedmore* the present tenant of this house was in a position to come at the end of the year and ask for a renewal, though he was not in a position to get a transfer. I think his rights were preserved, and that he could come under section 19 of the Act of 1869, as extended by section 7 of the Act of 1870, and ask for a renewal, which could only be refused on the four grounds. The justices were therefore wrong in refusing it upon other grounds. I think they were also mistaken in holding that *Reg.* v. *Cotham* applied. That case merely shows that the transfer machinery does not apply to such a case as the present.

*Appeal allowed. Case remitted to the justices.*

Solicitors for the appellants, *Charles Robinson & Co.*

---

## IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — June 12.

*In re* LANE-FOX.
*Ex parte* THE TRUSTEE. (*a.*)

*Bankruptcy — Voluntary settlement* — 13 *Eliz. c.* 5— *Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

*Where a voluntary settlement has been executed more than two years prior to the bankruptcy, and the settlor was at the time of the execution of such settlement able to pay all his debts without the aid of the property comprised in the settlement, it will not be set aside, except upon proof of actual intent to defraud future creditors on the part of the settlor or the trustees of the settlement.*

Motion by the trustee in the bankruptcy of Miss Louisa Emma Lane-Fox to set aside a settlement executed by the bankrupt on the 30th of January, 1891.

Miss Lane-Fox came of age upon the 25th of January, 1891, and thereupon became entitled to about £15,000, not subject to the control of any settlement or any trustee. She was recommended by her uncle, with whom she resided, and by other relatives to make a settlement for her own benefit, and she accordingly executed the deed now sought to be avoided upon the 30th of January, 1891. By this deed she conveyed to trustees the stocks, funds, and securities set out in the schedule thereto annexed, upon trust at their discretion to convert and invest as therein mentioned, and out of the moneys coming to their hands, whether capital or income, to pay her present and future debts as they might think fit, and during her life, in their absolute discretion, pay and apply the income of the trust premises to or for her benefit or the benefit of any husband or issue of hers. Any surplus income was to be accumulated. After her death the trust premises were to be held in trust for her issue attaining twenty-one or marrying as she should by deed or will appoint, and in

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

default of appointment for all her children, and in default of children for such persons as she should when discovert by deed or will, or when covert by will, appoint, and in default of appointment for her next-of-kin according to the Statutes of Distribution.

The settlement contained a power of revocation, with the consent of the trustees, of all or any of the trusts.

At the time of the execution of the settlement sufficient money was kept out of settlement to enable Miss Lane-Fox to pay her then existing debts, so she was absolutely solvent when she executed the deed without the aid of the money thereby settled. She subsequently became very extravagant, and the trustees on two occasions consented to revocation of the trusts, and raised sums out of the settled funds to pay the debts. Finally they refused to raise any more sums out of the settled funds, and on the 14th of February, 1900, Miss Lane-Fox filed her own petition with the object, as she admitted, of avoiding the settlement.

She was adjudicated bankrupt, and a trustee was appointed who moved to set aside the deed under section 47 of the Bankruptcy Act, 1883, but upon it being proved that Miss Lane-Fox was solvent when she executed the deed in 1891, the trustee obtained leave to amend his notice of motion and sought to avoid the settlement as fraudulent within 13 Eliz. c. 5 as having been made with intent to defeat or hinder creditors.

*Muir Mackenzie*, for the trustee in bankruptcy.

*P. M. Francke*, for Miss Lane-Fox.

*Reed, Q.C.*, and *Carrington*, for the trustees of the settlement.

WRIGHT, J.—This is a somewhat remarkable case. The trustee in the bankruptcy of Miss Lane-Fox seeks to have it declared that as against him a settlement which she made upon trusts for her own benefit in 1891 is to be treated as void. One of the curious circumstances of the case is that the receiving order was made upon the petition of the lady herself, and her object in making herself bankrupt was to get rid of this settlement; for what reason I need not inquire, whether it is her dislike to her trustees, or her desire to pay her debts, or to get control of her money; but the question is whether this settlement ought to be treated as void or voidable against the trustee. He based his case, in the first instance, on section 47 of the Bankruptcy Act, 1883, which, however, turned out to have no application whatever, because at the time the settlement was made the lady had, in point of fact, enough money to pay her debts without the aid of the property comprised in the settlement, and the settlement was more than two years old. Then, by leave of the court, the application has been turned into one to avoid the settlement under the statute of Elizabeth or the common law which that statute restated. It seems to me that the law on the subject is this: that in a case like the present—one where there are no existing creditors at the time of the settlement for whom sufficient provision did not remain outside the settlement—it is necessary, in order to avoid the settlement, to show that there was an actual intention to defeat, delay, or hinder future creditors. I think that the law is best laid down in the judgment by Lord Westbury—a great authority in these matters—in the case of *Spirett* v. *Willows*, 13 W. R. 329, 34 L. J. Ch. 365, where he lays down two propositions, the first of which has been questioned by Lord Selborne in *Freeman* v. *Pope*, 18 W. R. 906, L. R. 5 Ch. App. 538, as being too wide, but the other has not been questioned so far as I am aware.

The first proposition which has been deemed to be too wide is this—I am reading from 34 L. J. Ch., p. 365—"If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." That has been thought too wide. It does not apply here because the creditors here were not creditors at the date of the settlement. But then comes this passage: "But if a voluntary settlement or deed of gift is impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to delay, hinder, or defraud creditors, or that after the settlement the settlor had no sufficient means or reasonable anticipation of being able to pay his then existing debts; that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to hinder or defraud the creditors, and is therefore fraudulent and void." I think no decision can be found anywhere inconsistent with the proposition that an honest settlement affirmatively proved to be honest ought not to be set aside merely because some years afterwards it is proved to have the effect of defeating or delaying subsequent creditors. Here the case was one of an inexperienced and probably impulsive young woman just come of age possessed of considerable means—some £15,000, I think—which through one accident or another had come into her control without being under the protection of any settlement or of any trustee. Under those circumstances her friends and relations most properly, most wisely, and most prudently prevailed upon her, and she most properly, wisely, and prudently consented that the money should be put into a kind of settlement. Everything was open, everything was in the ordinary form and in perfect good faith, and to my mind it is affirmatively proved that this was a perfectly honest arrangement, and it is proved before me that there were no debts at the time beyond the amount of the moneys which were in hand to meet them. I think it would be outrageous if a settlement of such a description were to be set aside because afterwards the lady turns out to have become more extravagant than was supposed. Not merely were there no existing debts unprovided for at the time, but there was no reason to apprehend any future embarrassments. The income which she would derive under the settlement would be sufficient for all the probable expenses of a young girl of that class, who might be supposed to be unlikely to wantonly throw away her means. She had no intention of trading, nor is there any circumstance to show that she is within one or other of the very few exceptions which have been established under the general rule as laid down in such cases as *Spirett* v. *Willows* and *Freeman* v. *Pope*. I think all the cases that have been cited are consistent with what I have said but perhaps the language of the Court of Appeal in the case of *Ex parte Mercer, In re Wise*, 17 Q. B. D. 290, 34 W. R. Dig. 169, is as strong as any. To the same effect was Vice-Chancellor Kindersley's judgment as far back as the case of *Jenkyn* v. *Vaughan*, 4 W. R. 214, 3 Drew. 419; and I think there are many other similar cases.

To my mind the application of the trustee in bankruptcy fails, but it is a case in which I cannot say that he was wrong to investigate the matter. If he had made his application in proper form I do not think he ought to have been made to pay any costs; but here he based his application upon section 47 of

the Act of 1883, and he has no evidence to sustain his case under that section, and I think, as he obtained leave to amend only on terms as to costs remaining in my discretion, he ought to pay the costs of this application.

Solicitor for Miss Lane-Fox, *F. C. Sydney*.

Solicitors for the trustee in bankruptcy, *Colyer & Colyer*.

Solicitors for the settlement trustees, *Darley & Cumberland*.

---

Q. B. Div. (Wright, J.) May 21, 28.

*In re* VAUTIN.

*Ex parte* THE TRUSTEE. (*a*.)

*Bankruptcy — Fraudulent preference — Repayment of money lent for a special purpose—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

*When a debtor, though knowing himself to be insolvent, repays a loan to a creditor in the belief on reasonable grounds that he is bound by contract to return the money, he does not commit a fraudulent preference.*

Application by the trustee in the bankruptcy of Claude Vautin for a declaration that a payment of £1,000 made by the bankrupt to the respondent Turner, after the date of the act of bankruptcy on which the receiving order had been made, was a fraudulent preference, and for an order that Turner should hand over such sum of £1,000 to the trustee.

The facts were as follows: Upon the morning of the 27th of October, 1899, Vautin called upon Turner and asked him for a loan of £1,000, representing that that amount, together with £3,000 which he had borrowed upon securities from a financial company, would clear him of all his debts and "make him a free man." Turner gave Vautin a cheque for £1,000 upon the distinct understanding that it should be used together with the £3,000 in clearing Vautin of liability, and that if that should prove impracticable the money should be returned.

Vautin took the cheque and cashed it, but later in the day some unforeseen claims were made against him, he saw that the amount he had been able to borrow would not clear off his liabilities, and decided to leave the country. On his way to the coast, on the evening of the 27th of October, he posted two £500 notes to Turner, who received them on the following morning, after Vautin had committed the act of bankruptcy on which a receiving order was eventually made against him—viz., departing out of England with intent to defeat or delay his creditors.

The receiving order against Vautin was made on the 4th of November, he was adjudicated bankrupt, and Mr. Saffery, the applicant in this motion, was appointed trustee.

*Muir Mackenzie* and *H. Kisch*, for the trustee.

*Reed, Q.C.*, and *Carrington*, for the respondent.

WRIGHT, J.—In this case it seems to me that there are more grounds than one upon which the application fails. In the first place, I come to the conclusion of fact upon the evidence that the bargain between the parties was in substance that this £1,000 should be advanced by Turner by way of supplement to the £3,000 which was advanced by the financial company for the express purpose that it should be used with the £3,000 for clearing off the liabilities of the debtor and making him a free man, and for that purpose only. I accept Mr. Turner's statement that it was part of the understanding between the parties, although he does not allege that it was expressly mentioned, that if that were found impracticable the money was to be returned. Mr. Turner has not been cross-examined, and I am the more disposed to give credence to his evidence because, when the matter was expressly brought to his mind as to whether there was any actual promise to return the money if it could not be applied as intended, he had the candour to say that he did not recollect anything of the sort having been expressly mentioned. If that was the understanding, it seems to me that the case was brought within the authority of *Toovey* v. *Milne*, 2 B. & Ald. 683, a case which has been recognized in *In re Rogers, Ex parte Holland*, 8 Morr. 243, and in the leading case of *Bills* v. *Smith*, 13 W. R. 407, and in several other cases. And, in addition to that, I think it not at all immaterial to observe that, if Mr. Turner's statement is correct, part of the contract was that *pari passu* with the advance of the money there should be a security on shares which the bankrupt was to sell that day for the purpose of providing the security, and he was not to have the money except on the terms that he gave that security. If he did not sell the shares, and consequently did not give the security, he was to return the money. I think that strengthens the view very much that the real nature of the transaction was that the money should be returned unless in all respects the intention of the parties could be carried out. If that is the case, even though the trustee should be held entitled to this money, he would come under a liability to give effect to the arrangement that security was to be given. However that may be, I think the trustee fails on the other ground—namely, the ground of fraudulent preference, as well as on the ground—which is a distinct ground—that the money was advanced for a specific purpose, and did not form part of the general assets of the bankrupt. I think the case as to fraudulent preference fails, because, on the facts as they are stated by Mr. Turner, I come to the conclusion that it is not shown by the trustee that the dominant view with which the £1,000 was repaid was to prefer Mr. Turner. I arrive at that conclusion upon this ground—a ground which, I think, goes somewhat beyond any decided cases—and I state it plainly in order that, if I have gone wrong, I may be set right—and I draw the conclusion from the evidence — that the bankrupt, when he made the repayment of the £1,000 to Mr. Turner, did so in the belief, on reasonable grounds, that he was bound by contract to return the money. I say I doubt if any case goes so far as I am going now, because, irrespective of whether there was a legal contract effected or not, I think the cases justify me in holding that if the bankrupt in good faith and on reasonable grounds believed he was legally bound, then, even if he was not legally bound, that prevents it being a fraudulent preference, because it prevents the preference being the dominant view. I think that doctrine is justified by what is said by the court in *Bills* v. *Smith*, as well as by the judgment of the Court of Appeal in *New, Prance, & Garrard's Trustee* v. *Hunting*, 45 W. R. 577, [1897] 2 Q. B. 19, and by the House of Lords in *Sharp* v. *Jackson*, [1899] A. C. 419. I think, therefore, that this application fails, and must be dismissed with costs.

Solicitors for trustee, *Beyfus & Beyfus*.

Solicitors for the respondent, *Ashurst, Morris, & Co.*

---

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

## House of Lords.

From C. A. (England). March 9.

FOXWELL v. VAN GRUTTEN. (a.)

*Will—Estate tail — Fee expectant in remainder on termination of estate tail—Direction to trustees to convey—Construction—Intestacy—Heir by purchase or by descent.*

*A testator who died in* 1815 *by his will gave an equitable estate tail in certain lands to his daughter, and after her death directed his trustees (in whom was the legal estate) to legally convey the said lands unto such heirs of his daughter as should attain twenty-one, and to their several and respective heirs. The testator's daughter died without having barred her estate tail, leaving a son who attained twenty-one. He died in* 1894 *intestate and unmarried.*

*Held, that this grandson of the testator took an estate in fee simple under the will, and therefore his heir-at-law was entitled to the property.*

Appeal from a decision of the Court of Appeal (A. L. Smith, Rigby, and Collins, L.JJ.), affirming a judgment of Bigham, J.

The appellants brought this action to recover possession of certain lands in the county of Cornwall, claiming as the heirs of William Harris, who died in 1815, or as the heirs of his daughter Mary, who died in 1844.

The respondent claimed as heir of William Hartley, Mary's only child, who died in 1894 unmarried and intestate above the age of twenty-one years.

The case of *Van Grutten* v. *Foxwell* (before the House in 1897), 46 W. R. 426, [1897] A. C. 658, had decided that the testator's daughter Mary took an equitable estate tail under her father's will, and the further point of construction was now considered as to whether the testator had given to his grandson on attaining twenty-one an estate in fee simple expectant on the termination of the previous estate tail.

By his will dated the 31st of October, 1804, the testator William Harris devised the property in question to trustees in trust in the first place to have, receive, and take the rents, incomes, issues, and profits of all and singular my said freehold lands and tenements and tyn bounds to and for the use and benefit of such my child or children as shall be living, or wherewith my wife may be *ensient* at the time of my death, and to pay, apply, and dispose of such rents, incomes, and profits, or such and so much thereof as they my said trustees, or the major part of them, or the survivors and survivor of them, or the heirs of such survivor shall deem right and proper into and about the maintenance and education of such child or children until he, she, or they shall severally and respectively attain the age of twenty-one years, or be married. And from and after such child or children shall have attained the age of twenty-one years or be married then in trust to permit and suffer such child or children as they shall severally attain the said age of twenty-one years or be married to have, receive, and take, if more than one, in equal shares and proportions, the said rents, incomes, and profits of all and singular my said freehold lands, tenements, and hereditaments hereby devised to my said trustees to and for her, his, and their own use and benefit for and during the term of her, his, and their natural life and lives. And if I leave only one child and my wife not *ensient*, or if *ensient* and such child or children wherewith she may be *ensient* shall not be born alive or die before he, she, or they shall attain the age of twenty-one years or be married, then to permit and suffer in like manner such one child to have, receive, and take the said rents and profits of my said freehold lands, tenements, and hereditaments, tyn bounds, and premises to and for her or his sole use and benefit for her and during the term or her or his natural life. And from and immediately after the death of such child or children then my will is that my said trustees shall stand seised and be possessed of all, every, and singular my said freehold lands, tenements, hereditaments, tyn bounds, and premises hereinbefore devised to them in trust unto and to the use of the heirs of the body and bodies of such child or children lawfully begotten; if more than one, to be equally divided between them, such freehold lands, tenements, hereditaments, tyn bounds, and premises to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever.

It was held by the Court of Appeal that the testator's grandson William Hartley took a remainder in fee expectant on the determination of the estate tail given to his daughter, and that such remainder was now vested in the respondent as heir to the grandson William Hartley.

*Crackanthorpe, Q.C.*, and *Foote, Q.C.*, for the appellant.

*Haldane, Q.C.*, *T. H. Carson*, and *Boome*, for the respondent.

Their lordships took time to consider their judgment.

Lord MACNAGHTEN.—The will of William Harris, the testator in this case, has in its time given occasion for a vast amount of discussion, profitable and otherwise. But, happily, there is very little room for argument in regard to the question which your lordships are now called upon to decide. The point is a short one, and plain enough, I think, if only you are content to take the testator's words as the guide to his meaning, and suppose it possible that the testator meant what he said. The will contains a devise to trustees (who are vested with the legal estate) of all the testator's lands, tenements, and hereditaments upon trust for the testator's children, if more than one, in equal shares as tenants in common in tail, or, if there should be but one child (as in the event happened), upon trust for that only child as tenant in tail. So far the construction of the will has been settled in this House. After the death of such child or children the trustees are directed to convey and assure the said lands, tenements, and hereditaments in fee simple to the heirs special "as they shall severally and respectively attain the age of twenty-one years or be married." The real question seems to be whether that direction is part and parcel of the machinery and apparatus employed by the testator in and about the limitation of the estates or estate tail, or whether it is an independent gift to take effect in favour of designated persons in the line of succession. Judicial opinion is divided on the subject. On the original trial, where the question arose indirectly, the latter view was adopted incidentally by all the members of the Court of Appeal, consisting of Lord Halsbury, C., and Lopes and Rigby, L.JJ. In your lordships' House it found favour with a majority, which included Lord Herschell and Lord Watson. On the rehearing it was supported by Bigham, J., in a very able and lucid judgment, which was approved in the Court of Appeal by A. L. Smith

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

and Rigby, L.JJ. But Lord Davey, on the former occasion, was of a different opinion, and on the rehearing Collins, L.J., expressed "a strong preference" for Lord Davey's view. The learned Lord Justice begins by stating his belief as to what the meaning of the testator really was. He thinks that the testator meant to give a life estate to Mary Harris, who was his only child, and then to give "a remainder in fee simple" to her children. Before it was taken up by the appellants that was once Mr. Haldane's favourite contention. On the former occasion it was put forward as the principal ground of appeal. But then the parties to this litigation seem to me to have acted every now and then just like duellists in a play, dropping and exchanging their weapons, and each in his turn receiving the sharpest thrust from some point which was once his own. I cannot think that Mr. Haldane lost very much when this weapon was forced out of his hand. It is difficult to grasp. And certainly there are serious flaws in it. The gift is to "the heirs of the body or bodies" of the testator's child or children—a technical expression which must be understood in its technical sense, unless it can be shown from the will that the expression was used in another sense, and that other sense can be ascertained. Now, the majority of the noble and learned lords who heard this case originally were satisfied that there was nothing whatever in the will from first to last inconsistent with the words in question having their proper and technical meaning. There was nothing to be rejected, nothing to be modified. But the odd thing about this view is that when you have changed the expression "heirs of the body" into "children" you are further off than ever from an estate in fee simple. At the date when this will was made a gift of lands, tenements, and hereditaments to a designated person, was a gift for life merely, and not a gift in fee. It is difficult to suppose that the person who drew the will was ignorant of an elementary rule of law which at that time was common knowledge with all lawyers, good, bad, and indifferent. The opinion of the Lord Justice as to the testator's real meaning is, I think, the key to his judgment. "What construction," he asks, "is to be placed on the concluding words of the clause directing the trustees to convey the legal estate at a given date to the persons whom he had intended to make the object of his bounty?" So framed the question bears on its face its own answer. But I need hardly remind your lordships that there is no provision in the will directing the trustees "to convey the legal estate." The expression which the learned judge attributes to the testator seems to be taken from a passage in one of the judgments in the former case where it was used to explain and enforce a particular view of the testator's meaning. If you restore the testator's own words, the question will then run: "What construction is to be placed on the concluding words of the clause directing the trustees to convey the testator's lands, tenements, and hereditaments at a given time to the persons whom he had intended to make the objects of his bounty?" Now, if you assume that the testator was under the impression that he had already given the proposed objects of his bounty an equitable "remainder in fee simple," the direction in question could only be intended, as the Lord Justice says, "to clothe these persons with the legal estate." There would be nothing upon which the direction could operate except the bare legal estate. But it is always dangerous, I think, to speculate on the unexpressed meaning of a testator. And there is much force in Lord Cranworth's observation that "it is not the duty of a court of justice to search for the testator's meaning otherwise than by fairly interpreting the words he has used": *Abbott* v. *Middleton*, 7 H. L. Cas. 68, 7 W. R. H. L. Dig. 6. There is one part of the judgment of Collins, L.J., against which I feel bound to enter a respectful protest. The learned Lord Justice alleges that his view has the support of the Lord Chancellor and Lopes, L.J., founding himself, or, rather, speculating upon, some interlocutory observations thrown out by them in the course of the argument, and ignoring altogether the language of their considered judgment. It would, perhaps, be sufficient for the purposes of the present case if I were to content myself with pointing out what really took place during the argument, and what was really said in the judgment. The Lord Chancellor expressed no opinion of his own. All that the Lord Chancellor did was to put into plain and pointed language a proposition which the learned counsel addressing the court was aiming at with trope and metaphor. On that Lopes, L.J., no doubt said something in approval of the proposition. "That is," he said, "exactly how it strikes me. That seems a reasonable way of considering the words." First impressions are always interesting, but sometimes second thoughts are best. In his written judgment Lopes, L.J., points to "the provision that the trustees are ultimately to convey the fee simple to the beneficiaries," and concludes that they had the legal estate vested in them throughout—"that is," he adds, "until it became their duty to convey it in fee simple to those who were to be absolutely entitled." Now, your lordships will notice that Lopes, L.J., gives due effect to the words of limitation in the direction to the trustees. The conveyance, he says, was to be made in "fee simple." But more than that—it was to be made "to those who were to be absolutely entitled." What does that mean? It does not, of course, refer to acquisition of title by a disentailing assurance, for such an assurance would have got rid of the direction to the trustees as well as of the estate tail. It must mean "absolutely entitled" under the provisions of the will. But the only provision in the will under which the heirs special could become absolutely entitled is the gift to be found in the direction to convey. When you bear in mind that Lopes, L.J., was apparently under the impression that the gift of the reversion in fee to a tenant in tail would operate to destroy the tenancy in tail and vest in the donee an immediate estate of fee simple in possession, his meaning is perfectly plain. It differs in nothing, except in that one mistaken point, from the opinion of Lord Herschell and those who agreed with him. Lord Herschell asks: "What is there inconsistent with the creation of estates tail that the testator should direct his trustees to convey the reversion in fee to the heirs of the tenants in tail at a particular time?" Lopes, L.J., speaks of the time when it would become "their duty to convey it in fee simple to those who were to be absolutely entitled." The language is all but identical. With the exception to which I have referred the meaning is precisely the same. Rigby, L.J., expressed himself in very similar language. He observes that the extent of the legal estate vested in the trustees is shown to be nothing less than the fee simple "by the direction that the property is 'when the trust for maintenance ceases to be legally conveyed in fee simple.'" And the Lord Chancellor agreed with each of his colleagues. So there can be no doubt as to the opinion of every member of the court. But to come to a matter of far greater importance than the opinion of individual judges on a question of construction, I must say I rather doubt the expediency of treating a casual remark thrown out in the course of the argument by a judge, however eminent, as something committing him to an opinion or as

being in any way binding upon anybody else. A judge who interposes in the course of counsel's address does so, I should imagine, either to invite attention to some difficulty which occurs to him at the moment, and which counsel ought to have an opportunity of meeting, or else to elicit some information which he thinks, rightly or wrongly, will not come from counsel in due course, or perhaps to direct and shorten the argument, though I know some people fancy that interruptions from the bench have not the effect of shortening arguments—at least not always. But the very last thing that a judge means to do when he interrupts counsel is to express an opinion on any matter still open to debate. When the case was before your lordships on the former occasion I intimated my view on the present question. It was necessary to consider the meaning and effect of the clause. Almost every judge before whom the case came took it into consideration, though in the result it did not form a ground of the decision of the House. I am not going to repeat what I said then. I am quite prepared to accept the judgment of Bigham, J., as expressing more fully and more clearly the view which I was led to take. I would only venture to add a very few words. On a critical examination of the will I am inclined to think that the clause now in question did not form part of the instrument as originally prepared. It seems probable that originally the gift to the collateral relations was intended to take effect in every case on the determination of the previous limitations. If this suggestion be well founded it would account for the way in which the direction to the trustees is introduced. It was introduced, I think, by way of amendment, and causes perhaps a little awkwardness in the run of the sentence, as amendments so introduced frequently do. However that may be, when once the testator determined that the gift to the collaterals was not to take effect if any one of the tenants in tail married or attained twenty-one, the question must have suggested itself—What is to become of the reversion in fee if that condition is fulfilled? Surely the most obvious and the most natural thing for the testator to do was to give it in that case to his own issue fulfilling the prescribed conditions. The learned counsel who spoke second for the appellants argued, as I understood him, that the reversion expectant on the determination of an estate tail was so shadowy and trumpery a thing that no testator would be likely to concern himself about it at all. I do not think that this is the general opinion among people who have property of that sort to dispose of. Certainly this testator, who evidently bestowed much thought and care on the disposition of his property, did concern himself about this reversion, and that in a very special manner. The learned counsel for the appellant, adopting the argument of Collins, L.J., laid much stress on the words "such heirs." The Lord Justice observes that "the words 'heirs of the body' being once decided to be words of limitation only, the words 'such heirs' following cannot, without undue straining, be interpreted to mean individuals who are to be the objects of a new gift." Now I must say that I cannot follow that observation. No doubt the words "heirs of the body" have been decided to be words of limitation only. What difference could it make if they were words of purchase also? Heirs of the body who take by descent are just as much human beings and just as much individuals as heirs of the body who take by purchase. If a testator chooses to make a gift to heirs of the body taking by descent "as and when they shall attain twenty-one or be married," I cannot see what difficulty there is in ascertaining the persons intended. If the clause is to be construed as meaning only that the trustees are to convey the legal estate when their duties have come to an end there is no difficulty about the matter. But the advocates of that construction contend that if it is the reversion in fee which is to be conveyed, and not a bare legal estate, a sort of mist or darkness descends upon the scene, and no one can find the persons to take, though they are the very same persons who on the other construction would take the legal estate, and are described by the very same words. In my opinion the expression "such heirs" creates no difficulty. It refers to the preceding words, and means, of course, "heirs of the body or bodies of the testator's child or children"—the persons forming as they come into existence the whole line of succession capable of inheriting. But, however numerous they may be, the first in the line on attaining twenty-one or marrying carries off the whole estate or the whole share as the case may be, and there is nothing left for those who come after. That is, I think, the solution of the suggested difficulty. I had thought at one time that the difference of view which has been expressed in this case might possibly have sprung out of the notion which prevailed with the Court of Appeal on the former occasion, that the gift of the reversion in fee to a tenant in tail would have the effect of merging or defeating the tenancy in tail. Certainly, if the gift of the reversion had such an effect, I should have admitted that the limitations in this will were so unmeaning and whimsical that there would have been some difficulty in construing the words of the testator in their natural and ordinary sense. But after the argument which we have heard I rather think that the difference of opinion is due to the very different estimates formed of the capacity of the lawyer who drew this will. It was suggested in argument, and broadly hinted, I think, by the Court of Appeal in the former case, that the lawyer who drew the will was so incompetent that his words were hardly deserving of close and serious attention. On the other hand, there are some who think that the draftsman of this will was a fairly competent lawyer. And I confess I share that opinion. I do not even see any evidence to prove that he did not know or appreciate the rule in *Shelley's case*, 1 Rep. 88*a*, as well as it was known and appreciated at the time. The will was drawn in what may be called the dark ages, when Lord Eldon confessed that his mind was "overpowered" by the number and perplexity of the decisions. But I think it is extremely likely that the draftsman of the will was not acquainted with the case of *Harton* v. *Harton* 7 T. R. 652 which was decided only a short time before the date of the will, and, as far as I can make out, not even reported then.* Certainly it had not then acquired the authority which, in spite of Lord Eldon's criticism and the qualified approval or disapproval of Wigram, V.C., it afterwards acquired. It was the rule laid down in *Harton* v. *Harton*, or rather, I should say, the rule derived from that case, which, as it seems to me, upset the draftman's calculations. Another argument addressed to your lordships was that the direction to the trustees might be rejected altogether on the strength of a well-known line of cases which decide that limitations superadded to a gift to heirs of the body which are inconsistent with the devolution of an estate tail are to be rejected. But why are they rejected? They are rejected because they are repugnant to the gift. But no one can say that a gift of the reversion in fee

**Harton* v. *Harton* was decided in 1798.

to a tenant in tail (if that be the true construction of the testator's will) is repugnant to the gift of the tenancy in tail. On the contrary, it is perfectly consistent with it. It seems to me that if you construe the will fairly, giving to technical expressions their technical meaning, and to expressions not technical their ordinary and grammatical signification, you have a sensible construction perfectly natural and quite consistent with the scheme of the will. In my opinion the testator meant exactly what he said, and deliberately provided for the event which actually occurred. If I am told that, after all, that is a matter of opinion on which no certain judgment can be pronounced, I can only take refuge in Lord Thurlow's maxim, that "the good sense of all these cases is to believe that, where persons have expressed themselves right, they knew what they meant": *Jones* v. *Morgan*, 1 Br. Ch. Cas. 205, at p. 221. I think that the Court of Appeal was perfectly right, and therefore I move your lordships that the appeal be dismissed. Your lordships have been given to understand that an arrangement has been made between the parties as to the costs of the appeal. It will therefore not be necessary to say anything about costs.

Lord MORRIS and Lord SHAND concurred.

Lord DAVEY. — I have endeavoured to consider the point of construction on this will which has now been fully argued, and is directly brought before us for decision, with an open mind, unprejudiced by anything which was said by me on the former occasion. But I am bound to say that I cannot find any sufficient reason for altering the substance of the opinion I then expressed. It has been said that opinions were expressed by both Lord Herschell and Lord Watson on this point in agreement with that of Lord Macnaghten. I need scarcely say that if I found myself at variance with the deliberate judgments of these eminent lawyers as well as that of my noble and learned friend, I would bow to authority and not trouble your lordships with any observations of my own. But the point was not argued at the bar on the previous occasion, and it was not necessary for the judgment then pronounced, because the present respondents were then insisting on the validity of a disentailing deed which, if established, would have barred all subsequent limitations, including the one in question, if it be a new limitation. I therefore feel myself at liberty shortly to state the grounds upon which I adhere to my previous opinion. It is quite true that I was in error in speaking of the opposite construction as operating a defeasance of the estate tail. I used the expression inadvertently in reference to a suggestion to that effect in the judgment of Rigby, L.J. If anything, it is a remainder to take effect on the termination of the estate tail. But that accidental slip does not alter the substance of my opinion, that the words in question do not create a new limitation, but are merely ancillary to the previous limitation, which we have construed to be an estate tail (in the events which happened) in Mary. The words are, "such freehold lands, &c., to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever." The will is obviously drawn by a draftsman who was acquainted with legal phraseology, but not a sufficiently good lawyer to be master of it or know how to use it accurately. A succession of estates is carefully provided for in the will, and in every other instance a new limitation is introduced with the appropriate language for that purpose. The words "to be legally conveyed, &c.," follow immediately after the words "to be equally divided, &c.," which are clearly ancillary to or rather form part of the previous gift to the heirs of the body. So far as the form of the clause goes, it appears to me appropriate for expressing a direction annexed to the previous gift and inappropriate for creating a new gift in succession. Then, again, who are referred to as "such heirs"? According to the scheme of the will and the conception of the testator, they mean a class of persons whom he describes as heirs of the body of his children, and between whom he desired his estate to be divided on their deaths. According to their legal construction the words used by the testator included all the heirs of the body, taken in a course of succession, and, therefore, the rule in *Shelley's case* applies. But the construction of the clause in question adopted in the courts below appears to me to confine the description in that clause to the first members of the class who attain twenty-one or marry, and so to give a meaning to the words different from that which they bear in the previous gift. This testator did not know or forgot the rule in *Shelley's case*, and, in my opinion, he has attempted to engraft on words which created an estate tail a direction to convey to the heirs in tail in fee simple. Such a direction is repugnant and may be disregarded, as has been held in a line of cases beginning with *Goodright* v. *Pullyn*, 2 Ld. Raym. 1437, and *Wright* v. *Pearson*, Amb. 358. I think my noble and learned friend has been too severe in his criticism of the judgment of Collins, L.J. The rule in *Shelley's case* is a rule of law and not a rule of construction, and in its application frequently overrules the intention plainly expressed on the face of the will where it is one which the law cannot carry into effect. I believe that such is the case on the will before us. It seems to me extravagant to suggest that this testator intended or supposed that his children would take more than a life estate. But the law says otherwise, and must prevail. For the purpose, however, of construing such words as those we have before us, and saying whether they create a new limitation or one to be regarded only as an ancillary provision to the previous limitation, I think it legitimate to look to the intention expressed in the instrument, although it is not one which can be carried into effect *modo et forma*, and this I understand to be the basis of the learned Lord Justice's argument. The Lord Justice was of course aware that under the old law a gift to one without words of limitation passed only a life estate unless a contrary intention appeared on the will. But I presume that the Lord Justice would have said, if he had been asked, that he found such an intention in the direction to the trustees to convey to the heirs of the body in fee simple. The second point argued by Mr. Crackanthorpe depends on the true construction of the settlement of the 31st of August, 1819, made by Mrs. Hartley on her marriage. It raises questions of some difficulty and nicety. But as I understand that the majority of your lordships are in favour of the respondents on the principal point argued, in which case these questions do not arise, it is unnecessary for me to express any opinion upon them.

Lord BRAMPTON.—I concur in the judgment of Lord Macnaghten, and substantially for the reasons which he has very clearly explained. After much protracted litigation, the only question now remaining in controversy seems to be whether, according to the true construction of that clause in the will of William Harris directing his trustees to convey to the heir of the body of his only daughter the fee simple of the property in dispute, that heir by such gift and conveyance took an estate in fee simple by purchase or

by descent either from Mary, his mother, or from the testator, his grandfather. If by purchase, the respondent is entitled to the judgment of this House. If by descent, the appellants are so entitled, for they are the heirs of both Mary and her father, the testator. The testator William Harris died so long ago as the year 1815, seised in fee simple of the estate in question, called Rosewarne, in the county of Cornwall. By his will, made in 1804, he vested in trustees the fee simple of that estate, upon trusts to which I refer only so far as they apply to events as they actually happened, to receive and dispose of the whole income derivable therefrom for the use and benefit of his only child, a daughter Mary, during her lifetime, and after her death to stand seised of the estate in trust unto and to the use of the heir of the body of such daughter, with a direction legally to convey and assure the said estate to such heir on his attaining the age of twenty-one years or being married, and to his heirs and assigns for ever. Mary survived the testator, and married in 1819 one Winchcombe Hartley, by whom she had one child only, William Henry Hartley, who attained the age of twenty-one in 1844, survived his mother, who died in 1868, and himself died in 1894 intestate and without issue. Putting aside altogether this direction to convey the fee simple, an equitable estate in tail was given to Mary Hartley, with remainder to her son William Henry. This estate tail was never in fact barred, and William Henry was only equitable tenant in tail expectant upon the death of his mother until that event happened, when the devise of or the direction to convey the fee simple came into operation. Reading this devise, or direction to convey, in connection with the trusts creating the estate tail, I have come to the conclusion that the testator did not intend it to be a part and parcel of the machinery or language employed for the limitation of the estate tail. It was useless and unnecessary for that purpose. It looks rather as if the testator felt that when Mary died and her son came of age, the object with which the trusts were created would be accomplished, but there would still be the fee simple outstanding in the trustees, and, the trusts having been fulfilled, he determined to make a special and new gift of the fee simple to the heir of the body of his daughter, by directing the trustees to convey to him the fee simple which was no longer required for the carrying out of the trusts reposed in them, for which alone they were created. Such, I think, was the testator's intention, and such intention is quite sufficiently expressed and carried out by the words employed. It follows that William Henry took the fee simple by purchase, and that his heirs, on his death intestate, were and are entitled to the estate in fee simple, and that the appellants, not being such heirs, cannot disturb the respondent in his possession, which he claims as being himself the heir. I think, therefore, that this appeal should be dismissed.

*Order appealed from affirmed, and appeal dismissed.*

Solicitors for the appellants, *Robbins, Billing, & Co.*, for *Clarke, Son, & Walsh*, Preston.

Solicitors for the respondent, *Collyer-Bristow, Russell, Hill, Curtis, & Dods.*

---

## Court of Appeal.

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — July 16, 23.

*In re* JOLLY.
GATHERCOLE *v.* NORFOLK. (*a.*)

*Limitation statutes—Adverse possession—Rent—Set-off—Will—Construction—Real Property Limitation Act,* 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 34, 42—*Real Property Limitation Act,* 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

*The effect of the Limitation Acts of* 1833 *and* 1874 *is that, where a tenant has obtained an absolute title to property by reason of the expiration of the statutory period, all rights which the reversioner would have had in respect of the land come to an end, and rent, the non-payment of which has given the occupier his title, cannot be deemed to be owing.*

*Consequently, rent in respect of the period previous to the extinguishment of the landlord's estate cannot be brought into account under a hotchpot clause in his will.*

*Decision of* North, J. ([1900] 1 *Ch.* 292), *reversed.*

A testatrix gave her property in trust for the benefit of her four children in equal shares, with substitutionary gifts to the children of any of them who should die in her lifetime.

By her will she declared "that all sums which I have already paid or advanced or which I shall hereafter pay or advance to or for the benefit of any child of mine, and all moneys owing to me at my death by any child of mine, whether for rent or otherwise, shall be taken in or towards satisfaction of the share under my will of such child or his or her child or children, and shall be brought into hotchpot and accounted for accordingly, and that no such child of mine nor the child or children of any such child of mine shall be entitled to receive any share under my will until such moneys so owing shall be paid to my executors."

In 1868 she let to her son a farm, which belonged to her in fee, at the rent of £80 a year, without any written agreement. The rent was paid to April, 1881. He remained in possession till his mother's death in 1899, without paying further rent or giving any acknowledgment of her title or his liability, so that her title was extinguished in 1893.

The question raised by the summons taken out by her executors and trustees against the son, was whether unpaid rent for the twelve years from 1881 to 1893 ought to be deducted from the son's share in his mother's estate under the above hotchpot clause.

North, J., held that such rent was so to be brought into account in fixing the son's share, [1900] 1 Ch. 292.

The son appealed from this decision.

*Vernon Smith, Q.C.*, and *A. H. Poyser*, for the appellant.—The whole of the respondents' case is based, wrongly, on the assumption that there was a tenancy during the twelve years. But no such contractual relationship existed between the parties. Up to the passing of 3 & 4 Will. 4, c. 27 no such title as is admitted in the case could have been acquired, for it was always an answer to a claim of right arising from possession that the possession had not been adverse. The effect of the Act was to abolish that doctrine of "non-adverse" possession; there was no interference with the doctrine of adverse

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

possession (*per* Lord Denman in *Nepean* v. *Doe d. Knight*, 2 Smith's L. Cas., 10th ed., 542, and Dart on Vendors and Purchasers). The object and method of the Act appear clearly by comparing the treatment of tenancies by lease, at will, and from year to year, in each of which cases an exact period is fixed at which the possession is to be deemed to be adverse. The moment the Act has run its course it forms (so to say) the sole muniment of the possessor's title, and all prior relationships are swept away. The appellant now being in possession, it is evident that such possession must be deemed to have become adverse to the landlord the moment the statutory period commenced to run. This being wholly inconsistent with the contractual relationship of landlord and tenant, no rent could have accrued due during the period, so that there was no debt which the executors could retain.

*H. Terrell, Q.C.*, and *Napier*, for the executors. The landlord's estate was extinguished by the 42nd section of the Act of William IV., so that we admit that no rent can be considered due in respect of the period after 1893. But a debt, the power to recover which has been taken away by statute, is not destroyed but only changed in character. The Acts of 1833 and 1874 deal only with land and not with rent. *Flight* v. *Bentley*, 7 Sim. 149; *Tichborne* v. *Weir*, 67 L. T. Rep. 735, 41 W. R. Dig. 120; *In re Akerman, Akerman* v. *Akerman*, 40 W. R. 12, [1891] 3 Ch. 212, were referred to.

*Rolt*, for a daughter of the testatrix.

*Cur. adv. vult.*

Lord ALVERSTONE, M.R., after stating the facts, continued: North, J., has decided that the executors should deduct from the share of the son twelve years' rent of the farm for the period 1881 to 1893. I am unable to adopt this view. In the year 1893 the son obtained, by virtue of the Real Property Limitation Act, 1874, section 1, an absolute title to the property. It is, I think, inconsistent with his right so acquired that the rent which he ought to have paid should be deemed to be still owing. The effect of the Limitation Acts of 1833 and 1874 is, in my opinion, that, after the expiration of the statutory period of twenty and twelve years respectively, all rights which the reversioner would have had in respect of the land have come to an end, and I do not think it would be consistent with that position that rent, the non-payment of which has given the occupier a title to the land, should still be deemed to be owing. I am therefore of opinion that this appeal should be allowed, and that the trustees are not entitled to deduct anything in respect of the arrears of rent.

RIGBY, L.J.—I am of the same opinion. A very ingenious argument was addressed to us on behalf of the trustees, that the Real Property Limitation Acts dealt only with land, and that you must go to the statute of James as to a contract for rent. Then it was said that although the Acts barred the remedy as to the recovery of the land, they did not bar the right to recover the twelve years' arrears of rent. It is a very curious point, and not the less so because more than half a century has passed since the statute of 1833 came into operation (the Act of 1874 only changes the period from twenty to twelve years), and although there must have been thousands of cases in which people have been bitterly disappointed, yet no one ever seems to have brought an action for rent in a case where the Real Property Limitation Acts have operated. Nevertheless, such an action must have lain in all cases if the view of the trustees is right. Let us consider, however, what the usual practice of the profession has been. It seems to me that the day after twelve years are gone, the right to bring an action plainly determines. The right of action can only last for twelve years, and in the case of a tenancy from year to year the right of action is to be held to have first accrued when the last payment of rent was made. You have a right of action if the rent is not paid. A landlord could not eject until the day after the rent becomes due. The assumption is that on the day after the twelve years have elapsed, the tenant is to be taken to be no longer tenant. He is holding the land under a title which, according to the older law, would have been an adverse title. That is absolutely inconsistent with an agreement to pay, and so it was held that the tenant was no longer in possession as a tenant from year to year or as a tenant at all. That is absolutely inconsistent with a right to recover rent. The son in the present case, who has been tenant, was under no liability to pay rent after twelve years, not having been tenant at all during twelve years, although, if he had been sued before the twelve years, it would have been quite a different matter. After the twelve years a change of things arises.

COLLINS, L.J.—I am of the same opinion. I think the crucial point was put by Mr. Poyser—viz., that the effect of the statute was to do away with non-adverse possession. It is incompetent for the landlord to say that he still retains the right to recover. I think that is emphasized when you compare the position of a tenant under a lease in writing with that of a tenant from year to year. I think the tenant was in possession during those years not as tenant to the testatrix, but in a right under which he had no obligation to pay rent.

*Appeal allowed.*

Solicitors, *Field, Roscoe, & Co.*, for *Birkett & Ridley*, Ipswich; *Morris & Bristow*, for *Jackaman, Sons, & Miller*, Ipswich.

---

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) July 10.

BEARD v. LONDON GENERAL OMNIBUS CO. (a.)

*Master and servant—Negligence of servant—Liability of master—Scope of authority—Omnibus driven by conductor.*

*On the trial of an action for negligence against an omnibus company, it was proved by the plaintiff's witnesses that the omnibus by which the plaintiff was run down and injured had just finished one of its journeys and was coming down an incline at the rate of eight miles an hour while making a slight* détour *for the purpose of coming to the starting-place facing the right way for commencing a fresh journey, and that it was being driven by the conductor, who was not the regular driver.*

*Held, that the judge was right in withdrawing the case from the jury at the close of the plaintiff's case, on the ground that there was no evidence that the person who was driving the omnibus was acting within the scope of his authority.*

Application for a new trial of an action tried before Lawrance, J., and a jury.

The action was brought to recover damages for negligence.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The plaintiff, while riding a bicycle, was run down and injured by an omnibus belonging to the defendants.

It appeared from the evidence of the plaintiff's witnesses, that the omnibus had just finished one of its journeys, and that at the time when the accident happened it was coming down an incline at the rate of eight miles an hour, while making a slight detour for the purpose of coming to the starting-place facing the right way for commencing a fresh journey, and that it was being driven by the conductor, who was not a licensed driver.

At the close of the plaintiff's case Lawrance, J., withdrew the case from the jury on the ground that there was no evidence that the person who was driving the omnibus was acting within the scope of his authority, and he directed that judgment should be entered for the defendants.

The plaintiff applied for a new trial.

*Moyses* (*A. J. Wallach* with him) for the plaintiff.—The learned judge was wrong in nonsuiting the plaintiff. The question whether the driver of an omnibus was acting within the scope of his authority is a question of fact for the jury; it has always been treated so since *Limpus* v. *London General Omnibus Co.*, 11 W. R. 149, 1 H. & C. 526. The present case is different from that of *Gwilliam* v. *Twist*, 43 W. R. 566, [1895] 2 Q. B. 84, where the driver and the conductor of an omnibus authorized a stranger to drive the omnibus home. It is well known to be an everyday occurrence for the conductor of an omnibus to drive for short distances during the temporary absence of the driver, especially in bringing the omnibus to its starting point for a fresh journey. The jury ought to have been allowed to say whether in fact the conductor was acting within the scope of his authority in the present case.

*Jelf, Q.C.*, and *Clavell Salter*, for the defendants.

A. L. SMITH, L.J.—If the plaintiff had simply proved that the defendants' omnibus was being driven negligently, as in fact it was, then I think the presumption would have been that it was being driven by the person whom the defendants had authorized as their agent to drive. But the plaintiff's case itself showed that the omnibus was not being driven by the driver, but by the conductor. The duties of a driver and a conductor are independent duties, and *primâ facie* it is not the duty of a conductor to drive. It seems to me that the plaintiff's case, as it was presented, negatived the presumption which might otherwise have existed in his favour. I think that Lawrance, J., was right in holding that there was no evidence that the accident happened through the default of an agent authorized by the defendants to drive. The appeal must be dismissed.

VAUGHAN WILLIAMS, L.J.—This case seems to me to be on the border-line. I do not think that we ought to assume that it is necessarily beyond the functions of a conductor of an omnibus to take charge of the omnibus during the temporary absence of the driver. If a plaintiff were to prove that at a time when one journey was at an end and another journey was about to commence the conductor turned the omnibus round, and did so negligently, and by his negligence injured the plaintiff, then I think there would be a case to go to the jury, and it would be for the defendants to show, if they could, that it was outside the functions of the conductor to take charge of the omnibus during the temporary absence of the driver. But here the evidence shows that the omnibus was coming down a hill at the rate of eight miles an hour, and that is consistent with this—that the driver may have done what he certainly had no right to do, that is to say, he may have delegated his authority generally to the conductor. I think it would be unfortunate if it should go forth that, whenever a conductor is found exercising the functions of a driver, then no case can be made out against the proprietors of the omnibus in an action for negligence, unless the plaintiff accounts for the temporary absence of the driver. And the mere fact that the act of the conductor is an act of driving does not seem to me to be a sufficient reason for not leaving the case to the jury. But inasmuch as the plaintiff's witnesses show that the omnibus was being driven by a person who was not the regular driver, down hill at a great pace, an act of driving of such a character that it could only be within the scope of authority of a driver, I think that the onus was on the plaintiff to show that this act was authorized by the defendants.

ROMER, L.J.—I agree in thinking that the appeal fails. In my opinion the presumption of authority which would *primâ facie* exist in the plaintiff's favour may be rebutted by the evidence of the plaintiff's own witnesses. And I think that it was rebutted in this case when it was proved that the person who was driving the omnibus was not the regular driver but was the conductor, who was clearly not from his position authorized by the defendant company to drive. The onus was therefore cast on the plaintiff to give evidence that the conductor was in fact authorized to drive in the present case, but no such evidence was given. Neither was it alleged that there was any necessity for the driver to delegate his authority to the conductor.

*Application dismissed.*

Solicitors for the plaintiff, *Osborn & Osborn.*

Solicitors for the defendant, *Hicks, Davis, & Hunt.*

---

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — June 21; July 5

ROGERS v. HOSEGOOD. (*a.*)

*Vendor and purchaser—Restrictive covenant—Covenant running with the land—Intention—User—Restriction on number of houses—Private dwelling-house—Residential flats.*

*Held* (1) *that when the benefit of a covenant has once been clearly annexed to a piece of land, it passes by assignment of that land, and may be said to run with it, as well in contemplation of equity as of law, without proof of special bargain or representation on the assignment;* (2) *that the erection of a block of flats is a breach of a covenant not to erect more than one messuage or dwelling-house on a piece of land; and* (3) *that such erection is also a breach of a covenant not to use such messuage otherwise than as a private residence.*

*Decision of* Farwell, J. (ante, p. 202) *affirmed as to* (1) *and* (2), *but reversed as to* (3).

This was an appeal from a decision of Farwell, J. (reported *ante*, p. 202).

The facts are fully set out in the report of the case in the court below, but for the purposes of this report they may be shortly stated as follow.

The action was brought by the trustees of the will of the late Sir John Millais and by W. R. Rogers, as owners of property in Palace Gate, Kensington, for the purpose of enforcing restrictive covenants to which the defendant's adjoining land was alleged to be subject.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

bought it with the land, and this can hardly be the case where the purchaser did not know of the existence of the restrictive covenant. But when, as here, it has been once annexed to the land reserved, then it is not necessary to spell an intention out of surrounding facts, such as the existence of a building scheme, statements at auctions, and such like circumstances, and the presumption must be that it passes on a sale of that land, unless there is something to rebut it, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption. We find nothing in the conveyance to Sir John Millais in any degree inconsistent with the intention to pass to him the benefit already annexed to the land sold to him. The covenant by the vendor to build a wall, if required by Sir John Millais to do so, in order to prevent Sir John Millais's windows overlooking the adjoining plot does not seem to us to have any bearing on the point, and we are of opinion, therefore, that Sir John Millais's assigns are entitled to enforce the restrictive covenant against the defendant, and that his appeal must be dismissed.

It is, however, still necessary to consider the question raised by the cross-notice of Mr. Rogers. Mr. Rogers is one of the covenantees with whom the Duke of Bedford covenanted in a deed of the 30th of October, 1876, "that every messuage to be erected on the two plots, or either of them, should at all times thereafter be adapted for and used as and for a private residence only." Mr. Rogers was a party to a deed of even date, whereby he and his partners released the Duke from the covenants restricting the number of houses to be built on the plots contained in the conveyances of May, 1869, and July, 1869. He afterwards took an assignment from his partners of two other plots of the firm's building land, near to the Bedford and Millais plots. Farwell, J., dismissed the action, so far as it set up any claim by Rogers, on the ground that the latter could not after the release above-mentioned complain of the erection of several dwelling-houses; and the learned judge did not consider that the proposed building would be a violation of the covenant with Mr. Rogers, that every house to be erected on the two plots, or either of them, or any part thereof, should at all times thereafter be adapted for and used as and for a private residence only. We are of opinion, however, that such a block of flats as it is proposed to erect would involve a breach of this covenant. Though we agree, as we have said, that such a building does involve a breach of the covenant that no more than one messuage or dwelling-house should be erected or standing on such plot, and that such messuage should be adapted for and used as and for a private residence, we think it is also a breach of the covenant in question. Though it is certainly not one messuage or dwelling-house only adapted for and used as a private residence, neither does it seem to us to constitute several separate dwelling-houses adapted for and used as private residences only, within the meaning of the covenant. We think residential flats, involving the use of a public entrance and staircase, do not answer the description of private residences contemplated by the words quoted. The covenant must, we think, be construed in an ordinary or popular, and not in a legal and technical, sense; and we do not think that residential flats, though for many purposes separate dwelling-houses, come within the popular description of the class of buildings which it was intended to permit. The cross-appeal, therefore, of Mr. Rogers must be allowed.

Solicitors, *Parker & Thomas; Stibbard, Gibson, & Co.*

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) June 21.

GREAT WESTERN RAILWAY CO. v. LONDON AND COUNTY BANKING CO. (a.)

*Banker—Bill of exchange—Cheque—Crossed cheque—Receipt of payment for customer—Bills of Exchange Act,* 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

*A rate collector had been for many years in the habit of taking cheques which he received in payment of rates to a branch bank of the defendants and getting them to cash the cheques, but he did not keep any account with the defendants. Having fraudulently obtained a cheque from the plaintiffs by falsely pretending that a rate had been made, he took the cheque to the branch bank in accordance with his usual practice. The cheque was drawn on a London bank and was made payable to the collector or order, and was crossed generally and marked "Not negotiable." The defendants cashed the cheque and sent it up to their head office in London for collection, and it was duly presented and paid. In an action to recover the amount of the cheque,*

*Held, that the proper inference to be drawn from the facts was, first, that the collector was a customer of the defendants; and, secondly* (Vaughan Williams, L.J., *doubting as to this*), *that the defendants received payment of the cheque for him; and therefore the defendants, having acted in good faith and without negligence, were protected from liability by section* 82 *of the Bills of Exchange Act,* 1882.

*Judgment of* Bigham, J. (ante, *p.* 144), *affirmed.*

Appeal from the judgment of Bigham, J., at the trial of an action without a jury (reported *ante*, p. 144, [1899] 2 Q. B. 172).

The action was brought to recover £142 10s., money had and received by the defendants to the use of the plaintiffs, or, in the alternative, to recover damages to a like amount for the conversion of a cheque.

The facts were as follows: One Huggins had been for many years a rate collector in the employment of the Wantage Rural District Council and of other similar bodies. In this capacity he had been in the habit of receiving from the plaintiffs and others cheques for the amounts payable by them for rates, and the cheques so received he used frequently to cash through the defendants' branch bank at Wantage. He had been in the habit of cashing cheques in this way for fifteen or twenty years, and a considerable number of such cheques (fifty or sixty) were cashed by him in the course of each year. He was well known to the managers and officials of the branch bank at Wantage, but he kept no account with the defendants, nor had he any pass-book; his transactions with the defendants were completely disposed of in each case as and when he brought the cheques. The Wantage Rural District Council kept their accounts at the defendants' branch bank.

In November, 1898, Huggins falsely pretended to the plaintiffs that a rate had been made, and that the plaintiffs owed in respect of the same £142 10s. By this means he induced the plaintiffs to give him their cheque for that amount. The cheque was drawn on the head office of the London Joint Stock Bank in favour of Huggins or order; it was crossed generally and marked "not negotiable."

On the 16th of November Huggins, in accordance with his usual course of dealings with the defendants, took this cheque to their bank at Wantage to get it

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

cashed. He indorsed it, handed it across the counter to the bank clerk, and the latter filled up a paying-in slip, which Huggins signed. This paying-in slip contained no reference to the cheque itself, but purported to show a payment into the bank of £142 10s. in money, a payment out to Huggins of £117 10s., and a payment to the credit of the district council's account at Huggins's request of £25. Having thus obtained the cheque, the defendants crossed it to themselves, and sent it up to their head office in London for collection.

On the next day, the 17th of November, the cheque was duly presented and paid. Huggins's fraud was immediately discovered, and on the 18th of November he was arrested on a charge of obtaining the cheque by false pretences, and on the 2nd of January, 1899, he was tried and convicted. The plaintiffs then brought this action against the defendants.

At the trial Bigham, J., found as fact that the defendants received payment of the cheque in good faith and without negligence, and that they received it for Huggins; and he was of opinion that Huggins was a customer of the defendants within the meaning of section 82 of the Bills of Exchange Act, 1882. He accordingly held that, though Huggins had only a defective title to the cheque, and by section 81 of the Bills of Exchange Act could not give the defendants a better title than he had himself, yet by section 82 the defendants were protected from liability. He therefore directed that judgment should be entered for the defendants.

By section 81 of the Bills of Exchange Act, 1882, "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had."

By section 82: "Where a banker, in good faith and without negligence, receives payment for a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

The plaintiffs appealed.

*H. D. Greene, Q.C., Asquith, Q.C.*, and *Park Goff*, for the plaintiffs.

*A. T. Lawrence, Q.C.*, and *Guy Lushington*, for the defendants.

The following cases were cited: *Matthews* v. *Brown & Co.*, 63 L. J. Q. B. 494; *Lacave & Co.* v. *Crédit Lyonnais*, [1897] 1 Q. B. 148, 45 W. R. Dig. 8; *Matthiessen* v. *London and County Bank*, 27 W. R. 838, 5 C. P. D. 7; *National Bank* v. *Silke*, 39 W. R. 361, [1891] 1 Q. B. 435.

*Cur. adv. vult.*

June 21.—A. L. SMITH, L.J., read the following judgment: This action is brought by the Great Western Railway Co. to recover from the London and County Banking Co. as money had and received by the defendant bank to the use of the plaintiffs a sum amounting to £142 10s., or, in the alternative, in trover for a cheque for the like sum, which cheque had been fraudulently obtained from the plaintiffs by a man named Huggins, and which had been cashed by the defendants for Huggins and its proceeds received by the defendants from the plaintiff company under the following circumstances. Huggins was a rate collector at Wantage, and by falsely pretending to the plaintiff company that certain rates were due from them obtained from the plaintiff company in supposed payment of the rates the cheque in question. It was a cheque drawn by the plaintiff company upon the London Joint Stock Bank in London in favour of Huggins or order, and was crossed "and Co.," "not negotiable." It was proved that the plaintiff company always paid Huggins the rates due from them by cheques in the above form. The cheque, it will be seen, was a cheque drawn upon the head office of the London Joint Stock Bank in London, and what I will call Huggins's ordinary course of business with the defendant bank was to go to its Wantage branch when he received cheques from the plaintiffs, indorse them, and then present them at the Wantage branch to be cashed. And this the defendant bank was accustomed to do for Huggins. This was the course of business between the defendant bank and Huggins; and at times, at Huggins's request, the branch bank would place some portion of the cash, which would otherwise have been handed to Huggins, to accounts named by Huggins. The branch bank then forwarded the cheque so cashed for Huggins to its head office in London, which then presented and obtained payment of the cheque from the drawers, in this case the plaintiffs in this action. This as regards the cheque in question had all taken place before the fraud of Huggins was detected by the plaintiffs, and when they did afterwards discover it they demanded the cheque or its proceeds from the defendants, which was refused. The plaintiffs thereupon brought this action. The plaintiffs in the first instance attempted to show that the defendants, when they took the cheque, took it with notice of Huggins's fraud, but in this they wholly failed, and this was abandoned at the trial. I will assume that money had and received or trover will lie in the circumstances of this case; but in the view I take it is not necessary to decide this, for supposing, as I will, that such actions or either of them will lie, if the question decided by my brother Bigham is rightly decided, as I think it is, this question becomes immaterial, for the real question is, Did the defendant bank in cashing the cheque for Huggins as they did, though crossed and with the words "not negotiable" thereon, come within the protection afforded to bankers by section 82 of the Bills of Exchange Act, 1882? It is true that section 81 of the Act enacts that "where a person takes a crossed cheque which bears on it the words 'not negotiable' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had"—in this case no better title than Huggins, which after disaffirmance of the transaction by the plaintiffs would be no title at all. But section 82 protects a banker who receives payment for a customer of a crossed cheque as follows: "Where a banker in good faith and without negligence"—which it is admitted is the defendants' position in this case—"receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." Two points are made by the plaintiffs upon this section 82. The first is that Huggins was not a customer of the bank within the meaning of this section; and, secondly, if he were, the bank did not receive the proceeds of the cheque from the plaintiffs for their customer but for themselves. It was proved that the course of business between Huggins and the defendants—viz., the defendants' cashing cheques for Huggins, whether crossed and with the words "not negotiable" thereon, or without being crossed, at the Wantage bank, and collecting them—had been in existence for some twenty years, and that this was the way, as between Huggins and the branch bank, in which he obtained cash for the

cheques received by him as rate collector. I agree with my brother Bigham that whether or not a man is a customer of a bank is a question of fact. I do not agree with the suggested reading of the section that the word "customer" is confined to the case of a person who keeps a current account with a bank. I can find no such limitation in the section. This is not like the case of a stranger coming to a bank upon an isolated occasion to get a cheque cashed, which was the case in *Matthews* v. *Brown*, where it was held that such a person was not a customer within the section, Cave, J., saying that the word "customer" involves something of use and habit. In the present case there has been use and habit for twenty years. It was upon the same principle that Collins, J., in *Lacave & Co.* v. *Crédit Lyonnais* decided that one Ponce was not a customer, the learned judge saying that to constitute him one his relations must be much nearer and closer than those of Ponce in that case. I think that the cashing of the cheques for Huggins and then the collecting of the cheques by the defendant bank during a period of twenty years as a matter of fact constituted Huggins a customer of the bank, and I agree with Bigham, J., as to this.

Then comes the next question, Did the bank receive payment of the cheque from the plaintiff company for their customer Huggins, or for themselves? If they received such payment for Huggins I do not see how it can be even argued that Huggins was not their customer. It is said for the plaintiffs that the defendant bank did not do so, for it purchased from Huggins the cheque in question, and took it for better or for worse. I cannot think so. The defendant bank charged nothing for undertaking the suggested liability. Why should they have done so? I heard no reason, and I cannot conceive why they should have done so? The truth is that the branch bank, to accommodate Huggins and possibly themselves, in being able to pass money to London, cashed the London cheque at Wantage, undertaking to collect it for Huggins, he and not the bank standing the risk of the cheque not being met by the drawers. In my judgment they did not purchase the cheque at all. They collected it for Huggins, and not for themselves, as argued. This is the inference Bigham, J., drew, and I draw the same. For the reasons above I am of opinion that the defendants are entitled to the protection afforded to bankers by section 82 of the Act, and I agree with my brother Bigham in the conclusion at which he arrived. The appeal must be dismissed.

VAUGHAN WILLIAMS, L.J., read the following judgment: Apart from the Bills of Exchange Act, 1882, I think there can be no doubt but that the defendant bank would, in the circumstances of this case, have become holders for value to the extent of the amount of the cheque, and would have been able to sue in their own right for that amount. The defendants would in no sense have had to sue as trustees for Huggins. This would have been their right and position as endorsees *bonâ fide* for value, and that value being the full amount of the cheque it seems to me immaterial for the question to be decided in the present case whether you speak of the defendants as discounters or purchasers or holders for full value. In any view they, apart from the Bills of Exchange Act, 1882, would have been holders of the cheque able to sue in their own right for the whole amount: see *Thiedemann* v. *Goldschmidt*, 8 W. R. 14, 1 De G. F. & J. 4, at p. 11. Now, of such persons it seems to me that it would be *primâ facie* wrong to draw the inference that they were bankers receiving payment for a customer of a cheque endorsed generally by the payee and payable on demand, not being post-dated. Apart from some evidence of a contrary intention the right inference to draw in such a case would be that the bankers received it for themselves and not for the customer. Now what is the evidence of contrary intention—that is, of an intention that the defendant bank should collect and receive payment of the cheque as agents for Huggins? Nothing that I can see, except the fact that they made no charge for cashing a cheque payable on demand. Against this is the fact that there are no entries in the bank books and no receipt or other document such as one would expect if the bank were really acting as collecting agents for Huggins. The bank were willing to give cash for the cheque because they trusted Huggins. The mere absence of an express bargain in the series of years leaves the *primâ facie* presumption where it was. To draw the inference of agency in the absence of evidence is very like repealing the 81st section in the case of bankers. If this is the right view, does the fact that this cheque was marked "not negotiable" make any and what difference in the position of the bank? Are the defendants, notwithstanding these words "not negotiable," holders for value? I think they are. Section 81 runs thus: [His lordship read the section.] The section does not say that the person to whom the payee of the cheque gives a crossed cheque marked not negotiable shall not become transferee of the cheque, but merely that he shall not take a better title than that which the person from whom he took it had. The transferability of the cheque is not affected by the words "not negotiable," but only its negotiability. Such being the effect of section 81, I see nothing in this case to induce me to draw the inference that the defendants, after they ceased to retain the cheque by presenting it at the bank on which it was drawn and received the amount, received or held that amount as agents for Huggins; but Bigham, J., and my brethren take a different view of the facts, and draw the inference that the defendant bank received the amount of the cheque for their customer Huggins, notwithstanding the fact that when they took the cheque from him they paid him the full amount by paying for him £25 to the Wantage Rural District Council and giving him the balance of £117 10s. in cash. I do not think that I ought to differ from three judges on a question of fact, and it therefore becomes unnecessary to consider the question of the right of action of the plaintiffs, the drawers, on the assumption that section 82 affords the defendants no protection; but I see no reason to doubt but that the plaintiffs, as true owners of the cheque, would have an action for the money obtained by the presentation of the cheque, notwithstanding the fact that the cheque when issued was a voidable and not a void instrument. It would have been otherwise but for the statutory effect of the words "not negotiable," but I am inclined to think that the effect of those words is to place the person taking the cheque bearing those words in exactly the same position as the person from whom he takes it; but in the view of the facts taken by my brethren it is not necessary to decide this question.

ROMER, L.J., read the following judgment: This is a curious case, and one of difficulty; but I have come to the conclusion that Bigham, J., was right in holding the defendant bank protected by section 82 of the Bills of Exchange Act, 1882. I think on the facts the preferable view of the arrangement between Huggins and the bank with regard to the cheque in question is that the latter was to forward the cheque for collection, and to receive the proceeds on behalf of Huggins in the sense in which the section speaks of a bank receiving payment for a customer, and that in anticipation of such receipt the bank advanced to

Huggins the amount of the cheque. Of course, the bank had the right to apply the proceeds in repayment of the advance, and had a lien on the cheque for the amount of the advance; but this, while establishing that the bank had a beneficial interest to the fullest extent in the cheque, does not conflict with the position taken up by the bank that in a legal sense, in the sense of the wording of section 82, the bank, when receiving the proceeds of the cheque, did so on behalf of Huggins. Suppose in this case Huggins had a current account with the bank, which was not in credit, and that the cheque had been paid in by him in the ordinary way as a customer, and that the bank had credited him with the amount at once, and allowed him to draw against that amount before the bank received payment of the cheque—in that case, equally with this, the bank might have had a beneficial interest in the cheque even to the extent of its full value; but it would clearly, in my opinion, have received payment of the cheque for its customer within section 82. In that case, as in this, the bank, as against the world, would have been a "holder for value" of the cheque within the definition of holder for value in the Act. But this is perfectly consistent with the view that in both cases, within the meaning of section 82, the bank received payment of the cheque for Huggins. The chief facts which lead me to the conclusion that in this case the bank received payment of the cheque for Huggins are that throughout the long period during which Huggins's cheques were cashed by the defendant bank there is no evidence or suggestion of any bargain being come to between them, or of any contract of purchase being negotiated or really intended. It is clear that no remuneration was paid to the bank by Huggins for advancing the amounts of the cheques, and I cannot think that it was intended that the bank should run any risk in the matter of title, or any risk whatever other than that involved in the mere advance of the amounts of the cheques. It must be remembered that what the bank cashed for Huggins were cheques payable immediately and drawn to his order, and were not even like short bills; and the true intent of the parties is, in my opinion, further shown by the fact that the bank advanced to Huggins the full amounts of the cheques without charge, even though some were, like the one in question in this action, crossed "not negotiable," which to a bank must necessarily have caused hesitation or doubt if the bank was doing anything more than acting as a bank in receiving payment of the cheques on behalf a customer. If I am right in the view that the true arrangement between Huggins and the bank in cashing his cheques was that the bank should receive payment of them for Huggins and apply the proceeds in repayment of its advances, then I cannot doubt, bearing in mind how long and continuously that arrangement had existed and been acted on, but that at the time the cheque in question in this action was cashed the relation of banker and customer existed between the defendant bank and Huggins, and that the bank received payment of that cheque for a customer within the meaning of section 82. It cannot have been essential that a current account should have been opened, into which the advances on the cheques on the one hand and the payments to the bank on those cheques on the other hand should be entered. This view renders it unnecessary for me to consider whether, if the bank could not avail itself of the provisions of section 82, it could as an innocent party escape liability on the ground that the payment of the cheque to it was by the act of the plaintiff company itself.

Solicitor for the plaintiffs, *Robert Rogers Nelson.*

Solicitors for the defendants, *Harries, Wilkinson, & Raikes.*

From Chan. Div. (Webster, M.R., and Rigby and Collins, L.JJ.) — May 17, 21, 22, 31.

*In re* DIXON.
HEYNES *v.* DIXON. (*a.*)

*Bond—Bond to secure loan—Breach of condition—Interest from date of breach—Damages—4 & 5 Anne, c. 16, ss. 12, 13—Husband and wife—Loan to husband of wife's separate property—Statute of Limitations,* 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 5.

*Interest is payable as interest, and not as damages, under a bond having a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, even though no express mention of interest is made in the bond. The fact that the bond is conditioned for payment of principal at, and of interest up to, a certain date does not preclude interest being payable subsequently to that date in accordance with the before-stated rule.*

*Acting within the provisions of a marriage settlement, the trustees of the settlement lent the trust fund in* 1852 *to the husband on the security of his bond, conditioned for repayment of the sum advanced six months after date, with interest thereon at £4 per cent. This interest was payable under the trusts of the settlement to the wife for life, and to the husband for life after her death. Husband and wife lived together in perfect amity. The wife died in* 1876, *and the husband in* 1896. *The husband had never paid the sum secured by the bond, or any part thereof, and had never paid any interest on the same.*

*Held, that, under the circumstances, the hand to pay and the hand to receive the interest having been the same, no payment over was necessary; and that, therefore, the Statute of Limitations did not run, and the bond was still subsisting.*

*Held, also, that, having regard to all the circumstances of the case, the husband must be considered to have kept possession of the trust fund in the capacity of a quasi-trustee, and, that being so, the Statute of Limitations could not in any case have run in his favour.*

*Decision of* Byrne, J. (ante, *p.* 71, [1899] 2 *Ch.* 561), *affirmed.*

Appeal from the decision of Byrne, J., *ante*, p. 71, [1899] 2 Ch. 561.

By a settlement dated the 1st of October, 1847, and made on the intended marriage (which was afterwards solemnized) of Thomas Dixon and Jane Heynes, the one-fifth share of certain real estate to which the said Jane Heynes was then entitled was conveyed to certain trustees upon trust for sale and for re-investment of the proceeds on real or personal security, and upon further trust to pay the income to the wife for life for her sole and separate use; and after her death to the husband for life; and after the death of the survivor upon certain ultimate trusts.

It was also provided that no investment, or change of investment, should be made during the lives of Thomas Dixon and Jane Heynes, or the life of the survivor of them, without first obtaining his or her consent in writing.

In 1852 the real estate was sold, and the proceeds thereof amounted to £1,928 5s. 10d.

By a memorandum in writing dated the 12th of February, 1852, the said Jane Heynes authorized the trustees of the settlement to lend this sum of £1,928 5s. 10d. to her husband, Thomas Dixon, upon his giving them a bond conditioned for repayment of the said sum with interest thereon at the rate

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

of 4 per cent. per annum. The trustees accordingly lent the said sum to Thomas Dixon, and received from him in return a bond, dated the 13th of February, 1852, by which he bound himself, his heirs, executors, and administrators, in the penal sum of £3,856 11s. 8d., the condition of the bond being that if he, the said Thomas Dixon, his heirs, executors, or administrators, should pay to the trustees of the settlement the full sum of £1,928 5s. 10d., with interest for the same at the rate of 4 per cent. per annum, upon the 13th of August then next ensuing, then the obligation should be void and of no effect; but that otherwise the bond should remain in full force and virtue.

Jane Dixon was, by the terms of the settlement, entitled to the interest of the money secured by the bond for the term of her life. She died on the 21st of May, 1876, and her husband, the said Thomas Dixon, then became entitled to such interest for his life. Thomas Dixon died on the 1st of January, 1896, without having paid the said principal sum of £1,928 5s. 10d., or any part thereof, and without having at any time paid any interest in respect thereof. It appeared that husband and wife, during their married lives, had lived together in perfect amity.

The bond of the 13th of February, 1852, remained for many years in the possession of Thomas Dixon, and was discovered, together with the memorandum of the 12th of February, 1852, among his papers after his death.

The present action was instituted by the trustees of the settlement of the 1st of October, 1847, against the defendants, who were the executors of Thomas Dixon, for the administration of the real and personal estate of the testator, and the plaintiffs claimed payment of the sum of £1,928 5s. 10d., with interest thereon at the rate of 4 per cent. per annum from the date of the testator's death.

Byrne, J., on the trial of the action, decided (1) that the hand to pay and to receive the interest, during the lifetime of the wife, as well as afterwards, having been the same, no payment over was necessary, and, therefore, that the Statute of Limitations did not begin to run until the husband's death, and that the bond was still in existence; (2) "that interest is payable as interest and not as damages under a bond having a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, even although no express mention of interest is made in the bond"; and that he could not see "any just reason for holding that the amount of interest recoverable is diminished by reason only of the bond being conditioned for payment of principal and interest up to or at a certain date."

From this decision the defendants now appealed.

*Levett, Q.C.*, and *Baker*, for the appellants.—(1) The condition of this bond being broken, the sum of £1,928 5s. 10d. with interest thereon at 4 per cent. up to the 13th of August, 1852, became immediately recoverable; but anything in the nature of interest after the 13th of August, 1852, is recoverable, if at all, only in the form of damages, for there is no provision whatever in the bond for the payment of interest after that date: *Cook* v. *Fowler*, L. R. 7 H. L. 27, 22 W. R. Dig. 260; *Cameron* v. *Smith* 2 B. & Ald. 305; *In re Roberts, Goodchap* v. *Roberts*, 28 W. R. 870, 14 Ch. D. 49; *Foster* v. *Weston*, 6 Bing. 709; *Hogan* v. *Page*, 1 Bos. & P. 337. (2) This being so, the claim became barred by the Statute of Limitations during the lifetime of the wife: *Stone* v. *Stone*, 18 W. R. 225, L. R. 5 Ch. App. 74; *Mills* v. *Borthwick*, 13W. R. 707; *In re Hawes*, 41 W. R. 173; *In re Flamank, Wood* v. *Cock*, 37 W. R. 502, 40 Ch. D. 461, and similar cases, are all distinguishable. (3) This is also a claim against the estate of a dead person, and the *onus* of showing that the debt still subsists is on the respondents: *In re Wynne-Finch, Wynne-Finch* v. *Wynne-Finch*, 31 W. R. 526, 23 Ch. D. 267; *In re Hodgson, Beckett* v. *Ramsdale*, 34 W. R. 127, 31 Ch. D. 177; *Fladong* v. *Winter*, 19 Ves. 196. The fact that the bond was found among the husband's papers raises a presumption that it has long ago been discharged.

*Haldane, Q.C.*, and *Christopher James*, for the respondents.—(1) Interest is recoverable as such even after the 13th of August, 1852; *Bonafous* v. *Rybot*, 3 Burr. 1370; *Farquhar* v. *Morris*, 7 T. R. 124; *Walters* v. *Meredith*, 3 Y. & C. Eq. Ex. 264. The principle of *Cook* v. *Fowler* applies only to cases of a *simplex obligatio*, not to bonds with a penalty. (2) The debt accordingly, is not statute-barred: *Caton* v. *Rideout*, 1 Mac. & G. 599; *Coxwell* v. *Franklinksky*, 12 W. R. 1072; *Amos* v. *Smith*, 10 W. R. 759, 1 H. & C. 238. (3) But even assuming that no interest was payable after the 13th of August, 1852, yet the Statute of Limitations will not run in favour of a *quasi*-trustee, which was practically the character of the husband here. *Spickernell* v. *Hotham*, 2 W. R. 638, 1 Kay 669; *Soar* v. *Ashwell*, 42 W. R. 165, [1893] 2 Q. B. 390.

*Levett, Q.C.*, replied.

*Cur. adv. vult.*

May 31.—WEBSTER, M.R.—This is an appeal from Byrne, J., and the principal question involved is, whether, under the circumstances, a bond given in the year 1852 is barred by the Statute of Limitations. Now, the chief contention which was raised before us on the part of the appellants was this, that this bond ought to be regarded as a common money bond for the repayment of money, and that by applying the principle of *Cook* v. *Fowler*, and by applying in particular the proposition laid down in that case by Lord Selborne (L. R. 7 H. L. 27), at p. 37,* we ought to treat this bond as being statute-barred, upon the ground that there has been no acknowledgment or payment within a period of twenty years during the lifetime of the wife. But having regard to the view which I take of the law, I think we must come to another conclusion. I have had an opportunity of seeing the judgment which has been written by Rigby, L.J., dealing with many of the cases bearing on this branch of the law, and therefore I shall not think it necessary to go through them all myself; but I will state, as clearly as I can, what I understand to be their general result. I think that it is certain that ever since the case of *Bonafous* v. *Rybot*, and the judgment in that case of Lord Mansfield, it has been considered that the just intent of such a contract as the one embodied in this bond is to secure the repayment of principal, interest, and costs

* "Unless it can be laid down as a general rule of law that upon a contract for the payment of money borrowed for a fixed period, on a day certain, with interest at a certain rate down to that day, a farther contract for the continuance of the same rate of interest after that day, until actual payment, is to be implied, the decision of the Vice-Chancellor in this case is not erroneous. I entirely agree . . . that no such contract is to be implied, unless there is something to justify it, upon the construction of the words of the particular instrument; and that, although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract."

by means of the penalty. We were pressed to say that unless the principal were also claimed no suit would have been entertained for interest alone. I do not know that it is necessary to decide that point; but I should certainly have thought that it was open to argument whether at any rate a court of equity would not have had jurisdiction to order interest in cases in which a suitor was asking for interest, but not for repayment of principal; but it may be that if the parties went on their strict rights, the contract must be regarded as a contract for payment of principal and interest together secured by the penalty up to a certain date. There is, however, in my opinion, another incident in connection with this case that I do not think can be lost sight of, and that is the fact that the bond was given by the husband in respect of a loan which was made to him with full notice of the terms of the settlement. It appears on the face of the bond that this money was advanced by, and was to be repaid to, the trustees of the settlement; and from the language of the settlement itself it is obvious that the trustees had no power to invest except upon interest-bearing securities. Now, if we once succeed in firmly grasping the fact that such a security as the one here given would be regarded in those courts which are most conversant with the rights and duties of trustees as an interest-bearing security, then there would be nothing unusual in such a security being taken, assuming, of course, that it comes within the words "personal security." This is a further point which it is not necessary to consider to-day; but I will just add this much—that I think that the position of the husband who took this money and gave such a bond would bring him within the class of those persons who would be regarded as bound to a great extent—I do not wish to put it too high—by the same rules as would bind trustees. I endeavour to use what may appear to be somewhat untechnical language, because we were pressed as to the distinction between implied and constructive trustees. I should like to call attention to the language of Bowen, L.J., in *Soar* v. *Ashwell*, [1893] 2 Q. B., at p. 396, in which he enumerates various classes of persons who are subject to the rules binding trustees. "Thirdly," he says, "a similar extension of the doctrine has been acted on in a case where a person received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant." I myself think that if it be held that this bond was given by the husband for a receipt of money, which was, in effect, a breach of trust, he would be in the position contemplated by Bowen, L.J., and would not be a person entitled to plead the Statute of Limitations so far as the money remained in his hands. But, from whatever point of view you regard it, it seems to me that it would be an extremely difficult thing to say that, applying, as we are bound to apply, that further rule, the statute would run during the lifetime of the wife. It seems clearly established on the authorities that, whether you regard it as a receipt of interest or as a receipt of the wife's income, yet, so long as the husband and wife live together, the form need not be gone through of handing the money from the one to the other. I may point out, with regard to the case of *Amos* v. *Smith*, to which I have already referred, that I do not understand that case to have rested—as we were pressed by Mr. Levett to say that it did rest—solely on the fact that receipts had been given. I think that Lord Bramwell said distinctly that no suit in equity could be maintained by the husband against the wife in respect of the income which he had received. We were asked to say that it was necessary that some formality should be gone through in the shape of receipts being given by the one or the other, in order to come to the conclusion that the statute would not run. I cannot take that view. I think the effect of the principle which has been acted upon in many cases in courts of equity is this: that if husband and wife are living together under such circumstances that the wife's income is being received and dealt with by the husband, as it was in this case, the statute does not run. Therefore, it being common ground that unless barred at the death of the wife, it has not been barred since, I think, accordingly, that the bond was in force at the date of the wife's death.

RIGBY, L.J.—As a main part of the appeal in this case was based upon the argument that a bond within the statute 4 & 5 Anne, c. 16, s. 13, does not carry interest properly so called, but that damages only can be recovered for non-payment of the sum secured by it—though a jury may give such damages in the shape of interest—it may be worth while to repeat the often-stated grounds which show such argument to have no foundation. The Court of Chancery gave relief against the strictness of the common law in cases of penalty or forfeiture for non-payment of a fixed sum on a day certain, on the principle that the failure to pay the principal on a certain day could be compensated sufficiently by payment of principal and interest with costs at a subsequent day. It had no jurisdiction until quite modern times to give damages for breach of contract, but could always refer it to a master to compute interest and costs. The principle included, but was not confined to, the case of a common money bond with a penalty; but, of course, did not extend to the case of a simple bond where there was no penalty to relieve against. The explanation given by Lord Macclesfield, C., in the leading case of *Peachy* v. *Duke of Somerset*, 1 Strange 453 (7 Geo. 1, 1721), has always been received as correct: "The true ground of relief against penalties is from the original intent of the case where the penalty is designed only to secure money, and the court gives him all that he expected or desired"—*i.e.*, principal and interest.

The case before Lord Macclesfield was one of an attempt to obtain relief against forfeiture of copyholds grounded on the law relating to copyhold tenure, and failed because the principle of the court did not include such cases; but the Lord Chancellor says: "Even in cases of copyholds there are some cases of forfeiture intended for a different purpose, as for non-payment of rent or fine, which are only by way of security of the rent or fine, and therefore when these are paid afterwards with interest the money itself is paid according to the intent only as to the circumstance of time." In *Reynolds* v. *Pitt*, 19 Ves. 134, Eldon, L.C., speaking of relief in equity against forfeitures, says (p. 140): "The origin of this doctrine is to be attributed to those cases in which relief was given originally with reference to non-payment of money at the specified time, the court holding that by the payment of interest the party was put in just the same state as if the principal had been paid at the time stipulated." The context shows that Lord Eldon had originally grave doubts as to the soundness of this doctrine; but this only makes his statement of the doctrine really acted upon more emphatic. In the same case he mentions, as the earliest reported authority on the point, the case of *Cage* v. *Russell*, 2 Ventr. 352. That is not a case of a bond, but of a penalty imposed by a will. It is a very remarkable case, illustrating the manner in which the principle was applied. Of course, as the payment of interest was due to the doctrine of the court, it was altogether

unimportant whether or not interest was mentioned in the original contract. In the special case of a money bond with a penalty the court therefore held that the true intent of the penalty was to secure payment, with or without antecedent interest, of the principal money on the day fixed; and that non-payment was to be compensated for by payment at a subsequent day *with interest* down to the date of payment. This subsequent interest was therefore held to be due upon the bond, though not mentioned in it. The statute 4 & 5 Anne, c. 16, ss. 12 and 13, recognized and confirmed the doctrine in the case of bonds with a penalty, which thenceforth became binding on the common law courts. Thenceforward the cases at common law became important, and the decisions in those courts are to be considered, though the principle on which courts of equity proceeded was not varied. But with the exception of cases within the statute of Anne, the Court of Chancery alone had jurisdiction to relieve against forfeiture: see for a modern case of its existence, *In re Hulse, Ex parte Dagenham Thames Dock Co.*, L. R. 8 Ch. App. 1022, *per* James and Mellish, L.JJ. Before, however, noticing particularly the common law cases, it will be convenient to call attention to the large class of cases (including all except those where the penalty is intended to secure a money payment only) in which it remained necessary to call in a jury to ascertain damage with a view to relief from forfeiture. *Sloman* v. *Walter*, 1 Bro. C. C. 418, *coram* Thurlow, L.C., is a leading, though not the earliest, case. There the object of the penalty was to secure the use of a room in a house, and the plaintiff asked for an injunction to restrain proceedings at law for the penalty pending the trial of an issue of *quantum damnificatus*, the direction of which was part of the relief prayed. A common injunction was granted; and, on the coming in of the answer, Lord Thurlow continued it to the trial. Cases of this kind were very numerous. The court did not send them away to common law, but granted an injunction, and directed an issue of *quantum damnificatus*; and on the return of the issue relieved from forfeiture on payment of damages and costs. It might have been expected that anyone endeavouring to show that damages only are recoverable for breach of an agreement to make a money payment would have produced some instance of an issue *quantum indemnificatus* directed in such a case, or some decision, or, at the very least, some authoritative *dictum*, to the effect contended for. But the authorities actually referred to are uniformly opposed to the contention. Passing by the weighty and authoritative remarks of Lord Mansfield in *Bonafous* v. *Rybot*, quoted in the judgment of the learned judge in the court below, we may go at once to the case of *Farquhar* v. *Morris*, decided by the Court of King's Bench (Lord Kenyon, C.J.). The question was, on what terms a penalty in a bond making no mention of interest and not even fixing expressly a day for payment of the principal sum was to be relieved against. The court, exercising in 1797 the jurisdiction exclusively vested before the statute of Anne in the Court of Chancery, made the precise order which the Court of Chancery would have made —that is to say, they referred it to a master to compute principal, interest, and costs, so fixing the full amount recoverable on the bond, reckoning the interest from the date of the bond itself. Neither before nor after that case has there been, so far as appeared by any authority cited to us, any question that in a case falling within the statute of Anne interest was to be computed as opposed to damages being assessed. In *Cameron* v. *Smith*, Bayley, J., and in *Foster* v. *Weston*, 6 Bing. 709, Tindal, C.J., in answer in each case to a claim to have interest and not damages in respect of a document not within the statute of Anne, pointed out, as a reason for refusing the relief, that it was not a bond. This seems to me to be equivalent to saying, in each case, it is notorious that, in respect of a bond within the statute, interest is chargeable, but that is not the case here! In *Amos* v. *Smith*, Martin, Bramwell, and Channell, B.B., held, or, rather, assumed as plain, that interest was chargeable on a bond within the statute. I am unable to see the relevancy of the cases cited for the purpose of showing that interest beyond the amount of the penalty is not recoverable.

In *Amos* v. *Smith* it was held that receipts given by a wife entitled for her separate use to the interest on a bond payable by her husband were sufficient evidence of payment of interest on the bond to take the case out of the Statute of Limitations which is set up here, although no money actually passed. The court pointed out that payment by the husband to the trustees, and by the latter to the wife, was not necessary. The question is whether there is anything here which a court of equity would hold to be equivalent to the receipts given by the wife in *Amos* v. *Smith*. Now, in equity, when a wife living in amity with her husband allows him to retain money which she might have insisted on having paid to her for her separate use, she is to be assumed to have given to him all arrears of income. *Caton* v. *Rideout* is frequently cited as the authority for this proposition; but it only recognized, and did not lay down for the first time, the doctrine on which the court proceeds. Here the wife was restrained from anticipation and could only acquiesce in the husband's retainer as from the date when the interest became due. But even where there is no restraint on anticipation the wife is only bound as to arrears. No presumption of an agreement to give to the husband future income arises. In this case the wife might, had she been so minded, have maintained by her next friend a suit against her husband and the trustees of the settlement to enforce the execution of the trust of the settlement, and to pay her the interest on the bond. To such a suit there would have been no defence; and it certainly would not have been the course of the court to send her, as was suggested, to common law. If the advance of the money to the husband was for any reason a breach of trust, I should agree with what the Master of the Rolls has said on this point. There remains only the question of presumption of payment of the bond by reason of its being found in the husband's possession at the time of his death. But upon the evidence, and having regard to the fact that during his life he himself was entitled to the interest for which he was liable, and that he would have been entitled to the income of any investment of the money arising from the discharge of the bond, I do not think that any such presumption arises. The case is totally different from one in which the obligor of a bond has, apart from the obligation, nothing to do with the obligee. I am of opinion that the appeal fails and ought to be dismissed with costs.

COLLINS, L.J.—I am of the same opinion. But in deference to the very closely reasoned argument of Mr. Levett, I will add a few words. It seems to me that the one point at the bottom of this case is this—was this security, as between the parties, an interest-bearing security? If it was, then the presumption of *Caton* v. *Rideout* applies, and it must be assumed that payments of that interest were properly made, and that the Statute of Limitations has not accordingly run. Now, we had a very interesting argument from Mr. Levett to the effect that when you have a bond

for the payment of money upon a given day, and a penalty for non-payment, that is not an interest-bearing security. It was argued that the penalty merely settles the ultimate damages that can in any event be claimed for non-payment of the interest; and that, although upon proper proceedings being taken the obligor may be made liable to repay the principal sum and interest, yet that that interest must be looked upon simply as an aliquot portion of the penalty, which is in its nature damages—that though the amount of damages may be measured by interest, it really is damages, and that therefore there was no implication that this security was an interest-bearing security at all. It was argued, in short, that the principle of *Cook* v. *Fowler* applied here, and that, there being nothing payable but damages, the implication of *Caton* v. *Rideout* did not exist; that there was, therefore, no presumption of payment; and that accordingly the Statute of Limitations ran. But I think, when you come to analyze the state of the authorities as to bonds, it is clear that the sum payable in the bond, although there is a penalty, is not damages, but really is interest. And the truth of this is demonstrated, I think, by the fact to which attention was called by Mr. Haldane—namely, the distinction between a *simplex obligatio*—a simple bond without a penalty—and a bond with a penalty. In the first case you have simply an absolute contract to pay upon a particular day; and for all practical purposes that is on the same footing as a deed secured by a warrant of attorney, which was the actual case before the court in *Cook* v. *Fowler*. In those two examples of a simple absolute contract to pay money on a given day there is no implication in law of any obligation to pay interest as a part of the contract after the given day. If recoverable, it could only be recovered as damages. Now, what was it that differentiated the case of a bond with a penalty from the case of a bond without a penalty—for a difference there undoubtedly was? You could not recover interest, as interest, upon a simple bond without a penalty; but you could unquestionably—always in a court of equity, and afterwards, by the statute of Anne, in a court of law—recover, not damages, but interest, on a bond with a penalty. The explanation is this—that in the view of both courts the penalty really was for the purpose of securing that which was the real contract—*i.e.*, the principal with the interest. There was, it is true, for a very long time, a difficulty in suing for the interest, as interest, in a court of law; but when the statute of Anne was passed, the courts of law were in a position to give effect to that which had always been the doctrine of equity. And in this particular case, the mere machinery by which, in a certain event, the obligor could be made to pay interest appears to me to be quite immaterial. The point is really this: Was he under an obligation, which could in some way be enforced, to pay, not damages, but interest? I think he undoubtedly was. And if that was the position between these two parties, it was, as between them, an interest-bearing security; and being an interest-bearing security, the statute will not, under the circumstances, run. But apart from that, I find it impossible in the present case, assuming that this bond, as is unquestionably the fact, was for six months an interest-bearing security, and bearing in mind that it was retained afterwards by the husband with full knowledge of the trusts of the settlement—that he borrowed it in terms as a part of the trust money—and that he then kept it but paid no interest upon it—I find it impossible, having reference to all these facts, to distinguish this case from the case of *Spickernell* v. *Hotham*. The third point decided in that case was this: "In 1825 A. borrowed from the executors in trust of a will a fund which was thereby bequeathed to them in trust for himself for life, and then for other persons, and gave to them a promissory note for the repayment of this sum to them 'as executors in trust' with lawful interest. Held, that A. borrowed the fund and promised to repay it as trust money, and therefore that lapse of time was no bar to the claim against him for repayment." Stress was laid in that case by the Vice-Chancellor on the fact that A. borrowed the fund as trust money, and he says this: "But I think that A. in this case must be taken to have received these moneys into his hands as trust moneys. It is argued that there was no power to lend the trust moneys in such a manner, but in the absence of evidence the assumption is the other way. If I could not assume that there was such a power, I should be obliged to hold that A. received this money in breach of, and subject to, the trust, and then the circumstance of his being tenant for life would be important as to the question of *laches*, for the fact that he was entitled to receive all the income during that period would be some reason for not applying to him for payment of the principal, and, therefore, would be a ground for now arguing that the claim was not barred." Then, in answer to the argument put by counsel, who distinguished the cases referred to, and argued that there could be no trust, for it was not shown that there was any power to lend the fund upon personal security, the Vice-Chancellor says: "This was borrowed as trust money, and was to be repaid to the lenders as 'executors in trust' of the will." Now, if we look at the bond in the present case we have got precisely the same statement, for on the face of the bond it is recited that the husband undertakes to pay, or cause to be paid, to the trustees under the settlement made on the marriage, &c. Here, therefore, we have exactly the same express assertion or admission on the face of the security that the obligation is to pay it as trust money to the trustees. It seems to me, therefore, to be indistinguishable on this point from the case of *Spickernell* v. *Hotham* and numerous other cases to the same effect which have been cited before us. On these grounds I think the appeal fails. I should perhaps add this, that I think that Byrne, J., was perfectly right in the distinction he drew between *Cook* v. *Fowler*—which was a claim on a warrant of attorney—and the case, such as this, of a bond. I think the distinction is that which I have now laid down—the distinction between a *simplex obligatio* and an obligation with a penalty; and I think that, when you analyze the distinction between those two, it is obvious that the decision in *Cook* v. *Fowler* does not cover the case of an ordinary bond with a penalty.

*Appeal dismissed.*

Solicitors, *Fallows & Rider*, for *T. H. Walford*, Birmingham; *Thomas White & Sons.*

## High Court of Justice.

Chan. Div. } June 12, 13, 30.
Stirling, J. }

*In re* MORGAN.
SMITH *v.* MAY. (*a.*)

*Partition action—Conversion—Money received on sale—Distribution—"Person becoming absolutely entitled"—Partition Act,* 1868 (31 *&* 32 *Vict. c.* 40), *s.* 8—*Leases and Sales of Settled Estates Act,* 1856 (19 *&* 20 *Vict. c.* 120), *s.* 23.

*Land was sold under the Partition Act,* 1868, *and by an order of court a testator's share of the proceeds were paid out to the trustees of his will, and was invested otherwise than in land, in accordance with the trusts of the will. One of the beneficiaries of the said trust fund died intestate.*

*Held, that his share of the fund so invested devolved on his legal personal representative, and not on his heir-at-law.*

Summons.

The question on this summons was whether a sum of £714 2s. 7d. in the hands of the plaintiff as trustee of the will of Charles Henry Morgan, and representing one-fourth of the proceeds of sale of part of the real estate of the testator, sold in a partition action, devolved on the heir-at-law or the legal personal representative of one of the beneficiaries under the will, who had died intestate.

The will was dated the 30th of September, 1864, and by it the testator gave his residuary real and personal estate to John Jones and John Davies Weston upon trust to pay the rents, interest, dividends, and annual income thereof to his wife for life, and after her death to pay the rents, dividends, and annual income to Henry Charles Croft for life, and after the decease of the survivor to stand seised and possessed of and interested in the residuary real and personal estate upon trust for his two nephews, John Price Morgan and William Morgan, and his two nieces, Charlotte Morgan and Sophia Allen, in equal shares and proportions, and for their respective heirs, executors, administrators, and assigns absolutely. He empowered the trustees during the lifetime of his wife, with her consent in writing, to sell any part of his estate; and directed that they should stand possessed of the moneys to accrue from any such sale upon the like trusts as were therein expressed in regard to his general trust property and as though such moneys had originally formed part of his estate. The will contained no provision authorizing the trustees to invest in the purchase of land.

The testator died on the 30th of September, 1864, entitled to an undivided sixth share of an estate known as the Croft estate.

In June, 1875, an action was brought for the partition of this estate, and among the defendants were the trustees of the testator's will. On the 6th of March, 1875, the usual judgment was given in the action directing inquiries with a view to partition or sale of the estate. On the 20th of March, 1876, an order was made giving leave to Matilda Morgan, the testator's widow, to attend the proceedings in the action, which she thenceforth did. No other beneficiary under the will was a party to the action or was served with notice of or attended the proceedings.

By the chief clerk's certificate, dated the 16th of May, 1876, it was found that the defendants in that action, the trustees of the will of Charles Henry Morgan, were entitled to one-sixth of the estate, and it was stated as follows: "The last-named defendants have a power of sale with the consent of Matilda Morgan, the widow of the said Charles Henry Morgan and tenant for life under his will. The said Matilda Morgan has attended the proceedings in this cause pursuant to the order dated the 20th of March, 1876." It was further certified as follows: "All the persons interested in the said lands and hereditaments as aforesaid are parties to this cause or have attended the proceedings therein pursuant to order, and severally request a sale and a distribution of the proceeds instead of a division of the said lands and hereditaments."

On the 29th of May, 1876, an order was made for the sale of the Croft estate, and it was sold accordingly.

On the 28th of April, 1877, an order was made for the distribution of the proceeds of sale, and it was thereby ordered that one-sixth thereof should be paid to the "defendants John Jones and John Davies Weston as the trustees of the will of Charles Henry Morgan, deceased." The legal estate was outstanding in mortgages, and the trustees of Charles Henry Morgan's will did not join in the covenants to the purchasers of the Croft estate. A further order to the like effect was made on the 1st of June, 1878.

In pursuance of these orders the trustees of the testator's will received a sum of £2,858 10s. 4d. which they invested in accordance with the trusts of the testator's will.

The testator's widow died on the 10th of October, 1897, John Price Morgan, one of the beneficiaries named in the will, died intestate on the 7th of December, 1885, and the question arose with reference to the devolution of his share.

*Inskip*, for the trustees.

*Christopher James*, for the legal personal representatives.

*Adams*, for the heir-at-law.

STIRLING, J., after stating the facts, continued: By section 8 of the Partition Act, 1868, it is provided that sections 23 to 25 (both inclusive) of the Leases and Sales of Settled Estate Act, 1856, shall extend to and apply to moneys to be received on any sale under the authority of the Partition Act, 1868. By section 23 of the Leases and Sales of Settled Estates Act, 1856, money received on any sale is to be applied as the court shall from time to time direct to some or one of the following purposes—viz.: "The purchase or redemption of the land tax, or the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments, subject to the same uses or trusts; or the purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or the payment to any person becoming absolutely entitled." These purposes are expressed in terms almost identical with those of section 69 of the Lands Clauses Consolidation Act, 1845.

It has been held that where the share of a person under disability in a fund arising from a sale under either the Partition Act, 1868, or the Lands Clauses Consolidation Act, 1845, remains in court it devolves as real estate: see *Foster* v. *Foster*, 24 W. R. 185, 1 Ch. D. 588; *Kelland* v. *Fulford*, 25 W. R. 506, 6 Ch. D. 491; *Mildmay* v. *Quicke*, 25 W. R. 788, 6 Ch. D. 553; *In re Barker*, 29 W. R. 873, 17 Ch. D. 241. The reason is there stated by James, L.J., in the last case (see p. 243): "We find that

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

the words are, that the money is to be laid out in the purchase of hereditaments, to be settled in the same manner as the hereditaments in respect of which it was paid, and that means it is to be limited to the same uses, which is in fact a reconversion, unless the matter is governed by the other words, 'or to a person becoming absolutely entitled.'"

If the fund which represented the testator's share of the Croft estate had remained in court instead of being paid out to trustees, I should have thought that the share of John Price Morgan under the testator's will would have devolved as real estate; but the court has ordered the fund to be paid out to the trustees—that is, in the language of the Lord Justice, has treated the matter as governed by the words "to a person becoming absolutely entitled." For this mode of dealing with the share there is considerable authority. In *In re Hobson's Trusts*, 26 W. R. 470, 7 Ch. D. 708, the question arose under the Lands Clauses Consolidation Act, 1845, and was brought before the Court of Appeal upon the refusal of the Vice-Chancellor of the County Palatine to pay out funds to which married women were entitled, to the trustees of their marriage settlements, such trustees having power to sell and give receipts; the Court of Appeal in that case ordered the payment out to the trustees. [His lordship referred to the judgment of James, L.J., and continued:] That decision was acted on in many subsequent cases, among which I may refer to *In re Ward's Estates*, 33 W. R. 149, 28 Ch. D. 100, where an order was made for payment to trustees who held upon trust, to sell at the request in writing of the tenant for life, who joined in the petition. However, in the case of *In re Smith*, 37 W. R. 199, 40 Ch. D. 386, in the Court of Appeal, Cotton and Bowen, L.JJ., expressed serious doubts as to the correctness of the view expressed by James, L.J., in *In re Hobson's Trusts*, while Lindley, L.J., said that he was not prepared to say that the court might not have had jurisdiction under the Lands Clauses Consolidation Act, 1845, to order payment to the trustees. All these learned judges agreed that the jurisdiction, if it existed, ought not to be exercised in that case.

These cases all were under the Lands Clauses Consolidation Act, 1845, but the language of the Settled Estates Act of 1856 is so nearly identical that they have always been taken to be authorities for the purposes of that Act also.

In that state of the authorities, it seems to me that *In re Hobson's Trusts* has not been overruled and that a court of first instance cannot hold that the order there made was bad. Even if that case had been overruled I should find great difficulty in saying that the order which was made in the present case more than twenty-three years ago, and has never been appealed from, is not binding on all parties interested. This being so, the only question which remains is, what is the effect of the orders made in the present action? In my judgment the effect was that the fund in court ceased to be applicable to be laid out in land under the Settled Estates Act, 1856, and came to the hands of the trustees of the will of Charles Henry Morgan, to be held upon the trusts thereby declared. These trusts do not authorize an investment in land, and in my opinion the sum as to which the question arises devolves on the legal personal representative of John Price Morgan and not on his heir-at-law.

Solicitors, *Arber & Lewis*, for *Press, Inskip, & Press*, Bristol; *S. A. Stephens*.

---

Chan. Div. } July 18.
Kekewich, J. }

PÉPIN *v.* BRUYÈRE. (*a.*)

*Conflict of laws—Will—Unattested will—Valid according to French law—Bequest of leaseholds in England* —Lex rei sitæ—*Wills Act* (1 *Vict. c.* 26).

*The will of a foreigner domiciled abroad, though valid according to the* lex domicilii, *and though admitted to probate in England, will not pass leaseholds in England unless executed in accordance with the formalities required by the Wills Act.*

In this case the following question of law was set down for argument by order—namely, whether the beneficial interest of the testator, a French subject domiciled in France at the date of his will and of his death, in a leasehold messuage in England, passed by virtue of his unattested will to the specific legatee thereof, or whether the testator died intestate as to such beneficial interest. The testator died in the year 1895, leaving a holograph, but unattested, will which was made in French form and was valid according to the law of France, and letters of administration with the will annexed of the personal estate of the testator were granted by the Probate Division to the defendant Bruyère.

*P. O. Lawrence, Q.C.*, and *Jason Smith*, for the next-of-kin, argued that in order to pass leasehold property in England the will must comply with the formalities required by the Wills Act, and referred to Jarman on Wills, pp. 2, 5; Dicey's Conflict of Laws, pp. 72, 519; *Freke* v. *Lord Carbery*, 21 W. R. 835, L. R. 16 Eq. 461; *Duncan* v. *Lawson*, 37 W. R. 524, 41 Ch. D. 394.

*Warrington, Q.C.*, and *Mackay*, for the legatee, argued that the testator being a domiciled French subject, and the will being valid by the law of the domicil, letters of administration with the will annexed had been properly granted in respect thereof, although it did not comply with the formalities required by the Wills Act; and that the consequence of such grant was that the administrator was bound to deal with all the property coming to his hands, including the leaseholds, according to the terms of the will, provided the disposition of the leaseholds by the will was not in substance illegal by the law of England.

They referred to Westlake's Private International Law, ss. 164, 169; *Bremer* v. *Freeman*, 5 W. R. 618, 10 Moo. P. C. 306; *Croker* v. *Marquis of Hertford*, 4 Moo. P. C. 339, at p. 361; *Hood* v. *Lord Barrington*, L. R. 6 Eq. 218, 17 W. R. Ch. Dig. 151; *De Fogassieras* v. *Duport*, 11 L. R. Ir. 123; *In re Price, Tomlin* v. *Latter*, *ante*, p. 373, [1900] 1 Ch. 442.

KEKEWICH, J.—It might be doing an injustice to the defendant (the legatee) to say that his contention goes so far as this that a will of a foreigner in order to pass real estate or chattels real in England need only be a will according to the law of the domicil, but certainly I understand the argument to go to this extent, that when the will has been ascertained to be valid according to the domicil, and therefore is admissible to probate, then all questions as regards real estate and chattels real in England cease, and the will must operate as if it were to all intents and purposes a valid will. Reliance was placed very strongly on *Bremer* v. *Freeman*, and I am not sure that the first statement of the contention is not that to adopt. That was a decision in a well known case, and I will read two lines from the head

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

note: "The forms and solemnities of a will are governed by the law of the domicil of the testator." That is really all that was decided in that case for the present purpose; but the question arose in the Irish case of *De Fogassieras* v. *Duport*, on the further point, not at all conflicting, of course, with *Bremer* v. *Freeman*, whether the testamentary law of England, being also the law of Ireland for this purpose, was applicable to a will disposing of chattels real so as to make it necessary that the formalities required by the Wills Act should be observed before the will could be regarded as valid for that purpose. It arose there in a peculiar case; the testator had made a will executed according to the Wills Act, but it had not been made in a way which the law of France required, he being a French subject and domiciled in France, so that the principle of *Bremer* v. *Freeman* had to be applied with reference to a will which contained a disposition of chattels real in Ireland, and the court there held that the will must be good as regards the chattels real because the will was executed according to the Wills Act, but that it would not be good as regards ordinary personal estate because not executed according to the law of domicil. Therefore, adopting that principle, they granted a limited probate, that is, a probate limited to chattels real. Mr. Dicey, in his book, refers to that case in this way (p. 523): "This case is an Irish case and refers to land in Ireland, but undoubtedly is sound in principle and applies to immovables in England. Note that the will which also contained bequests of movables was as regards them invalid as not being executed in accordance with the law of the testator's domicil." That case, therefore, seems to me to be not in any way an answer to the principle established by the case of *Bremer* v. *Freeman*, which no doubt is perfectly well established law; but to show that it does not apply to real estate or chattels real and that because a will is admitted to probate it does not by any means follow that it affects real estate or chattels real. It seems to be the weakness of the defendant's case that he relies upon *Hood* v. *Lord Barrington*. There a will had been admitted to probate and the executors proposed to sell leaseholds, and the question was whether they were entitled to sell, and, it being questioned, their power to sell was upheld for the reason fully explained by Lord Romilly in his judgment, and further explained in Jarman on Wills (5th ed.), p. 5*n*, where it is said, "To dispose of leaseholds a will must be executed according to 1 Vict. c. 26, and that the will of a domiciled foreigner not so executed, though it may be proved here and will enable the executor to sell leaseholds (*Hood* v. *Lord Barrington*) will not operate on the beneficial interest. The title of the executor is from the probate; the beneficial interest will devolve as undisposed of." As I said, the weak point in the defendant's argument seems to me to be this—that it assumes that when once you have admitted the will to probate everything is done, and it is not necessary to consider the question whether the will is a good disposition of chattels real or real estate in this country. Here we have the will of a foreigner which, although not strictly proved here, is on the records of the court as annexed to a grant of letters of administration, which for this purpose is equivalent to probate. It is strange that there is no direct authority on the exact point which I have to decide, but I think it is perfectly clear, not only from the text-books, but also by the judgment of Lord Selborne in *Freke* v. *Lord Carbery*, that in dealing with leaseholds I am dealing with real estate—that is to say, that all the doctrines in reference to the applicability of the *lex rei sitæ* to real estate are also applicable when you come to deal with leaseholds. So far I have got judicial authority; beyond that I have not. But there is a strong consensus of opinion among the text-book writers. There is the authority of Jarman, which, although not dealing directly with international law, still necessarily does indirectly do so in connection with wills, and there we have a distinct expression of opinion. Mr. Dicey is perfectly clear on the subject. It is true he does not put forward any authority, because there is none; but he does express an opinion as if it was not a thing in doubt. He says (p. 520): "The formalities required for the devise of immovables, whether realty or personalty, the restrictions (if any) on such devise or bequest, and generally the validity of a will of lands, are wholly governed by the ordinary testamentary law of England." Then, in that convenient series of illustrations which help one to understand the book, he gives (p. 522) really the very case we have here: "A domiciled Scotchman dies possessed of freehold and leaseholds in England. He leaves no will, or, what in this case is the same thing, no will which is valid according to the law of England. The freeholds descend to his heir according to the law of England (*lex situs*). The leaseholds devolve upon the next-of-kin as determined by the Statute of Distributions." Mr. Westlake in his book proceeds on the same lines. There is no doubt room for Mr. Warrington's criticism as to the change in reference to paragraph 169 as regards movables and real estate, but it is quite plain that no real estate can be devised by will except in the form required by English law. He does recognise in the previous section, speaking of chattels real, that the question is a new one in a sense—that is to say, in the sense that there is no judicial authority upon it, but in another sense it is a point which is not new at all. It seems to have occurred to the text writers and to have been embodied by them in books, and so far as we have had to consider it the question has been treated, I cannot say as settled because it cannot be settled until the exact point arises and is contested, but as free from doubt. I must hold that in this case these leaseholds, being part of the soil of England, and therefore, as Lord Selborne puts it in *Freke* v. *Lord Carbery*, as much an interest in land as if they were freehold, are not disposed of by a will which does not comply with the formalities prescribed by the Wills Act, and that that is so, notwithstanding that the will has been recognized as a disposition admissible to probate so that the administrator can claim under the authority of the Probate Division.

Solicitors, *Baker & Nairne; Herbelet.*

## Court of Appeal.

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — June 18, 19; July 5.

*In re* GRAINGER.
DAWSON *v.* HIGGINS. (*a.*)

*Will—Evidence—Ambiguity—Admission of extrinsic evidence.*

*In endeavouring to construe a will, extrinsic evidence is admissible in order to explain an ambiguity in the words of the will themselves, but not in order to explain the intention of the testator.*

*A testator, after giving the usual direction as to the payment of his debts and funeral and testamentary expenses, and after bequeathing a number of general pecuniary legacies, gave and bequeathed "all the residue and remainder" of two specific mortgage funds, after payment of his just debts and funeral and testamentary expenses, to certain persons therein mentioned. There was no general residuary bequest. Extrinsic evidence was offered to show that the testator possessed at the time of his making his will no residuary property out of which to provide for the general pecuniary legacies already referred to. It appeared, however, that at the date of his death the testator possessed residuary property sufficient for the purpose in question.*

*Held* (Rigby, L.J., *dissenting*), *that, as a matter of fact, the words of the will, "all the residue and remainder were themselves ambiguous; that extrinsic evidence was accordingly admissible to show the state of the testator's property at the time of his making his will; that the general pecuniary legacies were payable out of the mortgage funds; and that there was an intestacy with respect to the residuary property which the testator had at the date of his death.*

Per Rigby, L.J.—*The words of a will are not themselves ambiguous unless, after full consideration, it is determined judicially that no interpretation whatever can be given them.*

This was an appeal from a decision of Stirling, J., given on the 7th of November, 1899.

By his will dated the 31st of May, 1895, the late Monsignor John Grainger, after appointing the Rev. William Dawson his executor, and after directing that all his just debts and funeral and testamentary expenses should be paid as soon as conveniently might be after his decease, bequeathed to his sister, Philomela Grainger, a specific legacy of certain plate and china marked with the Grainger arms; and devised and bequeathed to his uncle, the Most Rev. Charles Eyre, Archbishop of Glasgow, or to the Archbishop, or Bishop, of Glasgow for the time being, a certain freehold church and presbytery situated at Exmouth, in the county of Devon, together with their contents.

The above-mentioned direction as to the payment of debts was contained in a printed form, but the rest of the will was in the testator's own handwriting.

The testator then proceeded, after giving a number of general pecuniary legacies, amounting in all to a sum of between eleven and twelve thousand pounds, to certain persons therein more particularly mentioned, to give and bequeath "all the residue and remainder of the sum of £9,187 lent on mortgage to Sir John Lawson . . . and of the sum of £4,000 lent on mortgage to Mrs. Eliza Kirk . . . after payment of my just debts and funeral expenses and the expenses of proving this my will," to certain Canons Regular of the Lateran.

It appeared that at the time of his making this will the testator possessed only the two mortgage debts in question; the freehold church and presbytery, and the plate and china, already mentioned as specifically devised and bequeathed; and a sum of £145 at his bankers. He subsequently acquired, on the death of his mother, a further sum of about £10,000, which was still in his possession at the time of his death. There was no evidence to suggest that the testator contemplated the receipt of this legacy at the time of his making his will.

The testator died, and his will was proved on the 26th of January, 1899. The defendant Philomela Grainger was, at the time of the testator's death, his sole next-of-kin. A question having arisen as to whether, on the true construction of the testator's will, the general pecuniary legacies already referred to were payable out of the two mortgage debts of £9,187 and £4,000 respectively, or out of the subsequently-acquired sum of £10,000 in exoneration of the two said mortgage debts, an originating summons was taken out by the executor for the determination of this and other questions. On the 7th of November, 1899, Stirling, J., decided (*inter alia*) that, according to the true construction of the will, and in the events which had occurred, the said sum of £10,000 was liable for the payment of the legacies given by the said will in exoneration of the two several mortgage debts already mentioned.

From this decision the executor, the general legatees, and Philomela Grainger now appealed.

*Theobald, Q.C.*, and *J. Fischer Williams*, for one of the appellants.—The testator must have meant the general pecuniary legacies to be paid out of the two mortgage funds. We are entitled, in a case like this, to look at the surrounding facts; and from the surrounding facts we learn that the testator had, at the time of his making his will, no other fund available for the purpose. He had no sufficient ground for believing that he would survive his mother, and then come in for an additional fortune. Bearing these facts in mind we are in a position to solve the ambiguity of this will. "All the residue and remainder" of the two mortgage funds must necessarily be taken to mean "all the residue and remainder," after deduction, not only of the expressly-mentioned "just debts and funeral expenses," but also of the not expressly mentioned, but obviously implied, preceding general pecuniary legacies.

*Upjohn, Q.C.*, and *Northcote*, for the general pecuniary legatees. — "Rest and residue" must obviously be read with reference to the general legacies which have been given immediately before; *per* Lord Kingsdown in *Greville* v. *Browne*, 7 W. R. 673, at p. 674, 7 H. L. Cas. 689, at p. 705: "If any person unfamiliar with the technicalities of the law were to read a will to this effect—the testator gives a certain portion of his property to one person, and devises all the rest of his property to another, I cannot doubt that his opinion would be that 'the rest' must be construed to mean that which remains after what has previously been given is withdrawn": see also *Wheeler* v. *Howell*, 3 K. & J. 198.

*Jenkins, Q.C.*, and *W. M. Cann*, for the defendants the Canons Regular.—There is no ambiguity here of a kind to justify the admission of extrinsic parol evidence. The testator has himself defined the meaning of "rest and residue"—*i.e.*, the surplus left after the payment of his just debts and funeral and testamentary expenses. We are not, accordingly,

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

entitled to inquire into the state of his assets at the time he made his will.

*Ingpen, Q.C.*, for other parties.

*Theobald, Q.C.*, in reply.—Extrinsic evidence is admissible in the present case to clear up an ambiguity: *Attorney-General* v. *Drummond*, 1 Dr. & War. 353; *Colpoys* v. *Colpoys*, Jac. 451; *Singleton* v. *Tomlinson*, 26 W. R. 722, L. R. 3 App. Cas. 404, *per* Lord Blackburn at p. 425.

*Cur. adv. vult.*

July 5.—Lord ALVERSTONE, M.R.—In this case we have to construe the will of the Rev. John Grainger, a Roman Catholic clergyman. Stirling, J., has held that the clause in it commencing with the words "all the residue and remainder" is to be read by itself, and is to be construed as a bequest to the canons of the sum of £13,187 lent on mortgage, or of so much of it as remained at the testator's death, in 1898, after payment only of the testator's debts, funeral expenses, and the expense of proving the will; and that there is no connection between this clause and the preceding part of the will, or, in other words, that the pecuniary legacies were intended to be paid, not out of the £13,187, but out of any general residue possessed by the testator at the time of his death.

I am unable to adopt this view. I think that these words, as they stand in the will, form part of, and must be read in connection with, the preceding list of legacies, and that the words "all the residue and remainder" are at least open to the construction that the testator intended them to refer to what would be left of the sum of £13,187, which he clearly had in his mind, after payment of the legacies and after satisfying the annuity of £60 a year given to his housekeeper. And I think the words "after the payment of my just debts and funeral expenses" are not intended to define the mode in which all the "residue and remainder" of the sum of £13,187 is to be arrived at, but are intended to indicate that this residue and remainder, after payment of the legacies, might still be reduced by the payment of his debts. This seems to me the natural meaning of the clause in the place in which it occurs in the will, especially when it is borne in mind that the previous direction as to payment of debts, which was in somewhat different words, was in the printed form upon which the testator wrote his will. It is to be noted that there is no general residuary bequest, or anything on the face of the will to indicate that the testator possessed, or thought that he possessed, any other property than that with which he was dealing; and in my view if the meaning of the clause is not that which I have indicated, it is at least ambiguous, and open to the construction which I have put upon it as well as to the construction which Stirling, J., has placed upon it. Under these circumstances I think the case is one in which, upon the authorities which are collected and discussed in Wigram on Extrinsic Evidence, Jarman (4th ed.), pp. 422 *et seq.*, we are entitled to know what was the position of the testator at the time he made his will—to put ourselves, as some of the cases have said, in the position of the testator when he was writing the will. It is, in my opinion, established beyond doubt that he then possessed the plate and china, the freehold church, the sum of £13,187 advanced on mortgage, and a small sum of £145 at his bank, and no other property. There is nothing to show that he had expectations from his mother or from any other source; and I think it would be wrong to assume that the will contemplated that legacies and annuities which amounted to between £11,000 and £12,000 should be paid out of any general residue. I think the language of the will shows that the testator intended to deal with all the property which he believed he possessed by dividing it up among the legatees; and I think the words "all the residue and remainder" of the sum of £9,187 and of the sum of £4,000 clearly indicated this intention. It is to be noted that the clause does not come as a separate and independent clause following after the printed direction as to the payment of the debts. There is no separate gift of the residue. If the language was intended to have the meaning which Stirling, J., has put upon it, the words "residue and remainder" are somewhat superfluous. One would have expected to find a gift of the £13,187 after payment of the debts, &c. If this clause had stood alone, or was clearly separated from the other parts of the will, it would be more difficult to avoid the construction which Stirling, J., has put upon it; but having regard to the language used, and to its position, I think, as I have said, that, if the clause is not to be read in the way I have indicated, it creates an ambiguity which makes it our duty to get what light we can as to the circumstances of the testator at the time he wrote his will. For the above reasons I think the judgment of Stirling, J., was erroneous, and that we must construe the will as containing a bequest to the canons of the residue only of the amounts lent on mortgage after payment of the legacies and debts, &c. The result will be that there is an intestacy as to any residue of the property.

RIGBY, L.J.—The difference of view which exists in this case depends, I think, upon the construction of the words of the will, and not upon any divergence of opinion as to the rules regulating the admission of parol evidence. It has not been contended here, or, indeed, in any case since the publication in 1831 of the first edition of Sir James Wigram's treatise on the rules of law respecting the admission of extrinsic evidence in aid of the interpretation of wills, that if a will upon the face of it, and independently of extrinsic evidence, ought to bear a definite construction, that construction can be varied by evidence *de hors* the will. I take the publication of the said treatise as the dividing point, not because I am aware of any case before that time in which the proposition hereby sought to be negatived was decided, or even argued, but because the speedy and complete acceptance by the bench and bar of the authoritative nature of Sir James Wigram's treatise seems to render it unnecessary to investigate earlier authorities, except so far as they are recognized, or commented on, therein. The third edition, being the last revised by the learned author himself, was published in 1840; and without intending to throw any doubt upon the very full fourth edition published in 1858 (because the third was out of print), which does not in any relevant respect differ from the third, it is to the third that I shall refer whenever I find it necessary to invoke the authority of the writer.

The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the will) themselves, and evidence sought to be applied to prove intention itself as an independent fact (Wigram, p. 10). This distinction must never be lost sight of. The great majority of the cases of explanatory evidence consisted of the ascertainment of persons and things insufficiently explained by the will itself. When I say that it has never been contended that a will bearing a definite construction can have another and different construction put upon it by extrinsic evidence, I by no means undertake to assert that in point of fact this has never been done. Before the publication of Sir James Wigram's treatise

there probably were, and subsequently there possibly may have been, instances of the kind. All such instances, however, must be attributable to the result of an unconscious, though illegitimate, yielding to the almost necessary bias in favour of a particular intention indicated or suggested by extrinsic facts, as distinguished from the explanatory effect of such facts on the words of the will under discussion. The danger of this bias is manifest, and has been frequently adverted to—as, for instance, by Lord Thurlow in *Fonnereau* v. *Poyntz*, 1 Br. C. C. 472, at pp. 477 and 478, and by Sir Thomas Plumer, M.R., in *Colpoys* v. *Colpoys*, Jac. 451, at p. 455. The importance of it is well illustrated by the great pains taken by those learned judges, and by Lord Eldon in *Attorney-General* v. *Grote*, Wigram, Appendix, p. 200, to make it clear that in the wills before them respectively there was a sufficient want of exactness in the description of the legacies bequeathed to justify the resort to parol evidence as to the state of the property. In *Attorney-General* v. *Grote* Lord Eldon insists upon the point to which, in one form or another, he frequently adverted—see, for instance, *Barksdale* v. *Gilliat*, 1 Swans. 562—that individual belief ought not to govern the case—it must be judicial persuasion. There are numerous cases in which counsel for the parties have ingeniously, though of course not admittedly, sought to gain the benefit of the bias above referred to before establishing the right to resort to the parol evidence. All the points above insisted upon are capable of considerable enlargement; but enough has been said to show that the first question in this, as in every case where the construction of a written document is concerned, is whether the will or other document upon the face of it is, or is not, ambiguous; or, on the contrary, capable of a definite judicial construction. It must be borne in mind that a will is not ambiguous by reason only that it is difficult of construction. If it is finally held to bear a particular construction that must govern its legal meaning, notwithstanding any difficulty that the courts may have felt in arriving judicially at the construction. It is only ambiguous when, after full consideration, it is determined judicially that no interpretation can be given to it. The will, which is dated the 31st of May, 1895, and is, with the exception of some immaterial parts, in the testator's handwriting throughout, commences with the appointment of an executor. Then follows a direction that all the testator's debts and funeral and testamentary expenses should be paid as soon as conveniently might be after his decease. From this would be implied a charge upon his real estate in aid of his personalty of all his debts and funeral and testamentary expenses so far as they involved debts. Then comes a special bequest of china and plate to his mother and sister as joint tenants, and a specific devise and bequest of a church and presbytery (being real estate) and their contents, and a bequest of a sum of £2 000, in favour of the Archbishop of Glasgow. Next follows a bequest to his housekeeper of an annuity of £60 and a large number of pecuniary legacies, two of them to godchildren, and many of them to members of religious orders, amounting in nominal value (including the annuity at an estimate) to nearly £12,000. The important point to notice here is that there is not a syllable to show that the legacies are demonstrative—as they would be if payable out of a special fund—or other than general legacies payable out of residuary personal estate, if any. Immediately thereafter comes the following bequest: "All the residue and remainder of the sum of £9,187 lent on mortgage to Sir John Lawson . . . and of the sum of £4,000 lent on mortgage to Mrs. Alice Kirk. . . . After payment of my just debts and funeral expenses and the expenses of proving this my will, I give and bequeath to" certain Canons Regular of the Lateran. There the will ends, there being no bequest of residue of personalty; but, if the legacies are payable out of residuary personalty only, there is no intestacy unless the legacies are insufficient to exhaust the whole. I will deal first with the bequest last mentioned to the Canons Regular independently of the bequest of legacies preceding. It does not appear in itself open to any doubt whatsoever. It is a gift to them of the residue of mortgage debts after payment of debts, funeral expenses, and the expense of proving the will. The mortgage debts are specific items of the personalty; and the payments directed to be made thereout are clearly defined and capable of being accurately ascertained. So far, therefore, as the bequest itself is concerned, the residue, which is the subject of the gift, is also capable of being, and must ultimately be, precisely and accurately ascertained; and the expression "residue and remainder" is therefore fully and exhaustively accounted for and explained. I do not see how a desire to give whatever remains of the mortgage debts after payment thereout of the testator's debts and funeral expenses and the expense of proving his will, could be better, or more accurately, expressed; or how words could have been used more capable of conveying that desire without involving any additional meaning. It was suggested that a gift of all the mortgage debts, after payment of the specified sums, would have been sufficient; and would have left the interpretation free from doubt. But such a gift, though intelligible, would have been inaccurate. Nothing is intended to be given until the specific payments have been made. As the bequest is made out of specific sums, and only out of those sums, it is itself a specific bequest uncertain in amount during the testator's lifetime, but fully ascertainable after his death. The question, therefore, may be stated as follows: Whether a direction to pay general legacies out of a specified fund can be inferred, not as a matter of surmise or conjecture, but as a matter of judicial interpretation, simply and solely because the gift of the legacies is followed by a gift of all the "residue and remainder" of the fund, in a case in which the words "residue and remainder" have from the context a plain and undoubted meaning, not involving any reference to payment of the legacies; and in which nothing whatever is judicially known as to the state of the property; and in which the inference would involve an intestacy as to all the general residue, whatever it might happen to be. No authority to that or any like effect was cited to us. If there were any sound rule on which the inference could be drawn, it would extend to any general legacies given just before the specific bequest, whether great or small. A legacy of £10, for instance, would by inference be payable out of the specifically bequeathed fund, though standing alone. No inference can therefore be drawn from the approach to equality of the total amount of the legacies and the presumptive amount of the specifically bequeathed fund. In the present case such a construction would have the effect of varying, and, *pro tanto*, revoking, the specific bequest, by reading, in effect, the words "after payment of debts," &c., as though they stood "after payment of debts, legacies," &c. If this was what the testator intended he ought to have so provided; and it would have been natural that he should have done so when a single word would have been sufficient. If nothing had been known as to the amount of residue, I venture to think that such a construction would never have been contended for. *Greville* v. *Browne*,

and other cases governed by the same principles, were, indeed, referred to as supporting the contention that the general legacies are payable out of the mortgage moneys because given earlier in the will. But the differences between those and the present case are fundamental. First of all, the residuary gift of real estate there relied upon was not described in such a way as to limit its effect, but was a general gift. Then there was there—and this is the important point—a mixed residue of real and personal estate. Further, the charge on the real estate in no way depended on the position in the will of the legacies. That charge on the real estate would have been operative if the gift of legacies had followed, instead of preceded, the residuary devise. This results from the case of *Elliott* v. *Dearsley*, 29 W. R. 494, 16 Ch. D. 322, decided by Fry, J., and confirmed on appeal by James, Cotton, and Lush, L.JJ. Fry, J., at p. 326 (16 Ch. D.), quotes the Lord Chancellor's enunciation of the principle in *Greville* v. *Browne*: "For nearly a century and a-half this rule has been laid down, that if there is a general gift of legacies, and then the testator gives the rest and residue of his property real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies, and that what is afterwards given is given minus what has been before given, and therefore given subject to the prior gift." Fry, J., then proceeds, by saying: "In other words, the rule seems to be this, that that which in its nature is a charge on part has become a charge or a deduction from the entire mass, and that principle appears to apply whether the legacies are given before or after the gift of the residue." James, L.J., at p. 329, says: "Here the legacies"—which were given after the residuary devise—"are no doubt charged on the real estate by force of the word 'residue,'" and the other Lord Justices concurred. It is plain from this decision that the expressions in Lord Campbell's judgment referring to the prior gift of the legacies, and the subsequent making of the residuary devise and bequest, and any similar expressions in other judgments, are to be treated as not being emphatic in the sense of defining the position of the bequests in the will, but only as referring to the actual facts of the particular case under discussion. I may say that there are several independent points in the report which I have not taken notice of. In this way the only authorities plausibly referred to as justifying the construction contended for, disappear, and there seems to me to be no ground left for that construction. But if, notwithstanding all that has been said, the construction contended for could be supported, it would result that it should be arrived at on the construction of the will itself and there would be no ambiguity or doubt making necessary the resort to extrinsic evidence of the amount of personal property at the date of the will. Whether this would be allowable in any case on a will in the terms of that now before us seems more than doubtful. Sir James Wigram, than whom no greater authority has been called to our attention, says (Wigram, p. 103): "In practice an opportunity generally offers for objecting to the admission of evidence the materiality of which is questionable . . . and upon the discussion to which the objection will give rise, the materiality of the evidence will be considered and determined. . . . If, however, the facts tendered be such that they cannot from their nature be material, the court will at once reject them. Therefore evidence of the amount of a testator's personal estate at the time of making his will is in general inadmissible. The reason is obvious. The will, *quoad* the personal estate, speaks from the death of the testator; and consequently its amount at the time of making of the will, although it might bias the judgment, could not in general form a just ground of inference as to the meaning of the testator's words. Such evidence, however, may, under special circumstances, be material, and then it will be admissible."

The cases referred to as authorities for the departure from the generality of the rule laid down in this *placitum* are those already referred to—*i.e.*, *Barksdale* v. *Gilliatt*, 1 Swans. 562; *Fonnereau* v. *Poyntz*, 1 Brown C. C. 472; and *Colpoys* v. *Colpoys*, to which might be added *Attorney-General* v. *Grote*, Wigram's App. 200; and *Druce* v. *Denison*, 6 Ves. 385. *Fonnereau* v. *Poyntz*, *Colpoys* v. *Colpoys*, and *Attorney-General* v. *Grote* were all cases of bequests ultimately held to be ambiguous concerning long annuities. The case of *Fonnereau* v. *Poyntz* is carefully explained by Lord Eldon in *Druce* v. *Denison* in the following words: "Upon what ground, then, did he admit the evidence? As I have always understood, and now understand it from this report, upon this ground: that the testatrix, having given as a species of stock that which was of no known denomination of stock, the will showed she meant to give something, but did not ascertain the subject she meant to give. Therefore, Lord Thurlow looked at the property in order to prove what she meant, the will proving that she meant to give something. That was not contradicting any description in the will. It was not saying that was the personal estate of the testator which was not her personal estate, but that she meant by those words what she might be taken to mean, because upon the words attending to the different species of stock at the bank it could not be ascertained what species she did mean, it being clear that she meant some": 6 Ves., pp. 401, 402. This explanation would extend with only formal variations to *Colpoys* v. *Colpoys* and to *Attorney-General* v. *Grote*. The last-mentioned case was confessedly a most difficult one; and Lord Eldon admits, with reference to it, that he had from time to time changed his opinion. Sir W. Grant, who decided it as a judge of first instance, came to a judicial decision, though with great doubt, and to a conclusion on the will itself different from Lord Eldon's ultimate conclusion (see 3 Mer. 316), and of course he paid no attention to the parol evidence as to the state of the property. *Barksdale* v. *Gilliatt* and *Druce* v. *Denison* were decided by Lord Eldon on the ground that the testator himself had in each case by a writing, either already accepted as testamentary, or capable of being admitted to probate, made references—plainly intended to be explanatory of the will—as to the state of his property; and in *Attorney-General* v. *Grote* there was something of the same kind on which Lord Eldon relied—namely, the codicil (3 Mer. 318), wherein the testatrix recited that she might have made a wrong calculation of the value of her fortune in the funds, showing thereby that it was with reference to the actual state of her property that her bequests were made. In all these exceptional cases, therefore, there were special circumstances wholly wanting here to justify the reception of extrinsic evidence as to the state of the property at the date of the will. It would not, however, be necessary to resort to this doctrine, if, as appears to me to be the fact, there is really no doubt as to the construction of the will itself. The sum up, in conclusion, it appears to me that Stirling, J., was fully justified in the decision arrived at on the point here dealt with, and the appeal, in my opinion, ought to be dismissed. If, in fact, the conclusion should be contrary to the intention of the testator, the defeat of that intention would seem to be the logical result of the statutory rule that the will—by which is meant the whole will—must be in writing.

COLLINS, L.J.—I have come to the same conclusion as the Master of the Rolls, though I need not say it is with the utmost diffidence that I find myself constrained to differ on a point of this kind from Stirling, J., and my brother Rigby. There is, however, as it seems to me, no principle of law, and no rule specially applicable to the construction of wills, now in question between us. It is merely a question of what is the fair grammatical meaning of an English sentence when read in its context. Read by itself, cut off from its context, it is, I agree, capable of one meaning only; read in its place in the whole will, it seems to me, as a matter of mere grammar and common sense, to be quite as capable of another meaning, and taking the whole will together—both what it says and what it omits—even without the assistance of extrinsic evidence, I prefer the latter meaning. I do not dispute, therefore, any of the conclusions and observations made on the footing that the words of the will are clear and unambiguous. I will now address myself to the will itself. When we reach the sentence in question, the testator has adopted the printed direction for the payment of his debts in six months, and has then gone on to make in his own handwriting a devise of real estate and a series of bequests amounting in all to about £12,000. He then goes on, "All the residue and remainder of the sum of £9.187 lent on mortgage . . . and of the sum of £4,000 lent on mortgage," giving the details of both the mortgages, "after payment of my just debts and funeral expenses and the expenses of proving this my will, I give and bequeath to" these named persons, and then the will ends. There is no residuary gift. Now, taking the document as a whole, I should have thought it quite clear, but for the fact that my brothers Rigby and Stirling take a different view, that the sentence was grammatically capable of meaning "all that is left of the two mortgage debts at the point I have now reached in my will shall go, after you have paid my debts, &c., out of it, to A. and B." In other words, the expression "all the residue and remainder of" the two mortgage debts, coming as it does at the beginning of the sentence, is to my mind *primâ facie* a suggestion of a previous deduction from the sums named, which constitutes what he is dealing with as a residue before he goes on to further diminish it by the subtraction of debts. This suggests on the face of the will itself a tacit assumption on the part of the testator that the only sum that he had available, out of which to carve his legacies was these two mortgage debts, which he therefore treats, when he first mentions them, as already depleted by the deduction of legacies; and being depleted, he subsequently deals with them by describing what is left of them as a residue which, when further diminished by payment of his debts, is to be handed over to A. and B. The fact that the testator makes no other residuary gift suggests that he deemed himself as having disposed of all that he had to give; and the will on its face accords with this construction, since, without going outside it, we have such a correspondence between the sums bequeathed and the sums available for their payment as to create a presumption that the testator intended these named funds, and no others, to cover his gifts. That as a matter of grammar the words "all the residue and remainder of" the mortgage debts are capable of this meaning can, I think, be demonstrated. It is said that he has not in terms stated that the legacies, as well as the debts, are to be paid out of the mortgage funds; but that observation misconceives the suggested construction which asserts the prior deduction of the legacies as assumed in the word "residue," and therefore negatives the necessity of introducing the word "legacies" after "debts" in the sentence "after payment of my debts." Test it in this way: Suppose he had begun the will by saying "All the property that I have to dispose of consists of certain freehold land and certain mortgage debts amounting to £4,000," and had then proceeded to devise the freehold and bequeath the legacies and then gone on as in the will, "all the residue and remainder," &c.—could it be doubted that the words "residue" and "remainder" might in strict grammar be construed to mean the residue made by the deduction of legacies? So, likewise, if the words "after payment of my debts," &c., were left out, and the will were left in other respects as it is, could it be contended that there was any grammatical objection to construing "residue and remainder" as meaning that portion of the mortgage debts which remained after the payment of legacies. But it is obvious that the addition of the recital, in the one case, and the omission of the clause about debts, in the other, do not alter the grammatical capabilities of the words in the collocation in which they stand. In the first case the recital helps the inference in favour of one of two possible grammatical constructions; in the second case, the omission, by eliminating that which creates the ambiguity, makes one construction only possible. But together, or separately, they show that the words in question are capable of the construction which I put upon them. A still simpler test would be to enclose the words "after payment of my debts," &c., in a parenthesis. I have said that, taking the whole of the will and the evidence upon the face of it together, I think that the construction I contend for—being quite as sound in point of grammar as that which has been put upon it by Stirling, J.—is more in accordance with the intention to be gathered from the context and the scheme of the will as disclosed upon its face; but if I am further allowed to assist my judgment by the fact proved before Stirling, J., that, with the exception of a small current balance at his bankers, the testator had at the time of his will no other property except that which he purports to dispose of in his will, what was probable before becomes a practical certainty. Stirling, J., seems to have been of opinion that, had it been possible to create a doubt as to what was meant, it would have been legitimate to admit evidence as to the state of testator's assets at the time of the will. For the reasons I have given I think the construction, at the worst, ambiguous; and I think such evidence is admissible. The maxim that in construing a written document surrounding circumstances may be looked at has been nowhere more emphatically laid down than in relation to wills. "Every claimant under a will," says Sir J. Wigram (p. 196), "has a right to require that a court of construction, in the execution of its office, shall by means of extrinsic evidence place itself in the situation of the testator the meaning of whose language it is called upon to declare." *Doe* v. *Martin*, 1 Nev. & Mann. 524, is cited as an authority, and though I am aware that qualifications, sometimes subtle and difficult of general application, have been placed on this proposition, still I think that the evidence here suggested falls within the words of Bayley, J., in *Doe d. Jersey* v. *Smith*, 2 Brod. & Bing. 553, referred to with approval by Sir Thomas Plumer, M.R., in *Colpoys* v. *Colpoys*, Jac. 451, at p. 465. Bayley, J., says: "The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct and accurately described, but because there was an ambiguity upon the face of the instrument; because an indefinite expression is used capable of being satisfied in more ways than one; and I look to the state of the property at the time, to the estate

and interest the settlor had, and the situation in which she stood with regard to the property she was settling, to see whether that estate or interest or situation would assist us in judging what was her meaning by that indefinite expression." In the same case Sir Thomas Plumer, in dealing with the general rule excluding evidence of a patent ambiguity and the exceptions to that rule, sums up the situation by saying (at p. 464): "As a minor evil, therefore, common sense and the law of England (which are seldom at variance) warrant the departure from the general rule, and call in the light of extrinsic evidence." Common sense would certainly seem to demand that, given a real ambiguity—which, in my judgment, exists here—we should not decide it without availing ourselves of the means at hand of putting ourselves in the position of the testator at the time of the will. But the relation of parol evidence to the construction of written documents is not confined to wills; and the rules regulating it are of general application. The case of *Heffield* v. *Meadows*, L. R. 4 C. P. 595, 17 W. R C. L Dig. 62, decided with reference to a guarantee, and having the great authority of the late Sir J. S. Willes, as well as that of Montagu Smith, J., seems to cover the present case. There the question arose upon a guarantee in the following terms: "I, John Meadows, . . . will be answerable for £50 sterling that William York of Stamford, butcher, may buy of John Heffield, of Donington"; and evidence of the circumstances under which the guarantee was given was admitted in order to determine whether it was to be construed as continuing, or as limited to a single transaction. "It is obvious," says Willes, J, at p. 599, "that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee. Having done that, it will be proper to turn to the language of the guarantee, to see if that language is capable of being construed so as to carry into effect that which appears to have been the real intention of both parties." I think the appeal should be allowed.

*Appeal allowed.*

Solicitors, *Collyer & Davis; Blount, Lynch, & Petre; Withalls & Belton.*

---

App. Bankruptcy.
(Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) June 15.

*In re* DEAKIN.
*Ex parte* DANIELL. (*a*.)

*Solicitor—Charging order in favour of solicitor—Application to discharge—Limit of time for application—Jurisdiction to make charging order—Solicitors Act,* 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Bankruptcy Act* 1883 (46 & 47 *Vict. c.* 52), *s.* 104.

*Where property has been "recovered or preserved" by an order of the Court of Appeal, the court or judge of first instance which has seisin of that order when it comes down to be enforced is equally entitled with the Court of Appeal under section* 28 *of the Solicitors Act,* 1860, *to make a charging order in favour of a solicitor on the property so recovered or preserved.*

*An application to discharge a charging order must be made with promptitude, even although no steps have been taken to enforce the charging order.*

Semble, *a judge sitting in bankruptcy is entitled in that capacity to make a charging order under section* 28 *of the Solicitors Act.* 1860.

*The interpretation put upon* In re Suffield and Watts, 36 *W. R.* 584 20 *Q. B. D.* 693, *by Vaughan Williams, J., in* In re Wood, Ex parte Fanshawe, [1897] 1 *Q. B.* 314, 45 *W. R. Dig.* 155, *criticized and questioned.*

Appeal from a decision of Wright, J., sitting as a judge in bankruptcy.

On the 9th of February, 1900, the Court of Appeal dismissed with costs a receiving order which had been made on the petition of two judgment creditors against the debtor, F. Deakin, on the previous 16th of January.

The costs of the debtor were subsequently taxed at £43 3s. 5d.; and on the 23rd of March, 1900, G. H. Daniell, who had acted as solicitor for the debtor throughout the bankruptcy proceedings, applied for and obtained from Wright, J., sitting as a judge in bankruptcy, a charging order on the sum in question in order to secure his costs, charges, and expenses, under section 28 of the Solicitors Act, 1860.

This charging order was served on the debtor on the 28th of March; and on the 26th of May notice was given him that an application for the enforcement of the order would be made to the judge in chambers on the 30th May.

On the 29th of May the debtor served on Daniell notice of an application to discharge the order in question.

Both applications came on for hearing before Wright, J., on the 30th of May, when the learned judge refused the debtor's application to discharge, and made an order in favour of Daniell for payment of the sum secured by the charging order.

From this decision the debtor, Deakin, now appealed.

Section 28 of the Solicitors Act, 1860, enacts as follows: "In any case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be defending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved. . . ."

Section 104 of the Bankruptcy Act, 1883, enacts as follows: "(1) Every court having jurisdiction in bankruptcy under this Act, may review, rescind, or vary any order made by it under its bankruptcy jurisdiction. (2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows: . . . (*d*) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal."

*Turrell*, for the appellant Deakin.—(1) The charging order is altogether invalid. Section 28 of the Solicitors Act, 1860, enables a charging order to be made only by the court or judge before whom the property has been recovered or preserved. In this case the property was recovered or preserved in the Court of Appeal, and that court alone, accordingly, and not Wright, J., or any other judge of an inferior court, was entitled to make this charging order. (2) But even supposing that the order is good, it is good

(*a*.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

only as made by the learned judge in his capacity as a judge of the High Court of Justice, not in his capacity as a judge sitting in bankruptcy. A judge sitting in bankruptcy has, in fact, no jurisdiction as such to make a charging order under section 28. This is the effect of the decision in *In re Suffield and Watts*, 36 W. R. 584, 20 Q. B. D 693, as was pointed out by Vaughan Williams, J., in *In re Wood, Ex parte Fanshawe*, [1897] 1 Q. B. 314, 45 W. R. Dig. 155. Since, then, this order was made by the learned judge in his capacity as a judge of the High Court, it was open to him to discharge it within those time limits which are recognized as binding upon the High Court in cases of the kind—*i.e.*, at any time before the order had been acted on. Had Wright, J., refused to discharge the order upon the merits of the case the debtor would not have complained. As a matter of fact, however, the learned judge acted under a misapprehension. Conceiving that he had originally made the order under his jurisdiction in bankruptcy, he further conceived that he was at liberty to discharge it only under the power of section 104 of the Bankruptcy Act, 1883, as that section has been limited by the decision in *In re May*, 32 W. R. 839, 12 Q. B. D. 497. Without going into the merits he accordingly dismissed the debtor's application on the ground that it was made too late, in accordance with that section and decision.

Counsel for the appellant also referred to *Guy* v. *Churchill*, 35 W. R. 706, 35 Ch. D. 489.

*Herbert Reed, Q.C.*, and *G. P. C. Lawrence*, for the respondent Daniell.—(1) The court below has jurisdiction to make the charging order, even though the order by which the property was recovered or preserved happens to have been made in the Court of Appeal. (2) A judge in bankruptcy is perfectly entitled to make a charging order under section 28 of the Solicitors Act, 1860. *In re Suffield and Watts* does not bear out the interpretation put upon it by Vaughan Williams, J., in *In re Wood, Ex parte Fanshawe*. This order, accordingly, was made by Wright, J., under his bankruptcy jurisdiction: and, that being so, he is entitled to discharge it only within the time limits imposed by section 104 of the Bankruptcy Act, 1883, as read in connection with the decision in *In re May*. (3) But even if it be held that the learned judge made the order in his capacity of a judge of the High Court, yet we still say that, as a matter of fact, he refused this application to discharge on its merits, and not because it was made in contravention of some hard and fast rule as to time.

Counsel for the respondent also referred to *Dallow* v. *Garrold*, 33 W. R. 219, 14 Q. B. D. 543. and *In re Humphreys, Ex parte Roberts*, 4 Manson 239.

*Turrell* replied.

Lord ALVERSTONE, M.R.—This is an appeal from a decision of Wright, J., who has declined to set aside a charging order made by him on the 23rd of March last. Two main points have been urged by the appellant: (1) that the judge who made this order had no power to make it, having regard to the fact that the decision in favour of the appellant, by means of which the property was recovered, was made by the Court of Appeal; and (2) that the application to set aside this charging order could have been made to Wright, J., at any time, and was not, in fact, made too late. As to this second point, it is suggested that Wright, J., acted on some hard and fast rule as to there being some time limit. I doubt very much whether he so acted at all. I think that he acted generally, if I may use the expression, on the ground that the application was made too late. As to the first point, I think that Wright, J., had jurisdiction to make the order. The order was undoubtedly made by him sitting as a judge alike of the High Court and in bankruptcy. *Dallow* v. *Garrold* decided that any judge of the division in which the property had been recovered or preserved could make a charging order. Perhaps I may be allowed to add that, had he not, the result would be rather serious. Now were it not for what is said by Vaughan Williams, J., in *In re Wood, Ex parte Fanshawe*, I should also have thought that a judge in bankruptcy ought to have been able to make the same kind of order under section 28 of the Solicitors Act, 1860. The language of that section—"the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending"—is wide enough to include such a case. I do not myself think, however, that the point is really material, for Wright, J., acted in both capacities—as a judge of the High Court and as a judge in bankruptcy; and therefore, in one capacity or another, he had power to make the order. It must not, however, be thought that I should have endorsed, even if the point had been material, the view that if the learned judge had been only a judge of the Court of Bankruptcy, he would not have had jurisdiction to make the order now in question.

Then as to the substantial question of time. It was said that a person wishing to set aside an *ex parte* order such as this need not make any application till something is about to be done under the order. In my opinion it would be very unfair if that were so. A charging order creates a charge upon a fund, and, if any application to discharge it is to be made at all, it should be made within a reasonable time, and upon material facts laid before the court. I think that in this case Wright, J., was justified in coming to the conclusion that under the circumstances — having regard to the fact that no affidavit as to the merits was produced at the hearing—that no application to set aside was made between the 28th of March and the 29th of May—he ought not to set the charging order aside.

RIGBY, L J.—I am of the same opinion. I do not think that any such rule was laid down in *In re Suffield and Watts*, as was implied by the decision of Vaughan Williams, J., in *In re Wood, Ex parte Fanshawe*. As was pointed out by counsel for the respondent, the matter in *In re Suffield and Watts* was transferred to Cave, J., as a judge of the Queen's Bench Division of the High Court of Justice, it being considered a convenient thing that the particular judge who happens to be dealing with bankruptcy proceedings, should also deal with matters and actions connected with such proceedings. It was, therefore, not as a judge in bankruptcy, but as a judge of the Queen's Bench Division, that he was exercising the jurisdiction of making the charging order. It was held in that case, that having once exercised that jurisdiction, and made the order, he had then no jurisdiction to set it aside, but that the order must take effect according to its tenour without any alteration made by him. That is all. For myself, I should hesitate to say, whether under, or independently of the authority of that case, that where, in the course of bankruptcy proceedings, property has been recovered or preserved, the judge in bankruptcy could not exercise the power of making a charging order in favour of the solicitor by whose exertions it had been recovered or preserved. At any rate, it is not necessary to decide the point now, for here it is clear that Wright, J., had both jurisdictions. As to the merits, it is, in my opinion, too late to bring them forward now. I was rather alarmed at the suggestion that, because the Court of Appeal had made the order by which some property was secured, they alone

could make the charging order. I have never heard it doubted that a judge of the court which had seisin of the order of the Court of Appeal when it came down to be enforced was equally entitled to make the order.

COLLINS, L.J.—I am of the same opinion. The point of counsel for the appellant is this, that Wright, J., though he was not, as an actual matter of fact, exercising the bankruptcy jurisdiction at all, yet conceived himself to be exercising it; and conceived himself, consequently, as necessarily bound by the rule as to time, which, it was contended, was applicable only to cases in bankruptcy. It seems to me, however, that counsel is wrong in this latter contention. I think the true view as to the limitation of time which has been introduced into the practice of setting aside *ex parte* proceedings in bankruptcy is this—that it is a limit adopted for convenient illustration of a principle which underlies the jurisdiction in all cases—bankruptcy cases and all others alike. In bankruptcy there is allowed, in practice, a certain fixed time-limit; but that time-limit is really a mere instance of the application of a general rule with regard to setting aside *ex parte* orders which is found in the general jurisdiction in all Chancery and Common Law cases alike. The appellant's first and fundamental point accordingly breaks down. From this point of view it is of course immaterial whether the judge was exercising the jurisdiction in bankruptcy or any other jurisdiction. He applied the rule, or principle, which underlies all cases of this kind—that a person who wants relief must come with promptitude. As to the opinion expressed by Vaughan Williams, J., in *In re Wood, Ex parte Fanshawe*, I do not think, as at present advised, that *In re Suffield and Watts* decided all that the learned judge appears to think that it did. I think that in that case the Court of Appeal was dealing with a matter which did not raise that question at all. Cave, J., in that case, had not exercised bankruptcy jurisdiction, and he had no bankruptcy jurisdiction at the time when he made the order in question. He was exercising jurisdiction, not in bankruptcy, but as a judge of the Queen's Bench Division of the High Court, so that the decision of the Court of Appeal in that case was a decision as to the exercise of jurisdiction by a judge of the Queen's Bench Division, and could have no application to any jurisdiction which the judge could not exercise except in bankruptcy. It is not necessary to decide that question now; but I will only repeat that, as at present advised, I do not think that that case which Vaughan Williams, J., apparently thought dealt with the question, did really deal with it at all.

*Appeal dismissed.*

Solicitors, *Morris & Rickards; G. H. Daniell.*

---

From Chan. Div. (Webster, M.R., and Rigby and Collins, L.JJ.) — May 22, 24, 25, 28, 31.

SHAW *v.* HOLLAND. (*a.*)

*Company—Director—Wrongful allotment of shares—Measure of damages.*

*Allotments of shares were made* ultra vires *to directors or their nominees.*

*Held, that the measure of damages was the value of the shares at the date when the shares were allotted to the directors.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

This was an appeal from a decision of North, J.

The plaintiff was a shareholder in a company called the St. Helen's Development Syndicate (Limited), and he sued on behalf of himself and all other the shareholders, except the defendants.

The defendants were three directors of the company—Messrs. Frederick Catesby Holland, Charles James Tapp, and Emerson Bainbridge—and the company.

The plaintiff sought to make the defendant directors liable for the profits made by Tapp and Bainbridge in respect of a number of shares in the company which had been issued to them, or their respective nominees, either at par or at a premium of 10s. per share, which was less than the market value of the shares.

Clause 88 of the company's articles of association provided: "If within three months of the incorporation of the company the first directors shall procure responsible subscribers for shares of £1 each of the company, not exceeding 15,000 shares, they and their assigns shall have the option, at any time within two years of the incorporation of the company, to apply for from time to time and have allotted to them, or their assigns or their respective nominee or nominees, ordinary shares of £1 each at par, but not more than the number of shares so subscribed for in the whole, and such allotment or allotments shall be made within seven days after the receipt of any such application for shares in the usual form duly signed. The said directors shall be entitled to the benefit of this option as between themselves in such proportion as they shall determine."

*Eve, Q.C., Rufus Isaacs, Q.C.*, and *Norman Craig*, for the defendant Tapp.

*Lawson Walton, Q.C.*, and *Ellis Griffith*, for the defendant Bainbridge.

*Swinfen Eady, Q.C.*, and *J. H. Gregson*, for the plaintiff.

WEBSTER, M.R., said the question was whether the defendants Tapp and Bainbridge were liable in respect of four issues of shares in the company made to themselves or their nominees, as to some of them at par and as to others at 10s. per share premium, the issues being made under the option given by clause 88 of the articles of association and other options conferred by resolutions passed by the directors. As the directors were in a fiduciary position, unless they had acted within their powers the transactions could not stand. As to the option given by clause 88, the question of fact was whether the appellants had complied with the condition which entitled them to the option. It was admitted that Tapp had done so as to 3,500 shares, and that Bainbridge had done so as to 2,500 shares. The question raised by the appeal was whether Tapp had also fulfilled the condition as to 1,500 more shares and Bainbridge as to 2,500 more shares. His lordship reviewed the facts and evidence, and said that he could not differ from the conclusion of North, J., that the condition had not been fulfilled with regard to these additional shares. Tapp and Bainbridge were therefore liable in respect of those additional shares. His lordship was also of opinion that they were liable in respect of the other 2,500 shares allotted to Bainbridge, which were mentioned in the cross notice of appeal. The learned judge below had overlooked the fact that these shares stood in the same position as the others. With regard to the allotments made to the appellants under the options given by resolutions of the directors, his lordship agreed with North, J., that those resolutions were *ultra vires*, and the allotments made in pusuance of them were invalid. There had been nothing amounting to ratification by the

company. The appellants had been rightly held liable in respect of these shares.

As to the other point raised by the cross appeal—viz., the proper measure of damages—it had been urged that the defendants ought to be charged as to all the shares in question with the very highest value at which shares of the company had been sold during the period for which those shares had been held by the defendants. North, J., had not adopted this view, and his lordship thought that he was right, subject to a correction of the date which he had taken. His lordship did not wish to depart from the principle that persons standing in a fiduciary position should be charged with the highest value of property which they had wrongfully taken. But they ought not to be charged with more than the real value, and the value ought not in this case to be ascertained by the price obtained on the sale of a small number of shares. As North, J., had said, if a large number of shares had been placed on the market the highest price would not have been obtained. But his lordship thought that the true date for ascertaining the value of the shares was the date when the shares were respectively allotted to the directors, that being the date at which they had obtained the property for which they had to account. In substance the view taken by North, J., was right.

RIGBY, L.J., concurred. With regard to the measure of damages, his lordship agreed in the general rule that a wrongdoer ought to be charged with the highest possible price which could have been obtained for the property which he had wrongly appropriated while it was in his hands. But because there was evidence that some shares had been sold at a particular price it must not be assumed that all the shares could have been sold at that price. All the circumstances must be considered. His lordship was not disposed to differ from the conclusion of North, J., that it had not been shown that all the shares in question could have been sold at the highest price.

COLLINS, L.J., also concurred, and in the course of his judgment said:—

Now as to a point upon which we differ only to an extent from the judgment of North, J. It has been argued that these directors being wrongdoers, as they unquestionably were, must be mulcted in damages, measured by the highest price which the shares of which they wrongfully possessed themselves ever reached in the market. Now, I wish to say one word about that. The market value of these matters is merely itself a stepping-stone. It is a mere piece of machinery to ascertain the value of a thing. Where there is a market for that thing, a real market, then the market price determines the value. The principle would be precisely the same whether there was any market for it or not at all. What would have to be accounted for would be the highest value. Where you have a real market—a real market, where things can to any amount be exchanged and sold for money—then it is a short cut to the value to take the market price, but where those conditions do not exist it is not a short cut to the value—it is a short cut, but not to the value—to take the price at which certain isolated lots and shares could on given dates be sold. In other words, you are practically applying to them a value that does not exist. You are applying to them a market value when there is not in truth and in fact a real market for the shares at all, and therefore when you analyse that position it necessarily breaks down. The learned judge has found in effect that the value claimed was not a market value, because he said that if those shares had been put into the market in any substantial quantity they could not have been sold at all. Under the circumstances it would certainly be very unfair to take what is an artificial standard of value as being the true value.

I think, therefore, that the time at which the damages in this case are to be measured may be fairly taken as at the time at which the wrong was really done. It is an action for damages, and in this case I think it is analogous exactly to the common law action for conversion. It is true that in this case the thing is a *chose in action*, a share in a company, but applying the standard to it, the period at which they wrongfully procured that thing—the *chose in action*—was the time at which they procured it to be allotted to themselves. If it were a chattel, unquestionably at common law that would be the period at which the value would have to be measured; but although it is not a chattel, I do not see any reason why the same principle as to the time at which the damages are to be measured does not apply. Therefore I agree that the proper time for measuring the damages in this case is the date at which they committed the wrong in taking possession of that which they had no right to take possession of—namely, the dates at which they had these shares allotted to themselves.

Solicitors, *Hores, Pattison, & Bathurst; Edwards & Cohen.*

---

Appeal.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) May 26.

HOLMES v. GREAT NORTHERN RAILWAY CO. (a.)

*Master and servant—Employers' liability—Accident—Compensation—Accident arising out of and in the course of employment—Workman injured on his way to his work—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.

*In an arbitration under the Workmen's Compensation Act,* 1897, *it appeared that the deceased workman, who was in the employment of a railway company and lived near K. Station, being under orders to work in an engine-shed at H. Station, went by train from K. to H. free of charge, arriving at H. a quarter of an hour before the time for beginning work. Instead of making use, as he might have done, of either a bridge or a subway for the purpose of reaching the engine-shed, he proceeded to cross the line on the level, and while doing so was knocked down by a train and killed.*

*Held, that the accident arose out of and in the course of the employment of the deceased.*

Appeal from an award of the judge of the Clerkenwell County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the mother of a workman who had been accidentally killed while in the employment of the Great Northern Railway Co.

The deceased was an engine-cleaner, and he was for some time at work at King's Cross Station, near to which he resided. On the 4th of November, 1899, he received instructions that he was to go on the 6th of November to work at a new engine-shed which had been erected at Hornsey, about four miles from King's Cross. On the morning of the 6th of November he went with another man by train from King's Cross to Hornsey, arriving at Hornsey at 5.45. Work at the new engine-shed was to commence at 6. Not knowing the way from the station to the shed, he made inquiry, and was told that there were two

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

ways, one by a bridge and the other by a subway. He went either by the bridge or the subway, and after doing a day's work in the shed he returned in the evening. On the 7th of November he again went from King's Cross to Hornsey at the same hour and in the same way, and several other workmen went with him. On their arrival at Hornsey, in order to avoid losing time in going either by the bridge or by the subway, they proceeded to cross the line on the level. While they were doing so the deceased was knocked down by a passing train and was killed. The deceased did not take a ticket on either of the two days, neither was any fare demanded of him. The practice was that workmen who resided near King's Cross, and who were ordered to work at other places on the company's line, were taken by trains to and from their work free of charge.

The county court judge was of opinion that there was an implied agreement that the deceased should be carried by train to Hornsey, and that his employment began at King's Cross, and that the accident arose out of and in the course of his employment while he was proceeding to that part of the employers' premises in which he had been directed to work. He accordingly made an award in favour of the applicant for £150.

The employers appealed.

*Montague Lush* (*A. Clutton Brock* with him) for the employers.—The accident did not arise out of and in the course of the deceased's employment. His employment did not begin till his work in the shed began. Even if there was an implied agreement that he should be carried by train to his work, the accident did not happen in consequence of his travelling by train; it happened in consequence of his selecting a dangerous route for going to his work. He was not in any way invited into danger by the employers. This case is governed by *Holness* v. *Mackay and Davies*, 47 W. R. 531, [1899] 2 Q. B. 319.

*W. H. Duckworth*, for the applicant, was not called upon to argue.

A. L. SMITH, L.J.—I am of opinion that the county court judge was right in holding that this accident arose out of and in the course of the deceased's employment. It must be borne in mind that there is a difference between the beginning of a man's employment and the beginning of his work. It seems to me that there was in this case an implied contract between the masters and the man that they would take him by train from King's Cross to Hornsey, and bring him back again after the day's work was done. If the employment began at King's Cross, it follows that the accident arose in the course of the employment; and it also arose out of the employment, for the employers do not attempt to make out a case of serious and wilful misconduct.

VAUGHAN WILLIAMS, L.J.—I agree. I do not think it necessarily follows that because an employment has once begun it goes on all day till the time when according to the contract of employment it comes to an end. A workman may in the course of his employment do something for himself quite independent of his employment. Apart from wilful misconduct he may make a break in his employment. But that has no application here, for the deceased was crossing the line merely for the purpose of getting to his work.

ROMER, L.J., concurred.

*Appeal dismissed.*

Solicitor for the employers, *R. Hill Dawe.*

Solicitor for the applicant, *Alfred Slater.*

## High Court of Justice.

Chan. Div. Kekewich, J. — July 19.

HILDESHEIMER v. W. & F. FAULKNER (LIMITED). (a.)

*Copyright—Penalties—Number of offences—"Sum not exceeding £10"—Minimum sum—Artistic Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 6.

*The copyright in certain pictures was infringed by the distribution of over a million copies, which altogether cost to produce not more than £120. Upon summons to fix the amount of the penalties payable under section 6 of the Artistic Copyright Act*, 1862,

*Held, that each copy constituted a separate offence, for which the minimum sum which the court could impose as a penalty was one farthing.*

An action was brought by Albert Hildesheimer to restrain W. & F. Faulkner (Limited) and Sir Joseph Causton & Sons (Limited) from infringing his copyright in twelve pictures by distributing copies of them in packets of cigarettes.

The plaintiff obtained an order in the action dated the 22nd of May, 1900, perpetually restraining the defendants, Faulkner & Co., from selling or distributing the copies.

The order further directed an inquiry as to how many copies of the pictures printed by the defendants, Sir Joseph Causton & Sons (Limited), had, since the 8th of July, 1899, been put in circulation by the defendants, W. & F. Faulkner (Limited).

The defendants, Sir Joseph Causton & Sons (Limited), were ordered to pay the plaintiff £2 as damages.

In pursuance of this order, it was certified by the master that 1,012,600 copies of the twelve pictures had been put in circulation.

This was a summons by the plaintiff asking that the defendants, W. & F. Faulkner (Limited), might be ordered to pay such penalties and damages as might seem fit.

The cost of production of a million copies amounted to between £100 and £120, but the plaintiff, claiming to be entitled to a separate penalty of not less than one farthing for each copy, demanded penalties amounting to £1,054 15s. 10d.

The question depended upon the construction of the Artistic Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 6, which provides that if any person, "not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, colourably imitated, or otherwise multiplied for such sale, hire, exhibition or distribution any such work or the design thereof, or knowing that any such repetition, copy, or other imitation has been unlawfully made . . . . shall sell, publish, let to hire, exhibit, or distribute . . . . any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10. . . ."

*Warrington, Q.C., C. A. Russell, Q.C.*, and *Hildesheimer*, for the plaintiff.—There must be a separate penalty for each copy: *Ex parte Beal*, 16 W. R. 852, L. R. 3 Q. B. 387. The smallest sum the law can take account of is one farthing: *Ellis* v. *Marshall &*

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

*Sons*, 64 L. J. Q. B. 257, 11 Times L. R. 522; *Baschet* v. *London Illustrated Standard Co.*, *ante*, p. 56, [1900] 1 Ch. 73; Artistic Copyright Act, 1862, ss. 6, 8.

*Warmington, Q.C.*, *A. T. Walter*, and *Gray*, for the defendants, W. & F. Faulkner (Limited). — The defendants have only committed one offence, that is to say, multiplying a million copies. But if they have committed a million offences the court has discretion, and it is not bound to a particular coin. A hundredth part of a penny here would be a sufficient penalty per copy. There is no minimum sum fixed by the Act: *Green* v. *Irish Independent Co.* (*Limited*), [1899] 1 I. R. 386.

KEKEWICH, J.—The two questions falling for decision, though arising on the same section of the same Act of Parliament, are really different in substance, and require quite different consideration.

It is argued on behalf of the defendants that they only committed one offence; that in producing—either by themselves or by their agents is immaterial—these million copies they only committed a single offence, for which can be recovered by way of penalty a sum not exceeding £10. As regards that, I conceive myself bound by the case of *Ex parte Beal*, and the judgment of Blackburn, J., there, in which Mellor and Lush, JJ., concurred, to hold that that is not the true construction of the Act. I will not go through the judgment. It seems to me, notwithstanding the way in which the question was raised, and on which Mr. Warmington has commented, their decision is on the construction of the Act, and it is perfectly clear it is binding on me, and it is quite clear also, it seems to me, that that is the true construction of the Act. "Every such offence" seems to me to depend on "any repitition, copy, or imitation of the said work," and not on the word "multiply," and the words which are used in collocation and connection with "multiply"; and "every such offence" means every offence whereby a repetition, a copy, an imitation is produced. The construction contended for by Mr. Warmington seems to me a ridiculous construction of the Act, though my opinion perhaps is worth little, considering that, as I read the judgment in *Ex parte Beal*, it is settled by that authority.

The other question is one of a different character altogether. "For every such offence," construed as I have mentioned it, they shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10. I do not think "not exceeding £10" assists us very much; that is only a limit to prevent too much being recovered for any offence, however great.

But the difficulty is, what is a "sum" not exceeding £10? It is argued that I may give a fraction of a penny or a fraction of a pound, and that it is immaterial which, but the object of course is to get the court to give a fraction of a farthing, because, unless it is reduced to the fraction of a farthing there would be no large reduction from the sum of about £1,000 which a farthing per copy would give. You may try it, nevertheless, by the fraction of a pound just as well as you could try it by the fraction of a farthing. Is any fraction of a pound or a penny a "sum" within the meaning of the Act? Mr. Warrington's argument as to the impossibility of recovering small fractions of a penny as penalties would not strictly apply to the fraction of a pound, because it might be convenient, though not strictly correct, to describe five shillings as a fourth of a pound, and there would be no difficulty in recovering such damages if such an order or verdict were given, I suppose. But when you come to a fraction of a farthing you raise considerable difficulty, as was pointed out in argument, as to recovery, and that leads one to the conclusion that the Legislature must have meant by "sum" not merely a sum which can be expressed in figures, but a sum that exists in actual reality. It is a question, to my mind, of some little difficulty, and I was disposed, as Fitz-Gibbon, L.J., was in *Green* v. *Irish Independent Co.*, to avoid the conclusion which leads to extravagance, because I cannot help thinking that to give the defendants here £1,000 as penalties for the reproduction of a million of these ephemeral pictures is somewhat like extravagance. I observe that Fitz-Gibbon, L.J., was very much pressed with that, because he treats it as being rather a strong thing to do, and one which he desired to avoid doing. He says: "I am not satisfied that the law compels us to punish a number of offences for each of which a farthing is far more than an adequate penalty by awarding as many farthings as there are offences included in the aggregate of offences. The only reason for a farthing is, that it is the smallest coin of the realm, and if one of those coins is an adequate penalty for an aggregate of offences I cannot see that we are forced to give more than one farthing for the lot." But it is to be observed that that argument of his goes to show that you are not bound to give a separate coin, or a separate sum, for each offence, which, as I have already said, is concluded against his view by *Ex parte Beal*. The other two lord justices took an entirely different view. Walker, L.J., does not seem to have considered the question for himself, he simply followed Charles, J., in *Ellis* v. *Marshall & Sons*. I mean as far as he expressed himself, because he does say: "I should be glad if I had been able to come to the conclusion," but not being able to come to the conclusion he there mentions he continues: "Thinking like Charles, J., that I have no alternative, I am of opinion that there must be judgment for the plaintiff." He says he thinks he has no alternative, and in that way expresses his concurrence with Charles, J., but gives no further reason for his judgment. But Holmes, L.J., does. He says: "I feel bound to award at least a nominal penalty for every copy, and I know no better way of doing so than to make it a farthing for each. It seems to me that unless the penalty is measured by some coin recognised in our national system of coinage the provision of the Legislature is disregarded." I am not sure I should quite follow that in its fullest sense, but I do follow the argument that you must have some recognised figure, something you can recover, and that a fraction of a farthing would not answer that description. The decision of the court in Ireland is not binding on me, but, on the other hand, it is a judgment of the Court of Appeal there, and is entitled to the greatest respect, and I should not depart from it without the greatest consideration if it stood alone. But it does not stand alone. I have Charles, J.'s, judgment in *Ellis* v. *Marshall & Sons*, and he considered it carefully, and, though he does not mention, as I thought he had done, that he must give judgment for a farthing for each, he does, according to the report, give judgment on that footing. He fixes his £26 0s. 10d. on the footing of a farthing for each copy, and therefore, no doubt, that was the judgment at which he arrived. I thought he had said as much, but at any rate he says the same thing. Thus I have Charles, J.'s, decision, and the more recent decision in Ireland, which agreed with it, and carried it out; and the only thing against it here really is that the sum mounts up to a large amount. If I could I would reduce it; I do not hesitate to say so; but I think with these reports before me, and seeing the difficulty that has been pointed out in construing "sum" to mean a fraction of a sum, it will be my duty to say that a farthing per copy must be the limit. I cannot go beyond that; I

leave it to a higher court to investigate the matter further if the case is taken there. There must be an order that the defendants, W. & F. Faulkner, pay to the plaintiffs as penalties £1,054 15s. 10d.

Solicitors, *Cartwright & Cunningham; Rehders & Higgs.*

---

Chan. Div. } June 16.
Byrne, J. }

*In re* ESPUELA LAND AND CATTLE CO. (*a.*)

*Company—General meeting—Conditional notice—Validity of notice.*

*The articles of association of a company required thirty days' notice of every general meeting. On the 19th of February the company issued a notice of an extraordinary general meeting for the 23rd of March following, at which a resolution for reduction of capital was to be proposed. In the same document the company also gave notice of an extraordinary general meeting for the 7th of April, at which the said resolution, if passed at the first meeting, should be confirmed. The notice then continued: "Should the said resolution not be passed by the requisite majority at the meeting to be held on the 23rd of March, due notice will be given to the shareholders that the meeting on the 7th of April, of which notice is now given, will not be held."*

*Held, that the notice convening the second meeting was valid.*

Petition.

The articles of association of the above-named company provided that thirty days' notice should be given to the members before every general meeting.

On the 19th of February, 1900, the company issued the following notice: "Notice is hereby given that an extraordinary general meeting of the company will be held at the offices of the company on Friday, the 23rd of March, when the subjoined resolution will be proposed. Notice is hereby also given that an extraordinary general meeting of the company will be held at the offices of the company on Saturday, the 7th of April, when a report will be presented of the proceedings at the extraordinary general meeting of the company to be held on the 23rd of March, and the subjoined resolution will, if passed by the requisite majority at the meeting, be submitted for confirmation as a special resolution. Should the said resolution not be passed by the requisite majority at the meeting to be held on the 23rd of March, due notice will be given to the shareholders that the meeting on the 7th of April, of which notice is now given, will not be held."

The subjoined resolution referred to was a resolution for the reduction of the capital of the company.

Both the meetings above mentioned were held on the days appointed, and the resolution for the reduction of capital was passed and confirmed.

The company now presented a petition praying that the court would sanction the scheme for the reduction of capital.

*Levett, Q.C.*, and *G. Lawrence*, for the company, raised the question as to whether the notice of the second general meeting as given was not a conditional notice, and therefore invalid: *Alexander* v. *Simpson*, 43 Ch. D. 139.

BYRNE, J., held that the notice was valid.

Solicitors, *Markby, Stewart, & Co.*

(*a.*) Reported by R LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

Chan. Div. } June 12, 13.
Farwell, J. }

INGLE *v.* VAUGHAN JENKINS. (*a.*)

*Merger—Settled estates—Lease—Lessee tenant for life—Intention—Benefit of tenant for life.*

*Where a person entitled to the benefit of a contract enforceable in equity, and who is one of the original parties to it, ultimately becomes both the proper person to grant and to receive such benefit, merger does not necessarily take place; but the court will look to see what is to the benefit of the person in whom the various interests coalesce.*

Action for specific performance to grant a lease.

The defence was that the lessee had become tenant for life of the estate, and that his lease had merged in his life estate.

By the will of Wm. Vaughan Jenkins, dated the the 17th of August, 1866, certain property was settled on F. Vaughan Jenkins for life, with remainder to his son W. Vaughan Jenkins for life with remainders over. The tenant for life for the time being in possession, was entitled by the will to grant a lease for ninety-nine years of any of the land on a building lease according to certain specified conditions.

While F. Vaughan Jenkins was tenant for life in possession he entered into an agreement in writing with his son W. Vaughan Jenkins to grant him a lease under this power for ninety-nine years of three acres of the settled land on the erection by him of a house thereon fulfilling the specified conditions. In accordance with this agreement W. Vaughan Jenkins built the house on the land, but no lease was granted.

F. Vaughan Jenkins died in 1892, and W. Vaughan Jenkins became tenant for life in possession, till his death in 1897.

The plaintiff was the executor of W. Vaughan Jenkins, the defendant being the remainderman. The plaintiff claimed a lease under the agreement mentioned above. This the defendant refused to grant on the ground that W. Vaughan Jenkins' interest under the agreement had merged in his life estate when he became tenant for life in possession.

*Younger, Q.C.*, and *Cave*, for the plaintiff.—The father and son never intended this term to merge. This is the true test: *Snow* v. *Boycott*, 40 W. R. 603, [1892] 3 Ch. 110. It is for the benefit of the estate of W. Vaughan Jenkins that his interest should not merge.

*Hughes, Q.C.*, and *G. P. Hewitt*, for defendant.—The term has merged. This case is different from where charges are paid off by the tenant for life.

*Younger, Q.C.*, replied.

FARWELL, J.—It has been argued that specific performance of this agreement ought not to be decreed because the interest of W. Vaughan Jenkins in the lease thereby contracted to be granted merged in his life estate when he became legal tenant for life in possession. In my opinion there has been no such merger. In the first place, this is a contract specifically enforceable in equity, and there is no case which says that such a contract becomes merged even at law because the person who is entitled thereto happens ultimately to become the proper person both to grant and to receive such benefit. For instance, supposing that a testator had contracted to grant A a lease, if he subsequently devises the fee to A on trust, there is no merger. A can still enforce the contract; or, on the other hand, if the testator subsequently devises the fee to A for life with remainders over, I do not know of any case which says that A cannot

(*a*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

enforce such contract, even though A would receive from himself a grant of the lease.

In my opinion the doctrine of merger is rightly stated in Lewin on Trusts (10th edit.) p. 889. Counsel for the defendant argued that there was a distinction between the cases of merger of a leasehold interest at a rent and of a term to secure a charge. I do not, however, see any distinction. The prevailing principle is that the benefit of the person in whom the various interests coalesce is to be regarded, and I cannot see why the benefit of such a person should be regarded as of more importance in the case of a term of years to secure a charge, than in the case of a term of years at a rent. I do not see that there is any difference, whether the term is created to secure a charge in consideration of money advanced, or whether it is created in consideration of money expended on the land itself, as it was in this case. It makes no difference to my mind whether the estates meet in the same person by operation of law or by act of the petitioners. The principle of *Grice* v. *Shaw*, 10 Hare, 76, applies to this case. That was a very much stronger case because there the charge was paid off by a tenant in tail, and yet it was held to be kept alive for his benefit. All the authorities show that where a tenant for life pays off a charge he keeps the benefit for himself unless he expresses some intention to the contrary. Here W. Vaughan Jenkins, while still tenant for life in remainder, expended £1,500 in building this house and became entitled to a lease of it for ninety-nine years. He was aware that he might one day become tenant for life in possession. In my opinion it clearly was for his benefit that this leasehold interest should not merge, and therefore I hold that there was no merger in equity. It seems to me that this is an *a fortiori* case, as I am dealing here with a tenant for life, and however this matter may be regarded it must be for his benefit that the term should be kept alive.

Solicitors for plaintiff, *Buck, Mellor, & Norris.*

Solicitors for the defendant. *Preston, Stow, & Preston*, for *Rooke & Macdonald*, Bath

---

Q. B. Div.
(Kennedy and Darling, JJ.) July 31.

ST. SAVIOUR'S UNION v. BURBRIDGE. (*a.*)

*Vagrant—Person wilfully refusing or neglecting to maintain himself*—Delirium tremens—*Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

*A person who becomes chargeable to a parish or place during an attack of* delirium tremens *is not on that account a person who, being able to maintain himself, wilfully refuses or neglects so to do.*

Case stated by a metropolitan police magistrate.

A summons was issued at the instance of the St. Saviour's Union against Frank David Burbridge, charging him that being wholly able by work to maintain himself he wilfully neglected and refused so to do, by which neglect he became chargeable to the union, contrary to section 3 of the Vagrancy Act, 1824.

The summons was heard on the 21st January, 1900. The circumstances under which it was issued were as follows: On the 25th of November, 1899, it came to the knowledge of the relieving officer of the St. Saviour's Union that one Frank David Burbridge was suffering from *delirium tremens*, and that he was then at his own residence in a state dangerous to himself and to those about him. This knowledge was conveyed to the relieving officer by the certificate of Burbridge's medical attendant. Upon the receipt of the certificate and on the same day the relieving officer attended at Burbridge's residence and removed him to the workhouse infirmary of the St Saviour's Union, giving an order for his admission, in which he was described as a lunatic.

After his admission to the infirmary Burbridge was seen by the medical officer of the workhouse, and was found to be suffering from *delirium tremens*, and, thereupon, an order was obtained from a justice of the peace for the County of London, acting under the Lunacy Acts, detaining Burbridge as a prisoner in the workhouse. Burbridge was so detained in the workhouse until the 29th of November, upon which day, the attack of *delirium tremens* having passed off, he was discharged upon his own application and upon an order for his discharge being granted by the above-mentioned justice.

It was found in the case that in the above circumstances Burbridge became and was chargeable to the union for the period of five days. Upon the hearing of the summons the following facts were either proved or admitted:—

At the time of his admission to the infirmary, and for the first three days of his detention therein, Burbridge was quite unable to maintain himself, and at no time during his detention would he have been allowed to leave the workhouse, except upon an order for his discharge being given by the justice. Burbridge was a person generally well able to maintain himself and was, as a fact, well-to-do and in such a position that the guardians might reasonably apply to him for the cost of his maintenance or sue him in respect thereof. No application had been made by the guardians to Burbridge to pay the cost of his maintenance, and he had not refused to do so, and he protested before the learned magistrate that he would willingly have paid upon application.

It was contended on behalf of the guardians that, on these facts, the learned magistrate ought to convict. The learned magistrate, however, held that he had a discretion in the matter and dismissed the summons.

The question for the opinion of the court was whether the learned magistrate had such discretion.

*J. A. Johnston*, for the appellants.—The offence under section 3 of the Vagrancy Act is constituted if two things are proved, (1) That the respondent became chargeable to a parish or union; (2) that being able to maintain himself he became so chargeable by wilfully refusing or neglecting so to do. The learned magistrate found, as a fact, that the respondent became chargeable, and he also found that he was able to maintain himself before he became incapacitated by *delirium tremens*. The learned magistrate, however, dismissed the summons because he was incapable of maintaining himself while he was in the workhouse. In that he was wrong, because in ascertaining whether the respondent was able to maintain himself within the meaning of the Act he ought to have regarded the time when the respondent drank to excess and so by his own voluntary act rendered himself incapable of maintaining himself and not the period of his chargeability. Further, the voluntary act of the respondent, whereby he incapacitated himself, constituted a wilful refusal to maintain himself within the meaning of the Act. The learned magistrate had no choice, therefore, but to convict the respondent. The fact that there was no refusal on the part of the respondent to pay for his maintenance is irrelevant, for the "refusal" referred to in the act is a refusal to maintain himself, not a refusal to pay for his maintenance.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

*H. Sutton*, for the Home Secretary, appeared to assist the court, but was not called upon to argue.

Kennedy, J.—The learned magistrate was right in dismissing the summons. In a case of this kind it is necessary to see what are the facts. At the time when Burbridge was taken to the workhouse he was very ill, and was suffering from *delirium tremens*. He was described to be, while at his own residence, dangerous both to himself and to those about him. He was, in fact, not merely drunk, but he had become for a time, by his own voluntary act, diseased and incapable of maintaining himself. It is impossible to suppose that the Legislature in the Vagrancy Act intended to punish people who by a voluntary act brought on a disease. The question for the learned magistrate was: Could this man be convicted of the offence of wilfully refusing or neglecting to maintain himself? It is impossible to say that he could be so convicted because he was suffering from a disease, however the disease might have been caused.

The learned magistrate would have been quite wrong had he convicted the man.

Darling, J.—It appears that the respondent, Burbridge, is a man who, by drinking, brought on *delirium tremens*, and who, while at his own residence, was dangerous to himself and to those about him, and that for that reason he was taken to the infirmary. The learned magistrate had to ascertain whether he was by that mere fact an idle and disorderly person. The section under which he was charged begins with the words "being able to maintain himself." At the moment when the respondent was suffering from *delirium tremens* he was not able to maintain himself. Therefore he is not within the section, unless it can be said that he is within it because the disease from which he was suffering was brought on by his own voluntary act.

I do not think that that is the meaning of the Statute. If the Statute had intended that result it could have expressed it in plain language. It was at least not more unusual for people to get drunk at the time when the Act was passed than now, and *delirium tremens* is not a modern complaint. The Act could well have said that a person who makes himself so drunk as to bring on *delirium tremens* is an idle and disorderly person. By section 16 it is provided that a person who begs without having a licence from a justice of the peace is an idle and disorderly person. It would have been as easy to put Burbridge and people of his kind into that section.

If the argument put forward on behalf of the appellants is right—if, that is to say, a man who wilfully takes something which ultimately renders him incapable of maintaining himself is within the section—then the case I put in argument is equally within the section, namely, that of a man who having been told by his medical man that excessive smoking would in his case bring on a complaint which would incapacitate him from earning his livelihood, continued nevertheless to smoke to excess, and so brought on the complaint against which he had been warned. That case was indistinguishable from the present case. Coupling this absurdity, to which that instance reduces the argument of the appellants, with the want of appropriate words in the Act bringing the case within it, in my opinion the learned magistrate was quite right in the conclusion at which he arrived.

*Appeal dismissed.*

Solicitor for the appellants, *Howard C. Jones.*

Solicitor for the Home Secretary, *The Treasury Solicitor.*

Q. B. Div.
(Grantham and Channell, JJ.) June 18.

National Telephone Co. v. Tunbridge Wells Corporation. (a.)

*Telegraph company—Prohibition—Laying wires or tubes under a street—Jurisdiction of highway authority—"Difference"—Former jurisdiction of stipendiary magistrate or county court judge to arbitrate—Telegraph Act,* 1878 (41 & 42 *Vict. c.* 76), *ss.* 3, 4—*Telegraph Act,* 1892 (55 & 56 *Vict. c.* 59), *s.* 5.

*By the Telegraph Act of* 1892 *the statutory power which a stipendiary magistrate or county court judge had to hear and determine an appeal from the refusal of a highway authority to permit a telegraph company licensed by the Postmaster-General to break up a street for the purpose of laying wires or tubes, has been rescinded; and the increased power given to such local authorities by that Act to veto the laying down of wires or tubes under any street within their district is now final.*

This was an application by the Corporation of Tunbridge Wells for a writ of prohibition to issue directed to the county court judge of Kent prohibiting him from further proceeding with the hearing of a plaint in the county court at Tunbridge Wells, entered by the telephone company, to which the corporation were defendants. The question for decision of the High Court was whether a stipendiary magistrate or a county court judge had, since the passing of the Telegraph Act, 1892, any jurisdiction to hear and determine an appeal from the refusal of a highway authority to allow a telegraph company to open streets for the purpose of laying wires or tubes.

The special case set out the following facts and sections:

By section 6 of the Telegraph Act, 1863, a telegraph company was empowered to break up any street or road, subject to the restriction that they could not place a telegraph under any street of any municipal borough except with the consent of the highway authority.

By the Telegraph Act, 1868, s. 2, the same provisions were made to apply to the Postmaster-General.

By the Telegraph Act, 1869, s. 4, the Postmaster-General was given the exclusive power of transmitting telegrams with the exception of telegrams transmitted with his written licence.

The word "telegram" has been held to include telephonic messages: *Attorney-General* v. *Edison Telephone Co.*, 29 W. R. 428, 6 Q. B. D. 244.

By the Telephone Act, 1878, s. 8, if any highway authority having power to withhold consent to the Postmaster-General to placing telegraphs under a street fail, within twenty-one days after being required, to give their consent, a "difference" shall be deemed to have arisen between such highway authority and the Postmaster-General, and such a difference, by section 4, should be referred to a stipendiary magistrate or to a county court judge, who was empowered to hear and determine such difference as if he were an arbitrator under the Regulation of Railways Act, 1868. In that case the magistrate or the county court judge might give the necessary consent, which was to have the effect of a consent given to the Postmaster-General by the highway authority under the Act of 1863.

By the Telegraph Act, 1892, s. 5, where the Postmaster-General had licensed any company to transmit telegrams, he might license the company to exercise

(a.) Reported by Erskine Reid, Esq., Barrister-at-Law.

his own powers under the Acts of 1863 and 1878, and thereupon those Acts should apply. But notwithstanding anything in the Act of 1878 a licencee should not exercise any of these statutory powers without the consent of the urban sanitary authority or county council, and should be subject to any terms and conditions which the county council or urban sanitary authority might attach to any such consent, and should comply with any regulations of such council or authority from time to time in force in relation to telegraphic lines.

By two deeds, dated 1884 and 1896 respectively, made between the Postmaster-General and the National Telephone Co., the company were authorised to work and use certain lines of telegraph for the purpose of transmitting telegrams within the municipal borough of Tunbridge Wells.

By a deed dated the 10th of March, 1896, and made between the Corporation of Tunbridge Wells and the Telephone Co., the corporation consented to the company exercising within the borough such powers as might from time to time and at any time be delegated by the Postmaster-General to the company in pursuance of the provisions of section 5 of the Telegraph Act, 1892. This deed contained the following stipulation: "It is expressly agreed that the consent contained in the preceding clause is given upon the following conditions—(1) except as regards the work mentioned in the schedule the company shall not exercise any of the powers conferred on the Postmaster-General by the Telegraph Acts, 1863 and 1878, in respect of which the consent of the corporation is required under the said Acts, without obtaining the further consent in writing of the corporation to be from time to time given to the specific works for the time being proposed to be carried out under such powers, it being intended that the general consent contained in the preceding clause is not to operate to relieve the company from the obligations of obtaining the particular consent of the corporation to such specific work as required by and provided for in the said Acts." Clause 10 of this agreement contained a reference of all disputes and differences under its terms to two arbitrators or an umpire.

The company gave notice that they desired to open up a street and lay telephone wires, and execute works not mentioned in the schedule of the last-mentioned deed. The corporation refused to give them leave, and the company submitted that under section 4 of the Telegraph Act, 1878, they were empowered to refer this "difference" to the county court judge.

When the matter came before the county court judge he expressed his opinion that he had jurisdiction to hear and determine the difference, but refrained from doing so until the hearing of this motion.

*Joseph Walton, Q.C.* (with him *Alexander Macnorran, Q.C.*, and *Boxall*), for the corporation, having read the case, was stopped by the court.

*Cripps, Q.C.*, and *J. Cassell*, for the company.—The consent required by the deed of the 10th of March, 1896, means the consent subject to appeal to the county court judge, for in effect it provides that for all works other than those specified in the schedule the consent of the corporation must first be obtained "as required by the said Acts." Further, we say that the county court judge being constituted an arbitrator, a writ of prohibition cannot go, for it is not an appropriate remedy.

GRANTHAM, J.—There can be no doubt in this case that we ought to order prohibition, for the National Telephone Co. have not brought themselves within the Act of Parliament which gives general powers to carry on these works in the manner in which the National Telephone Co. claim the right to execute them. There is not much doubt as to the real history of this legislation. By the passing of the Act of 1892 the Crown delegated to private companies powers which, up to that time, it had retained in its own hands; accordingly it gave to highway authorities greater powers of consenting to or forbidding proposed alterations in their streets than they formerly possessed. In 1878 everything was in the hands of the Crown through the Postmaster-General. Then pressure was brought to bear upon them, and they consented to delegate some of their powers, but the moment they did that and allowed these works to be carried out by a company, they very properly changed their *modus operandi*. During the time that it was a Crown monopoly and the Crown had a right to do this work it was considered just that the judicial authorities of the Crown should be invoked to determine any differences that arose between the Crown and the public authorities. The Postmaster-General consented to do this work in Tunbridge Wells. By the Act of Parliament it was provided that supposing there was a difference between the Postmaster-General and the authorities at Tunbridge Wells, some tribunal must determine who was right. It being a question of the right of the Crown to do this the Legislature decided to invoke the aid of the judicial authorities of the Crown—the county court judge or the stipendiary magistrate. Then came the Act of 1892, whereby their powers were delegated. The moment private individuals carried on this work, the right which the Crown had to call in the aid of the judicial authorities ceased, and more power was given to those authorities in whose district the work was to be done. The urban authorities were then given a power of veto. Their consent had to be obtained, first, to exercise the powers to be delegated, and then there was a further right given to the local authority to say in what way they would consent to these powers being exercised. The Tunbridge Wells authorities gave a general consent, but subject to the general terms of the agreement, the consent was only given for the execution of the work thereby agreed upon and set out in the schedule, and before any other work was begun it was stipulated that the company must apply for and obtain the further consent of the local authority. The parties to the agreement rightly understood what their respective rights and liabilities were. Under the Act of 1892 this agreement was expressly and properly drawn to give such rights as the corporation intended to give in the first instance to the National Telephone Co., reserving to themselves the right which, by the Act of 1892, they had power to reserve. The National Telephone Co. were bound by the terms of the agreement, and had no right to say that the county court judge was the proper tribunal to determine any difference which had arisen between the parties.

On the second question, whether the county court judge was an arbitrator, assuming he had jurisdiction, section 4 of the Act of 1878 refers the matter of disputes to him "as if he were an arbitrator." In my opinion, that section by those words does not say that the county court judge shall be the arbitrator whenever differences arise. It is merely a direction to him how he should in such a case act. For these reasons prohibition is clearly the appropriate remedy, and the application to us of the corporation must be allowed.

CHANNELL, J., concurred, and referred upon the second point in the case to *Hull* v. *M'Farlane*, 2 C. B. N. S. 796, where the trustees of a burial society who were not "persons interested" within the meaning

of section 41 of the Friendly Societies Act, 1855, so as to enable them of their own accord to institute proceedings against the society in the county court for the purpose of controlling them in the proposed alteration of their rules, had applied to the county court, and the judge having entertained the application, the Court of Common Pleas granted a prohibition.

Solicitors for the corporation, *Sole, Turner, & Knight*, for *Cripps, Son, & Dash*.

Solicitor for the company, *W. E. L. Gaine*.

---

## IN BANKRUPTCY.

Q. B. Div. (Wright, J.) May 8, 19.

*In re* FORD.
*Ex parte* THE TRUSTEE. (*a*.)

*Bankruptcy—Pending action—Payment of money into court as condition of leave to defend—Bankruptcy of defendant before trial—Secured creditor—Title of trustee—R. S. C., ord.* 14, *r.* 6—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 168.

*Money paid into court as a condition for leave to defend under ord.* 14, *r.* 6, *must be treated as money paid in to abide the event, and is a security to the plaintiff for the sum for which he may obtain judgment at the trial. In the event of the defendant becoming bankrupt before the action has been tried, the money does not pass to the trustee in the bankruptcy, but must remain in court until the event has been decided, either by trial of the action or by adjudication upon a proof by the plaintiff in the bankruptcy.*

Application by the trustee in the bankruptcy for a declaration that he was entitled to a sum of £1,000 which had been paid into court by Ford, the bankrupt, in an action entitled *Jay & Co.* v. *Ford*.

Upon the 15th of August, 1899, Messrs. Jay & Co. issued a writ against Ford for £1,116 4s. 6d. and took out a summons for judgment under order 14. The summons was heard upon the 21st of September, 1899, when the defendant obtained leave to defend upon an order made in the usual form as follows: "It is ordered . . . that the plaintiffs be at liberty to sign final judgment for the claim endorsed on the writ, unless the sum of £1,000 be paid into court within three days." The money was paid into court, and a defence with a counterclaim was put in on the 5th of December, 1899, and amended by leave on the 10th of January, 1900. No reply was delivered nor was any notice of trial given. On the 29th of January, 1900, Ford filed his own petition in bankruptcy, and a receiving order was made against him. He was subsequently adjudicated bankrupt and a trustee was appointed by whom this application was made.

*Muir Mackenzie* and *Sinclair*, for the trustee.—The sum of £1,000 paid into court in this case was not paid into court to abide the event as in the case of *Tomlinson* v. *Hampson*, 38 SOLICITORS' JOURNAL 401, but was paid into court to prevent judgment being levied against the defendant, and it remained the defendant's property until the plaintiffs proved their title to it. The defendant became bankrupt before the plaintiffs had proved their title, and consequently the money is now the property of the trustee in the bankruptcy: *Barter* v. *Dubeux*, 29 W. R. 622, 7 Q. B. D. 413; *Ex parte Halling*, 26 W. R. 182, 7 Ch. D. 157. The plaintiffs' right to the money has become merely a provable debt, they are not secured creditors because they do not hold "a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to them from the debtor," as required by section 168 of the Bankruptcy Act, 1883.

*Reed, Q.C.*, and *Macaskie*, for Jay & Co.—The money was paid into court to abide the event; the plaintiffs have an equitable title to it, and it is a security to them to the extent to which they can establish their claim: *Ex parte Banner, In re Blythe*, 30 W. R. 24, 17 Ch. D. 480; *Ex parte Bouchard, In re Moojen*, 28 W. R. 129, 12 Ch. D. 26; *The Cella*, 36 W. R. 540, 13 P. D. 82; *In re Gordon, Ex parte Navalchand*, 46 W. R. 31, [1897] 2 Q. B. 516.

*Muir Mackenzie* replied.

*Cur. adv. vult.*

May 19.—WRIGHT, J.—Messrs. Jay sued Ford on the 15th of August, 1899, for £1,116 4s. 6d., and applied for judgment under order 14. The defendant, on certain suggestions of fraud, obtained leave to defend upon an order made on the 21st of September, 1899, in the usual form, as follows: "It is ordered that . . . the plaintiffs be at liberty to sign final judgment for the claim indorsed on the writ, and costs to be taxed unless the sum of £1,000 be paid into court within three days." The money was paid into court, and a defence with a counter-claim was put in on the 5th of December, 1899, and amended by leave on the 10th of January, 1900. No reply was delivered, nor has any notice of trial been given. On the 29th of January the defendant filed his own petition, and a receiving order was made. The trustee in bankruptcy now claims the money on the ground that, as he alleges, the £1,000 still remained the money of the bankrupt at the time when the trustee's title accrued, and that the plaintiffs at that time and now were and are ordinary creditors for whatever debt they may be able to prove. I say nothing about there being no evidence to show that the money was the bankrupt's.

It seems plain on principle and on the authorities that Messrs. Jay are for the present entitled to the benefit of the security which they obtained by the order of the 21st of September, 1899, and the payment into court in compliance with this order. The order must be treated as an order that the right to the money when paid into court shall abide the event. See *Bird* v. *Barstow*, 40 W. R. 71, [1892] 1 Q. B. 94, where the order appears to have been in the same form as in this case; and it is settled that where money is ordered to be paid into court to abide the event it must be treated as a security that the plaintiff shall not lose the benefit of the decision of the event in his favour. See *Ex parte Banner, In re Blythe; Ex parte Bouchard, In re Moojen; In re Tomlinson, In re Gordon, Ex parte Navalchand*.

The very object of such an order is that the plaintiff shall be in as good a position, so far as the money paid in extends, against contingencies such as bankruptcy, as if he got immediate judgment; and the cases cited show that where the plaintiff has without default on his part failed to get judgment before the bankruptcy, the "event" is the decision of his right in the bankruptcy. The money must remain in court until the event is decided by the trial of the action, if that is to be tried, or by adjudication upon a proof by the plaintiffs in the bankruptcy.

*Application dismissed.*

Solicitors for the trustee, *Nunn & Popham*.

Solicitors for the respondents, *Francis & Johnson*.

---

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

## Court of Appeal.

From Q. B. Div. (A. L. Smith and Vaughan Williams, L.JJ.) — Aug. 8.

FURBER v. TAYLOR. (a.)

*Practice—Costs—Order of county court, action upon.*

*An action cannot be maintained in the High Court upon an order of a county court for the payment of costs.*

Appeal from an order of Lawrance, J.

Two interpleader issues were directed to be tried in a county court between the plaintiff as the holder of a bill of sale, and the defendant as an execution creditor.

The county court judge decided in favour of the plaintiff and ordered the defendant to pay the costs of the issues, amounting to £77 16s. 4d., to the registrar of the court for the use of the plaintiff.

The plaintiff, being unable to obtain satisfaction by means of execution, commenced an action in the High Court to recover the costs so ordered to be paid.

On an application under order 14 Lawrance, J., gave the defendant unconditional leave to defend the action.

The plaintiff appealed.

*H. Kisch*, for the plaintiff.—The case of *Berkeley* v. *Elderkin*, 1 W. R. 305, 1 E. & B. 805, shows that an action cannot be brought in the High Court on a judgment of a county court. But the reasoning of that case does not apply to an order of a county court. There is no decision which shows that an action cannot be brought on a final order of a county court for the payment of a sum of money.

*Abinger*, for the defendant, was not called upon to argue.

A. L. SMITH, L.J.—Prior to the Judicature Rules no action could have been brought upon a judge's order. It has been held by this court that under ord. 42, r. 24, an action can now be brought upon a judge's order: *Godfrey* v. *George*, 44 W. R. 245, [1896] 1 Q. B. 48; *Pritchett & Young* v. *English and Colonial Syndicate*, 47 W. R. 577, [1899] 2 Q. B. 428. And by those decisions we are bound. Under the old law the same doctrine was applicable to an order of a county court as to a judge's order, and in my opinion the law so far as regards an order of a county court remains as it was before. The action, therefore, is not maintainable, and the appeal must be dismissed.

VAUGHAN WILLIAMS, L.J., concurred.

*Appeal dismissed.*

Solicitor for the plaintiff, *R. Furber*.

Solicitor for the defendant, *J. W. Browne*.

---

From Q. B. Div. (Earl of Halsbury, L.C., and A. L. Smith and Vaughan Williams, L.JJ.) — Aug. 1.

GODMAN v. MOSES. (a.)

*Practice—Appeal—Appeal from inferior court—Right to appeal from High Court to Court of Appeal—Jurisdiction to give leave to appeal—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 45—*Judicature Act,* 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 5.

*Where a Divisional Court, after deciding an appeal from an inferior court, refuses leave to appeal, the Court of Appeal has jurisdiction to grant leave to appeal.*

Appeal from a decision of a Divisional Court (Darling and Channell, JJ.), on an appeal from a county court.

The judgment of the county court was in favour of the plaintiff. The defendant appealed, and the Divisional Court affirmed the judgment of the county court, and refused to give the defendant leave to appeal to the Court of Appeal. The defendant applied *ex parte* to the Court of Appeal for leave to appeal, which was granted.

On the appeal coming on to be heard, the plaintiff took the preliminary objection that, the Divisional Court having refused leave to appeal, no appeal lay to the Court of Appeal.

*Bray, Q.C.* (*Hohler* with him), for the plaintiff.—The case is governed by section 45 of the Judicature Act, 1873, by which the determination of appeals from inferior courts by the Divisional Court "shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior court shall have been heard." This enactment is not repealed by section 1, sub-section 5, of the Judicature Act, 1894, which says that "in all cases where there is a right of appeal to the High Court from any court or person, the appeal shall be heard and determined by a Divisional Court constituted as may be prescribed by rules of court; and the determination thereof by the Divisional Court shall be final, unless leave to appeal is given by that court or by the Court of Appeal." The Act of 1894 was not intended to extend the right of appeal at all.

*Gore-Browne*, for the defendant.—The case is within the express terms of section 1, sub-section 5, of the Act of 1894. In the case of *Holland* v. *Girling*, mentioned in 43 SOLICITORS' JOURNAL, at p. 600, the Court of Appeal held that they had power to give leave to appeal from a judgment of a Divisional Court affirming a decision of a county court judge and refusing leave to appeal.

Earl of HALSBURY, L.C.—It seems to be clear that this question has already been decided by this court, and that in a case like the present the Court of Appeal has power to give leave to appeal. The preliminary objection must therefore be overruled, and the appeal must be heard.

A. L. SMITH and VAUGHAN WILLIAMS, L.JJ., concurred.

*Preliminary objection overruled.*

Solicitors for the plaintiff, *Speechly, Mumford, & Co.*, for *R. Henwood*, Horsham.

Solicitors for the defendant, *E. R. Keele*, for *Down, Scott, & Down*, Dorking.

---

From Q. B. Div. (A. L. Smith and Vaughan Williams, L.JJ.) — July 30.

MANCHESTER SHIP CANAL CO. v. S. PEARSON & SONS (LIMITED). (a.)

*Arbitration—Submission to three arbitrators—Power of court to stay action—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

*Section 4 of the Arbitration Act, 1889, applies to all submissions, including those in which the reference is to three arbitrators.*

In re Smith & Service and Nelson & Sons, 39 *W. R.* 117, 25 *Q. B. D.* 545, *distinguished.*

Appeal from an order of Bigham, J., directing that proceedings in the action should be stayed.

The plaintiffs were shipowners, and the defendants were charterers under a charter-party which provided that any disputes between the parties should be referred to three arbitrators, one to be appointed by the shipowners, another to be appointed by the charterers, and the third to be appointed by the two others. The action was brought to recover freight.

The defendants applied under section 4 of the Arbitration Act, 1889, for a stay of proceedings, and Bigham, J., being satisfied that there was no reason why the matter should not be referred in accordance with the submission, and that the defendants were ready and willing to appoint an arbitrator and to do all things necessary to the proper conduct of the arbitration, made an order staying the proceedings.

The plaintiffs appealed.

*Horridge*, for the plaintiffs.—In the case of *In re Smith & Service and Nelson & Sons*, 39 W. R. 117, 25 Q. B. D. 545, the Court of Appeal held that the provisions of the Arbitration Act, 1889, do not apply to a case where there is a submission to three arbitrators. The decision was that where in such a case either of the parties refuses to appoint an arbitrator the court has no power to order him to do so. Lord Esher, M.R., said that as the reference in that case was to three arbitrators, it was obvious that the case did not come within sections 4, 5, or 6. And Lindley, L.J., said the same thing. The court ought not to stay this action and compel the plaintiffs to go to a tribunal which the court has no power to enforce.

*Ellis Hill*, for the defendants, was not called upon to argue.

A. L. SMITH, L.J.—I do not see any reason why this action should not be stayed. The case of *In re Smith & Service and Nelson & Sons* does not govern this case at all. It was there held that there was no power conferred on the court by the Arbitration Act to appoint one arbitrator of three. This is not an application to appoint one of three arbitrators; it is an application to stay the action. Section 4 is perfectly general in its terms, and is not limited to any particular classes of submissions; and "submission" is defined by section 27 to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. I think that there was jurisdiction to make the order, and that it was rightly made.

VAUGHAN WILLIAMS, L.J., concurred.

*Appeal dismissed.*

Solicitors for the plaintiffs, *Rowcliffes, Rawle, & Co.*, for *Hill & Dickinson*, Liverpool.

Solicitors for the defendants, *Jaques & Co.*, for *Samuel Wright & Co.*, Bradford.

---

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — June 19.

ATTORNEY-GENERAL *v.* HANWELL URBAN DISTRICT COUNCIL. (*a.*)

*Local government—Public health—Compulsory purchase of land—User for different purpose—Order of Local Government Board—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 175.

*A direction by the Local Government Board under section* 175 *of the Public Health Act*, 1875, *that land which has been acquired by a local authority for specific purposes, but is not required for those purposes, shall not be sold, cannot authorize a permanent user of the land for purposes other than those for which it was originally acquired.*

*Decision of* Kekewich, J. (*reported* ante, *p.* 69), *affirmed.*

This was an appeal from a decision of Kekewich, J. (reported *ante*, p. 69).

The question involved was whether a local authority could hold land acquired by them for specific purposes free from any restriction as to user if the land was not required for those purposes, the Local Government Board having directed, under section 175 of the Public Health Act, 1875, that it should not be sold. The action was brought by the Attorney-General at the relation of Lord Jersey, with Lord Jersey as co-plaintiff, under the following circumstances:

In 1881 the Brentford Union, as the then sanitary authority for the Hanwell district, acquired under section 176 of the Public Health Act, 1875, about twelve acres of land in the parish of Hanwell belonging to Lord Jersey "for the disposal of the sewage of the parish of Hanwell in their district." This purchase was sanctioned by the Local Government Board on the petition of the sanitary authority, and after an inquiry as to its propriety.

The greater part of the land so acquired was used exclusively for the sewage purposes contemplated; but in 1896 the defendants, as the successors of the Brentford Sanitary Authority, proposed utilizing about two acres of the land, which had been found to be unsuitable for sewage purposes, for the erection of a hospital for infectious diseases other than small-pox.

A public inquiry was held on the 17th of December, 1896, by a Local Government Board inspector, and the result was that by an order under the seal of the board, and dated the 3rd of April, 1897, the board directed that the two acres acquired "for purposes of sewage disposal," but which were not "required for such purposes," should be retained by the council as a site for the erection of a hospital for infectious diseases other than small-pox. The plaintiffs thereupon brought the present action, claiming an injunction to restrain the defendants from erecting the hospital on the land, or from using the same as the site for any such hospital, on the ground that their so doing would be a nuisance or injury to the plaintiff, the Earl of Jersey, or his tenants, or his adjacent lands. The defendants denied that the proposed hospital would be a nuisance, and relied on the order of the 3rd of April, 1897.

The case mainly turned on the effect of sections 175 and 295 of the Public Health Act, 1875. Section 175 provides, *inter alia:* "Any lands acquired by a local authority in pursuance of any powers in this Act contained, and not required for the purpose for which they were acquired, shall (unless the Local Govern-

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

ent Board otherwise direct) be sold. . . ." ection 295 provides: "All orders made by the Local overnment Board in pursuance of this Act shall be inding and conclusive in respect of the matters to hich they refer."

Kekewich, J., held that the defendants were not ntitled to use the land for purposes other than those or which it was originally acquired, and granted the njunction asked for.

The defendants appealed.

*Warrington, Q.C.*, and *Stallard*, for the appellants.—After the Local Government Board has given a irection that land is not to be sold the local authority an keep the land free from any restriction as to user. There is no case which decides that land retained under section 175 of the Public Health Act, 1875, cannot be used except for the special purpose for which it was originally bought. In *Attorney-General v. Corporation of Southampton*, 1 Giff. 363, 8 W. R. Ch. Dig. 2, there was a special trust attached to the land, and the case only decides that where land is held on a special trust it cannot be used for any other purpose. So also in *Attorney-General* v. *Corporation of Sunderland*, 24 W. R. 991, 2 Ch. D. 634, there was no question but that the land could only be used for the particular purpose for which it was acquired. But there is no case where the land was not wanted for the purpose for which it was acquired, and in *Attorney-General* v. *Teddington Urban District Council*, 46 W. R. 88, [1898] 1 Ch. 66, it was admitted that the land might eventually be needed for the purpose for which it was acquired. [Lord ALVERSTONE, M.R.: Can a mere direction under section 175 to retain land get rid of statutory restriction?] It can, because otherwise the land would simply lie waste. The reason in the *Teddington case* that only a temporary user was allowed, was that the land would eventually be needed for its proper purposes; but here it is not needed for sewage purposes at all.

*Renshaw, Q.C.*, and *Howard Wright*, for the plaintiffs.—The acquisition of land under section 176 is hedged round with provisions in the vendor's interest, and it cannot have been intended to get rid of these by a mere direction to retain the land unsold. The object of section 175 was to avoid the necessity of a sale which might cause inconvenience, as in the *Teddington case*. If the land is not sold and is not required for its proper purpose it can be let. The Local Government Board have no power to remove any restrictions as to user, and no direction of theirs can alter the rights of third parties.

*Warrington, Q.C.*, replied.

Lord ALVERSTONE, M.R.—In this case I have felt considerable difficulty in the course of the argument and I do not think it could be regarded by any means as a perfectly clear case; but, after the best consideration I can give to the matter, I think the judgment of Kekewich, J., is right and ought to be affirmed.

It appears that in the year 1881 the predecessors in title of the defendants, the urban authority, exercised the compulsory powers of the Public Health Act of 1875 and purchased from Lord Jersey, under the provisions of the 176th section, a certain quantity of land. It is important to point out that under that section provision is made for the protection of persons whose land is intended to be purchased compulsorily by requiring a full advertisement of the nature of the undertaking and requiring a petition to the Local Government Board to state the purposes for which the land is required; and, by the provisional order, confirmed by Act of Parliament, under which the predecessors of the defendants obtained power to acquire the land, it is expressly recited that the guardians of the poor of the Brentford Union required to purchase and take lands for the disposal of the sewage of the parish of Hanwell. I think it must be taken that unless that which has happened subsequently by virtue of the 175th section alters the rights of the parties, the defendants, or rather their predecessors and therefore the defendants, acquired the land under statutory powers and for statutory purposes, namely, for the purpose of using it for the disposal of sewage.

It appears that two acres of this land, either from the point of view of level or from other local circumstances, was not fitted to be used for sewage purposes, and thereupon the Hanwell Authority in the year 1897, or thereabout, contemplated acquiring more land from Lord Jersey, as to which no question arises. The idea occurred to them that they might use these two acres not for anything in connection with sewage, but for the purpose of establishing an isolated hospital, and, as was very frankly stated, they took steps to borrow money to erect a permanent hospital on this land, not a mere temporary user while the land was not required for sewage purposes. It is not necessary to go through the formalities of the steps that were taken which led up to an order of the 3rd of April, 1897, whereby the Local Government Board having recited the application to them under section 175 that the land which formed part of the land required by the Local Board of Hanwell for the purpose of sewage disposal, but which is not required for such purposes, shall be retained by the council as a site for the erection of an hospital for infectious diseases, the Local Government Board directed that that land should be retained by the council as a site for the erection of an hospital for infectious diseases other than small-pox.

I ought to say that, in my opinion, no special weight and no special authority can be given to the words that are added there—namely, the words directing the land to be retained by the council as a site for the erection of an hospital for infectious diseases other than small-pox. It could not be, nor is it suggested that by virtue of any implied or expressed authority the Local Government Board had any powers to enforce against an unwilling person or persons who could otherwise have objected to it the establishment of an hospital for infectious diseases. But what is said, and it is a point that gave me considerable difficulty, is that the order is an order that must be taken to be made under section 175, and on its face it purports to be so, and that that being so it is a direction that the Hanwell Authority—the defendants—may retain the land as their own, and that retaining the land they are entitled to use the land for any purposes for which they can lawfully use the land which belongs to them, and if one was able to gather that that was the intention of the Act of Parliament from the sections which prescribe the way in which the land shall be compulsorily acquired and subsequently used, there would appear to be at first sight a good deal to be said for that argument.

In my opinion, the language of section 175 is not sufficient to enable the urban authority to apply the land permanently for a purpose which is different from that for which it was originally acquired. I think the provisions of section 176 and the scheme of the Act referring to the acquisition of land are very important. The district authority have a limited authority. They possess powers which are given them by Act of Parliament, or it may be by orders that the Local Government Board have made pursuant to the provisions of the Act of Parliament. Their power to acquire land compulsorily is to acquire it for specific purposes, and I think as long as they hold it without fresh statutory authority they can only hold it for those purposes. I think that the doctrine and

principle in the *Southampton case* would apply—I do not know that this was seriously disputed by the appellants—namely, that, with regard to the land as to which statutory power has been given to the board to apply it for sewage or other purposes (I will take sewage purposes in this instance), the whole of the negotiation and contract for compensation proceeding upon that basis, they hold the land subject to that restriction. I do not in any way base my judgment upon anything in the conveyance, because it has not been seriously pressed upon us, nor do I understand it was pressed in the court below. I think the real rights depend upon and are governed by the statute.

That being so, we must consider what is the meaning of the words, and what is the position when, setting aside all the special directions about a hospital, the Local Government Board have directed that the land should not be sold. As I ventured to point out in the course of the argument, I can imagine many reasons why it is desirable that the land should be in the hands of the local authority, even though they can only use it permanently for purposes consistent with the purposes for which they originally acquired the land. It might be very undesirable to have a third owner coming in, or an adverse owner coming in, and building houses or getting control of or acquiring rights against some particular mode of user of the land, and I can well conceive that, quite apart from the right to use it for any purposes which they are entitled to use the land for, there might be many cases in which it would be right, and when the Local Government Board might, in their discretion, think it would be right, that the land should not be sold. But, at any rate, it seems to me that it is too strong to suggest that, under a provision which is merely intended to control the question of whether the land shall or shall not be sold, you can import into that the power of the district authority—the purchasing body—to use it for a purpose wholly inconsistent with the purpose for which it was originally acquired.

I think there still remains affecting the rights of both parties the limit which was put upon a body with limited authority to buy under the provisions of section 176 for certain special purposes, and that we cannot say when there has once been given a direction that they need not sell the land, that they hold it absolutely unfettered and free so that they can use it as though it were any other piece of land that they had acquired not under compulsory powers, or that they had acquired by agreement with some person who was willing to sell them land. I am not, of course, to be supposed to be dealing at all with a case of some temporary user of the land—beneficial user of the land—either by letting or otherwise. I am dealing with the case before us, which is the intention of the defendants to permanently turn two acres of this land to a purpose to which it was not intended to be turned, and to which they had no power to turn it apart from this direction of the Local Government Board. I think it would be giving powers to the Local Government Board to affect and control the rights of parties who have never been heard and have had no statutory opportunity of being heard on the matter to a greater extent than ought to be given. In any event, I think that it would require much stronger words than that simple direction that the land shall not be sold to enable the defendants to exercise a power over this plot of land for the purpose which they desire.

For these reasons, I think the appeal should be dismissed.

RIGBY, L.J.—I am of the same opinion. What is weighing with me—not that I suppose there is anything other than *bonâ fide* in the conduct of this authority—is that it would give such an opening for manipulating these sections of the Act for unjustifiable purposes. People might say: "We will obtain land for a sewage farm; we had better take more than we want, or something that we do not want, in order that we may erect an hospital." I do not for a moment suggest that that was in the minds of this local authority; but if it is lawful, why should not it be carried out? They say: "Some objection might be taken to the hospital, but we should be free to build that when we have the land and get liberty to retain it, and then we can apply it to any purpose for which we are authorized by Act of Parliament to apply land."

I think for the reasons that have been given by the Master of the Rolls, and having regard to those considerations, the appeal ought to be dismissed.

COLLINS, L.J.—I also am of the same opinion. I think that any other decision would defeat the scheme of the Public Health Act.

It is clear that this land was acquired in the first instance for a particular purpose of user—namely, for the purpose of a sewage farm. It is also clear law that having been acquired for that purpose it could not have been diverted to any other purpose, and it seems to me that the scheme of the Public Health Act in sections 175 and 176 is, that when land has to be purchased under compulsory powers, that can only be done after full notice by advertisement, apprising the persons interested about what is intended to be done, and, in particular, apprising the person from whom the land is to be taken, as it does in subsection 3, of the purposes for which they are acquiring it, and that the scheme involves that there can be no compulsory purchase of land unless the person from whom the land is to be taken has full information as to the purposes for which it is required. Obviously, that becomes one of the most important, if not the most important factor in the question as to what compensation is to be paid to him on such a purchase.

Now, those being the conditions which the Legislature has imposed for the acquisition of land compulsorily, it would be an extraordinary thing if they permitted, in the same code, land to be acquired with all those formalities and with distinct information as to the purposes for which it is required to-day, and then a sudden change arising, of which I could easily give an instance, which renders it no longer required for that purpose, they permitted that, notwithstanding these formalities interposed to protect the vendor, the purpose may be wholly changed for one much more injurious to the vendor and which would have led possibly to his getting double the compensation he did receive, and that it should be competent for the local authority without any further evidence and without any further notice and without any further inquiry to do that.

Take this instance, which is not at all an uncommon one: Supposing they acquired land compulsorily with all the proper formalities under the 175th section for the purpose of a public recreation ground; and within a year afterwards some neighbouring owner makes them a free gift of land in some other place equally or more convenient for the purposes of a recreation ground and they accept it, with the result that the land originally purchased for the recreation ground is no longer required for the purpose, so that the provisions of the 175th section obliged them to sell it subject to the clause which Mr. Warrington so much relied on—"unless otherwise directed by the Local Government Board"—is it to be suggested that the Local

Government Board, by intervening and relieving them from the obligation of selling, shall enable them to turn that into a sewage farm which was bought for the purpose of a recreation ground? To hold that, would be to hold that the subsidiary clause in the parenthesis in section 175 defeats the whole of the scheme of the code contained in the 176th section. It seems to me that due effect can be given to the words in that paragraph consistent with the main scheme, and that it is not necessary to say that by a parenthesis the local authority is enabled to defeat the purpose of the Act. It seems to me, as the Master of the Rolls has pointed out, that these words "unless otherwise directed by the Local Government Board," are simply words introduced to qualify the exigency of the section compelling a sale there and then. There may be instances where the local authority, for instance, may be absolutely assured that they do not require the land in question for the purpose for which it was acquired, and, nevertheless, the Local Government Board authority may not be absolutely of the same opinion, and, without formulating an opinion that it is not so required, may think it necessary to interpose some delay before a sale takes place. That is a perfectly conceivable instance in which they might fairly and properly exercise that power, and a case for which it would be quite reasonable for the Legislature to provide something to mitigate the absolute exigency of the obligation to sell.

Now, in the case before us, it seems to me that the local authority have, by introducing the condition upon which these lands are to be held, attempted to do something that is entirely outside their power under this Act, and that there is no provision in this Act for the purpose of not merely suspending the right to sell, but of designating the purpose for which that right to sell should be suspended; and if that order were tried by the condition appended to it—namely, the condition that it should be applied for a hospital—it seems in my judgment, speaking for myself, that that order would be *ultra vires*, and Mr. Warrington does not contend, at all events, that it carries any further weight by the added condition as to the purpose to which it was to be applied. He divests the order of that condition appended to it, and says that he stands simply upon their general rights as a local authority in possession of land unfettered; but it seems to me that they cannot possess themselves of land through this machinery without going through the process indicated by the 176th section of the Act. To hold otherwise would, I think, be to defeat the object of the Act. I therefore agree that this appeal must be dismissed.

Solicitors, *Warren S. James; Freshfields & Co.*

---

From Q. B. Div. (Webster, M.R., and Rigby and Collins, L.JJ.) — May 18.

*In re* ELY.
*Ex parte* THE TRUSTEE. (a.)

*Bankruptcy—Fraudulent transfer of business to company—Avoidance by trustee—Conversion—Waiver of tort—Account against directors as well as company—No profits remaining in hands of directors—Liability of directors to account.*

*Where, in the case of a conversion by two joint tort-feasors, one of whom, as between themselves, has acted as principal and one as agent, the injured party elects to waive his remedy for damages against the agent and to proceed against him by way of account, the injured party is entitled to demand from such agent an account of so much of the converted property, or of its proceeds, as may still be actually remaining in the agent's hands at the time of taking the account. But he is not entitled to demand an account of so much of the converted property, or of its proceeds, as such agent has duly handed over, in the course of his agency, to his principal.*

Appeal from the decision of a Divisional Court.

Stephen Ely formerly carried on a drapery business at Christchurch Road, Bournemouth, and was indebted in 1899 to the firm of Arthur & Co., of Glasgow, in a sum of about £20,600.

On the 8th of August, Messrs. Arthur & Co. commenced an action against Ely for £809, due to them on three dishonoured bills of exchange.

On the 4th of September Ely agreed with one Roantree for the sale to the latter of his business, in order to convert it into a limited company.

On the 25th of September, this company was registered under the title of Stephen Ely & Co. (Limited), and on the 26th of September the company adopted the contract of sale already mentioned of the 4th of September.

On the 29th of September judgment was obtained against Ely in the action commenced against him by Messrs Arthur & Co., and on the 20th of November, Ely was adjudicated a bankrupt in proceedings based upon this judgment.

On the 4th, 8th, and 26th of December, various transfers of the bankrupt's property were made to the company in pursuance of the agreement of the 4th of September.

The county court judge at Poole, in Dorsetshire, on the application of the trustee in the bankuptcy of Ely, (1) set aside the sale to the company carried out in pursuance of the agreement of the 4th of September, on the ground that the same was a fraudulent conveyance under section 4, sub-section 1 (*b*) of the Bankruptcy Act, 1883; (2) declared that the business of the bankrupt had vested in the trustee as from the 4th of September; and (3) ordered that (*a*) the company should deliver up and pay to the trustee the property and assets of the bankrupt, and that (*b*) each of the five directors personally should deliver and pay to the trustee all of such property and assets as were then, or had been, and should account for such parts thereof as had been, but were not then, in the possession or control of each of the five directors.

The Divisional Court (Wright and Phillimore, JJ.), on appeal, on the 15th of March, 1900, whilst confirming the rest of the judgment, varied it so far as related to the personal liability of the five directors, on the ground that there was no evidence that the directors had in any way acted *mala fide* or assisted the bankrupt to defraud his creditors; and on the further ground that, although they must account for the property of the debtor actually still in their hands, yet they could not be called to account for what they had disposed of in good faith and in the ordinary course of business. It was admitted that the directors retained in their own hands none of the assets and property of the bankrupt.

Against this variation of the judgment, the trustee in bankruptcy now appealed.

*Neville, Q.C.*, and *Muir Mackenzie*, for the appellant.—In cases of conversion the injured party is at liberty either (*a*) to proceed against the tort-feasor for damages in tort; or (*b*) to waive the tort, elect to treat the wrong-doer as his agent, and claim from him an account for moneys had and

(a.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

received: *Smith* v. *Baker*, L. R. 8 C. P. 350, 21 W. R. Dig. 260. He is at liberty, moreover, to proceed against those who have converted as mere agents equally with those who have converted as principals: *Stephens* v. *Elwall*, 4 M. & Sel. 259; *McEntire* v. *Potter*, 37 W. R. 607, 22 Q. B. D. 438, at p. 441; *Barker* v. *Furlong*, 39 W. R. 621, [1891] 2 Ch. 172; *Consolidated Co.* v. *Curtis*, 40 W. R. 426, [1892] 1 Q. B. 495, at p. 497 (distinguishing *Turner* v. *Hockey*, 56 L. J., Q. B. 301, 35 W. R. Dig. 209); *Betts* v. *De Vitre*, 16 W. R. 529; Bullen and Leake on Pleading (5th ed., 1897), p. 300. The innocence of the tort-feasor, whether principal or agent, is quite immaterial: *Hollins* v. *Fowler*, L. R. 7 H. L. 757, 23 W. R. Dig. 238. The conversion refers back to the 4th of September, and the appellant asks for an account of the property as it came into the hands of the company and directors on that date. The appellant is not concerned with what has happened to it since—it is immaterial, for instance, whether any part of it does, or does not now remain in the possession of the directors.

They also referred to *Smith* v. *Sleap*, 12 M. & W. 585, and *In re Hirth*, 47 W. R. 243, [1899] 1 Q. B. 612.

*Herbert Reed, Q.C.*, and *Cooper Willis*, for three of the respondent directors.—The trustee is entitled to a real account of the property as it stands at the time of his taking the account. He is not entitled to an account of the property as it stood on the 4th of September, when it was taken over by the company. To demand an account of the property as it stood on the 4th of September, is practically to proceed against the directors by way of tort, which he has elected not to do; and having once elected to waive the tort he is not at liberty to change his mind: *Smith* v. *Hodson*, 4 T. R. 211; Smith's Leading Cases (9th ed.), Vol. II., p. 138; *Ex parte Vaughan*, 33 W. R. 151, 14 Q. B. D. 25.

*E. Clayton*, for two of the respondent directors.

*Neville, Q.C.*, in reply.—There has never been any such election here as the respondents allege: *Rice* v. *Reed*, [1900] 1 Q. B. 54.

WEBSTER, M.R.—Some very important questions of law have arisen in the present case, but I do not feel it necessary to deal with them all. [His lordship stated the facts.] Now we have had an interesting argument from Mr. Neville as to the effect of a conversion of property by a principal and agent, but I am not disposed to give any judgment dealing with those points. Those points, indeed, do not arise as the facts are now understood. Since the business was taken over by the company it has been carried on on behalf of the company, and, as I understand it, when the trustee took possession of the stock he took possession of it as it stood on the day of his taking it—not as it stood on the 4th of September. But it is further admitted that no profits of the goods that have been sold have remained in the possession or pockets of the directors themselves—indeed, the directors have never claimed any possession of them in their own right. Under those circumstances is there any claim which can be enforced against the directors which can justify us in calling on them to account? I agree with Mr. Neville that the trustee did not adopt the company, or deal with it as a lawfully existing association. But the conclusion which I have drawn is that the trustee did elect to waive the tort as against the company and to claim an account of the proceeds. It is said that we ought to draw a line at the 4th of September, and treat the goods and stock which were in existence then as having been converted; and treat the trustee as supposed to have nothing to do with what happened afterwards. For myself, I should have great difficulty in coming to that conclusion. I think that the fair result of what happened is this, that the trustee disaffirmed the conveyance to the company, and claimed that the business was his own. Under those circumstances he had a claim against the company for a real account of what they had done. I cannot see that, after having claimed from the company an account of the goods they have sold, and after having admitted that the directors have made no personal profit, he is entitled to call upon the latter to account. The decision of the Divisional Court must be affirmed.

RIGBY, L.J., concurred.

COLLINS, L.J.—I am of the same opinion. So soon as the transaction by which this company seemed to acquire a property in the goods of the bankrupt has been declared void, we arrive at the following result: The company has been carrying on a business which belonged to the trustee—which was not their own at all. That being so, the trustee is at liberty to say: I am in a position to sue you in tort, or, in the alternative, to call you to account for the proceeds, as money had to my use. If he choose to proceed in tort, the facts would justify judgment against the company and its directors alike. If he choose to proceed by way of account, dealings which, without his assent, would be unlawful, are not unlawful now. He has chosen to proceed by the latter course. But at this point another fact is introduced into this discussion. It is admitted that the directors have paid over everything that they have received. To ask them to account for this now would be inconsistent with the alternative that the trustee has adopted. The two states of things cannot co-exist.

*Appeal dismissed.*

Solicitors, *Phelps, Sidgwick, & Biddle; A. Marchant; Ward, Perks, & Mackay.*

---

## High Court of Justice.

Chan. Div. Stirling, J. — July 17; Aug. 7.

*In re* DASH.

SOLICITOR TO THE TREASURY *v.* LEWIS. (*a.*)

Donatio mortis causa—*Possession—Dominion.*

*In order to constitute a valid* donatio mortis causa, *the donor must not merely part with the possession of, but also with the dominion over, the thing given.*

*Held, that there had not been a valid* donatio mortis causa.

Action.

The plaintiff in this action was the legal personal representative of Mrs. Eliza Dash, widow, who died intestate at Bristol on the 31st of January, 1899.

The object of the action was to recover from the defendant Edwin Thomas Lewis property of the deceased of very considerable amount, to which he claimed to be entitled by virtue of a *donatio mortis causa* made to him by the intestate shortly before her death.

The other defendants were the representatives of certain charitable institutions who claimed to be beneficially interested in the property so given to Mr. Lewis.

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

The question to be determined was whether the alleged *donatio mortis causa* was valid in law. The circumstances in which the alleged gift took place are set out in the judgment.

*Sir E. Carson, S.G.*, and *Ingle Joyce*, for the plaintiff.

*Swinfen Eady, Q.C.*, and *Christopher James*, for the defendant Lewis.

*Upjohn, Q.C.*, and *Buckmaster*, for the other defendants.

STIRLING, J., in delivering judgment, said: Mrs. Dash, the intestate, was born about 1812. She was twice married, and became a widow for the second time about twenty years ago. She derived from her second husband, Mr. John Dash, a considerable fortune. The defendant Mr. Lewis, whose integrity and straightforwardness are beyond question, realized her husband's property, and afterwards managed her affairs for her. He was in the habit of seeing her once a week, generally on Thursday evenings. He stated that he had on many occasions urged her to make a will, but she always refused; one reason being that she objected to the payment of duty and another that she did not wish anyone to know her means. Some months before her death she said to Mr. Lewis that she had been thinking over how she would like her property disposed of, and asked him to "jot it down." He proceeded to do so, but after a time she said she would go no further, and Mr. Lewis went away and left the paper with her. Thus matters stood on Thursday, the 26th of January, when Mr. Lewis called on her and found her very ill. What took place was thus stated by him in a written statement, of which a copy was furnished to the plaintiff: "I went there on the Thursday evening and found her very unwell. She then said 'I think you had better go on with what we were talking about the other night.' She produced the bit of notepaper, on which I had previously made a memorandum of amounts which she wished to give. She then said, 'You will please to write down what I tell you.' I said, 'It will be of no use, Mrs. Dash.' She said, 'Don't tell me that. If I give you everything you can certainly do what I tell you with it.' I said, 'How am I to begin?' She said, 'You know what to say. I give you everything subject to your settling my affairs, seeing to my burial, and paying the amounts to the charities and persons I name.' Before writing out the paper I said, 'I don't know what to say. You ought to have a solicitor here.' 'No,' she said, 'I am going to give you everything if you promise me (and I am sure if you promise me you will fulfil) that you will do what I tell you.' After this I wrote out on a bit of paper the heading in my own words and copied the amounts and names from the memos. previously made by me. She made her cross, and I wrote her name on the paper after she had made the cross."

The paper there referred to was in these terms: "40, Horfield-road, Bristol, Jan. 26, 1899.—I, Eliza Dash, residing at the above address, do give the whole of my property, whatever it may consist of at the time of my decease, to Edwin Thomas Lewis, of Upton Lodge, Cotham-park, Bristol, upon the distinct promise that he will settle up my affairs and see to my burial, and will also give the following sums to the charities and persons named." Then followed a list of charities and individuals, with sums of money set opposite their names, including Muller's Orphan Asylum, £10,000; Hook's Mill Orphan Asylum, £5,000; Dr. Barnardo's Homes, Stepney, London, £3,000; and many others. Mr. Lewis's statement then proceeded: "She told me where to find her securities. She said, 'Go upstairs into the back room and in a basket near the bedside you will find the deposit note and Usher's shares.' There were two keys on the table. She gave me one. I took it and went upstairs. I found the door locked, and unlocked it. I lifted up some clothes from the top of the basket and found a banker's deposit note for £30,000 and a certificate for 200 £5 preference shares in Usher's Brewery Co. There were two or three small parcels done up in paper. I have since found they were gold. She had particularly mentioned the deposit note and Usher's shares. I brought down the deposit note and the share certificate and gave them to her. She had them in her hands. She handed them back to me and said, 'You take charge of them. If I get better of course you will bring them back.'"

Mr. Lewis saw her again on the 30th of January, when he called between five and six o'clock. He went again on the following day. [His lordship then again referred to the defendant's statement, in which he gave a further account of other property of the deceased's which had come to his hands, including a sum of £300 in notes and some gold and silver.] She died (continued his lordship) on the same evening about 10.45.

It was decided in *Hills* v. *Hills*, 8 M. & W. 401, that a gift may be good as a *donatio mortis causa* although it is coupled with a trust or condition that the donee shall provide the funeral of the donor, but, as is pointed out by Parke, B., such a circumstance affords "a strong argument that the deceased did not intend to make a *donatio mortis causa*, but, as it were, to make the defendant her executor under a nuncupative will." That is one mode of formulating the question which arises in such cases. It was put to the jury in another way by the learned judge who tried the case of *Hills* v. *Hills* (Lord Cranworth)—viz., "whether it was intended as an absolute gift to the defendant after the death of the intestate or whether she intended to retain a control over the property during her life." I understand that to refer to what is established law—viz., that in order to constitute a good *donatio mortis causa* the donor must not merely part with the possession of, but also with the dominion over, the thing given: see *Hawkins* v. *Blewitt*, 2 Esp. 663; *Reddel* v. *Dobree*, 10 Sim. 244. In determining such a question all the circumstances must be taken into consideration. The case for the defendent is strongest with reference to the deposit note, and that I proceed to consider. According to the written statement of Mr. Lewis, Mrs. Dash more than once stated her intention to give him everything. She directed him to write down what she told him; he said it would be of no use. She then said: "Do not tell me that; if I give you everything you can certainly do what I tell you with it." He agreed to write, and asked her how he was to begin. She said: "You know what to say. I give you everything if you promise me, and I am sure if you promise me you will fulfil, that you will do what I tell you." Her intention therefore being to give everything, she could not mean to divest herself of everything at the moment when she called on him to record her wishes. That is made perfectly clear in the written document, which I regard as of the greatest importance, as being a formal contemporary record of what was intended to be done. It begins: "I . . . do give the whole of my property, whatever it may consist of at the time of my death." Over all that property, therefore, she intended during her life to retain a power of disposition. Further, the document seems to me to be distinctly of a testamentary character. In substance it contains directions for payment of debts and funeral

expenses and legacies. After the paper was written and signed by a cross she directed Mr. Lewis to a place where he would find the deposit note. Upon his return she took it from him and handed it back to him, saying, "You take charge of it; if I get better of course you will bring it back"; to which is added, "If I do not you will know what to do with the money." That language might be used so as to create a *donatio mortis causa;* but it must, as I conceive, be interpreted in connection with what had previously taken place. In my judgment Mrs. Dash meant that Mr. Lewis was to take charge of the note and deal with it simply as part of that which she meant to dispose of as from her death, and over which she showed her intention to reserve dominion during her life. The reference to the note being brought back if she recovered does not seem to me to exclude such dominion; it only shows that she did not at the time consider that she was likely to exercise it. This is, I think, shown by the additional statement made by the deceased to Mr. Lewis—viz., "If I do not get better you will know what to do with the money," referring, as Mr. Lewis admitted, to the document of the 26th of January. In my opinion, therefore, there was no valid *donatio mortis causa* of the deposit note; and, as the gift fails as to that, it *a fortiori* fails as to the other subjects of disposition.

Solicitors, *Solicitor to the Treasury; Arber & Lewis.*

---

Chan. Div. }
Kekewich, J. } Aug. 3.

*In re* TREASURE.
WILD *v.* STANHAM. (*a.*)

*Administration — Estate duty — Appointed fund — Residuary estate—"Testamentary expenses"—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 9 (1).

*A fund appointed by will under a power of appointment does not pass to the executors as such within the meaning of the Finance Act,* 1894, *and is therefore chargeable with estate duty.*

*Estate duty is included in "testamentary expenses."*

This was an originating summons taken out by the executors of the will of Mrs. Treasure to determine whether the estate duty payable on her death in respect of property appointed by her will under a power of appointment ought to be paid out of the property so appointed or out of the residuary estate.

It appeared that the testatrix had a power of appointment under the will of her father over one-third of his property.

By her will dated the 26th of February, 1894, she appointed the plaintiffs executors and trustees and directed and appointed with regard to all property to which any power of appointment whether general or special vested in her under her father's will extended, should be held upon trust for the plaintiff J. A. Wild and the defendant as tenants in common in equal shares, and the testatrix gave the residue of her real and personal estate to her trustees upon trust for sale and conversion and to divide the proceeds, after paying funeral and testamentary expenses and debts, among certain other persons.

The testatrix died on the 6th of May, 1899, and the will was duly proved.

*J. Dixon,* for the executors.

*P. O. Lawrence, Q.C.,* and *W. M. Cann,* for the appointees.

*Warrington, Q.C.,* and *W. A. Peck,* for the residuary legatees.

KEKEWICH, J.—The arguments on behalf of those interested in the residuary estate who desire to throw the burden of the estate duty on the appointed fund was mainly directed to the construction of section 9 (1) of the Finance Act, 1894, or rather to its application to the case in hand. In my opinion the appointed fund did not pass to the executors as such. I have arrived at this opinion independently of the law as it stood before the date of the Finance Act, and to which I do not propose further to refer, but the arguments founded on that state of the law go to confirm it. The position of executors under a will exercising a general power of appointment must be treated as settled by *In re Hoskin's Trusts,* 25 W. R. 779, 6 Ch. D. 281, and *In re Philbrick's Trusts,* 13 W. R. 570, which was there referred to by Jessel, M.R., and having regard to what was said by James, L.J., in *In re Hoskin's Trusts,* no distinction can be made between a power given to a married woman and one given to any other person. In *In re Philbrick's Trusts* Sir John Romilly explained that when a married woman made a will in exercise of a power and appointed executors, inasmuch as she could only make her will by virtue of the power, and could only have appointed the executors for the purpose of administering the appointed property, she must be considered to have appointed the property to the executors as trustees. Let me repeat that after what was said by James, L.J., in *In re Hoskin's Trusts,* this must be treated as applicable to a power exercised by any other person, and that, notwithstanding what was said by Sir John Romilly, is, in language and in substance, not strictly applicable to such a case. It was argued that executors appointed by a will exercising a general power could not be held responsible if they did not look after the administration of the fund and it was unfortunately lost, because they are only bound to require payment of the fund to them if required for the purposes of the will. I do not wish to conclude the question of their responsibility, but there is certainly room for contending that this argument is not consistent with the doctrine laid down in the cases cited. Nevertheless, it seems to me that the appointed fund does not pass to the executors as such, and *In re Culverhouse, Cook* v. *Culverhouse,* 45 W. R. 10, [1896] 2 Ch. 251, does not decide that it does. There the property in question was leasehold specifically bequeathed, and the judgment proceeded on the title of the executor as explained in the passage in Williams on Executors there cited. Where there is an appointed fund, on the other hand, the executors do not take it by virtue of their office, but because, to again quote Sir John Romilly's language, the donee of the power must be considered to have appointed the property to the executors as trustees. On this point, therefore, I am in favour of those who say that the estate duty must be charged on the appointed fund. On the other question—namely, whether the estate duty falls within the description of "testamentary expenses," and must therefore be paid out of the residuary estate, I am in favour of those who say that it must be so paid. I must in this follow my own judgment in *In re Clemow, Yeo* v. *Clemow, ante,* p. 541, [1900] 2 Ch. 182. It was attempted to distinguish that case on the ground that there the direction was to pay the testamentary expenses of another person. That is true, and the distinction is of importance with reference to one of the points argued and decided in that case, but as regards the point with which I am dealing here, my judgment was based

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

entirely on the reasoning that as the payment of estate duty was essential to obtaining a grant of probate, that duty must be considered as much a testamentary expense as any other payment necessarily or properly incurred by the executors for that purpose.

Solicitors, *Wild & Wild; Crawford & Chester.*

---

Chan. Div. } Byrne, J. } May 17.

BORN *v.* TURNER. (*a.*)

*Mortgagee—Sale by mortgagee under statutory power of part of mortgaged property—Grant of implied easements over unsold land—Light—Conveyancing Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 6, *sub-sections* 1, 2, 4, 5; *s.* 19, *sub-section* 1—*Co-defendants—Third-party procedure—Costs—R. S. C., ord.* 16, *r.* 55.

*A conveyance by a mortgagee exercising his statutory power of sale of part of the mortgaged property will pass to the purchaser an implied easement as to light over the portion remaining unsold.*

*An owner of land brought an action for infringement of light and trespass against a neighbouring owner and a person engaged in building a wall for him. The builder, not being satisfied with the way in which the defence was being conducted, severed his defence, and was separately represented.*

*Held, that, under the circumstances of the case, he was justified in so doing, and entitled to be paid solicitor and client costs by his co-defendant.*

Trial of action.

This was an action in which the plaintiff claimed an injunction to restrain (*a*) trespass on the ground of the plaintiff, (*b*) injury to light to a small greenhouse. The defendants were the owner of an adjacent property and his builder.

The facts were as follows: The property of the plaintiff consisted of property situate at Brighton used as a yard, with sheds and stables around it, and of a piece of land used as a garden upon which there was built a greenhouse or conservatory which was really a vinery, a place used for growing cucumbers and for potting plants. The premises belonging to the plaintiff and the first defendant were in 1887 mortgaged by the then owners to one Stoneham. On the 11th of July, 1887, Stoneham, in the exercise of his statutory power of sale, conveyed part of the premises, including the land the subject-matter of the action, to Wm. Born, the predecessor in title of the plaintiff.

In 1898 the mortgagee conveyed the remainder of the property to the defendant Turner.

In 1899 Turner employed a builder, the defendant Hackman, to erect a wall and building on his (Turner's) part of the premises, which the plaintiff submitted constituted an encroachment on his land and interfered with the access of light to the greenhouse.

Hackman, not being satisfied with the way in which the defence was being conducted by Turner, severed from him, and was separately represented at the hearing by solicitor and counsel.

One defence was that on a grant by a mortgagee no implied easement as to light will pass.

*Rowden, Q.C.*, and *Peterson*, for the plaintiff.—A sale by a mortgagee under his statutory power passes continuous easements exactly as a sale by an owner in fee simple. A mortgagee cannot derogate from his grant any more than can an owner in fee simple.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

They referred to Conveyancing Act, 1881, s. 6, sub-section 2; *Wheeldon* v. *Burrows*, 27 W. R. 165, 28 W. R. 196, 12 Ch. D. 31; *Broomfield* v. *Williams*, 45 W. R. 469, [1897] 1 Ch. 602.

*Norton, Q.C.*, and *Bourne*, for Turner.—A mortgagee selling under his power of sale cannot grant an easement over the unsold portion of the mortgaged property. Section 19, sub-section 1, of the Conveyancing Act gives the mortgagee power to sell any part of the mortgaged land; but this will not authorize a sale of trade machinery apart from the land or holdings: *In re Yates, Batchelor* v. *Yates*, 36 W. R. 563, 38 Ch. D. 112. Section 17 of the Conveyancing Act may be read with the Settled Land Act, 1882, s. 3, sub-section 1, as these two Acts were part of one scheme. Express power is given by the Settled Land Act to the tenant for life to sell any easement over the settled land, but no such power is vested in the mortgagor under the Conveyancing Act.

They referred to *Buckley* v. *Howell*, 9 W. R. 544, 29 Beav. 546; *Dayrell* v. *Hoare*, 12 A. & E. 356; Wolstenholme on the Conveyancing and Settled Land Acts (8th ed.) p. 70; Robbins on Mortgages, p. 902.

*Alexander, Q.C.*, and *Tindal Robertson*, for Hackman.

*Rowden, Q.C.*, in reply.—The mortgagee has power to create an easement because all the fee simple of the estate is vested in him. It is only when he gets a surplus in his hands that he becomes a trustee for the mortgagor.

BYRNE, J.—The question of law that has been raised in this case is whether or not by the conveyance of that portion of the mortgaged property upon which the vinery was standing there was an implied grant of a *quasi*-easement of light to that building over the other land then in mortgage. The Conveyancing Act of 1881, s. 6 (2), provides that: "A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all lights, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with or reputed or known as part or parcel of, or appurtenant to, the land, houses, or other buildings conveyed or any of them, or any part thereof." That is, of course, subject to their being no contrary intention expressed in the conveyance as provided by sub-section (4), and there is no contrary intention expressed in the conveyance in the present case. Then the 5th sub-section says: "This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties."

Now it is said that there are opinions in two well-known text books and that there is a case from which I ought to hold that there could not be a grant of a new easement over land retained by the mortgagee—that is by an express grant. I do not think it is necessary for me to determine that question in the present case. In my opinion the mortgagee has conferred upon him by the power of sale a power when the mortgage money has become due—I am using again the words of the Act, in the 19th section (1) (i.)

—"to sell or to concur with any other person in selling the mortgaged property, or any part thereof." The first question is: May a mortgagee under this power sell a part of the mortgaged property? Clearly he can. Did the mortgagee in this case in selling the garden and conservatory do more than sell a part of the mortgaged property? I think he was selling a part of the mortgaged property, and a part which seemed, from physical circumstances, to be naturally divided from the other part. There is no suggestion of eccentricity in division, or of impropriety in the sale. The sale seems to have been within the terms of the power, and the question is what passed by the grant by the mortgagee. The mortgagee has the legal estate; his powers, of course, are not the same as those possessed by an owner in fee simple. The owner in fee simple might sell the material of a house from off the property; he might dig up part of the property and sell gravel; he might partly pull down the house and sell the bricks; and he might certainly sell the trade machinery out of his trade manufactories. The mortgagee, of course, stands in a different position. He may not, as has been held, under the power to sell a part of the mortgaged property, sell machinery affixed to a manufactory apart from the manufactory itself: *In re Yates, Batchelor* v. *Yates*. I mention that case simply by way of illustration. Of course, other illustrations were given in the course of the case which would show that the mortgagee had no power to do more than sell the whole or part of the mortgaged property. Now I hold that this was a selling of part of the mortgaged property, and if he can sell part of the mortgaged property he can grant the mortgaged property, and he can so grant it by virtue of the power of sale which is conferred on him, and by virtue of the legal estate which he has he can so grant it as to carry with it a destruction of the equity of redemption in the part sold, and with all legal incidents ordinarily accompanying a grant, as, for instance, appurtenances such as ways over the grounds of third persons will of course pass, and I do not myself see my way to saying that the operation of the grant is not to be similar to the operation of a grant by an owner in fee, so far as concerns passing apparent continuous easements. And I may say, that I can see at once if it were not so it might operate most injuriously to the mortgagor in many cases. I will take for example the case of a mortgage of a piece of property on a portion of which a house is erected with lights. A purchaser is found who is willing to give a very handsome price for that portion of the land with the house upon it. He is not willing to buy the adjoining property included in the mortgage. The mortgagee can, by effecting the sale of the house, get a good bargain for himself and for the mortgagor, on the footing that the man who has bought the house has given his price because he thought he was to have a house with the proper enjoyment of light to that house. And it appears to me that if a mortgagee so desiring to sell a piece of land with a house upon it could only sell it so as to confer upon the person purchasing such an interest as would not entitle him to complain of his being built in all round, and of having all his light taken away from him, that would operate most injuriously for the mortgagor as well as for the mortgagee. My view is that the meaning and intention of the power in the mortgage is that the mortgagee may, so long as he does not do more than sell the whole or part of the property, grant that whole or part, as the case may be, with all the legal incidents attaching to a grant of the whole or part.

Under those circumstances I have come to the conclusion that in this case, the sale being that of a garden, with a vinery upon it, that the purchaser acquired at the same time a right to the access of light to this vinery over the land retained by the mortgagee, and that he is entitled to see that that right is not interfered with by any person subsequently acquiring the adjoining land. As a matter of fact the adjoining land was subsequently acquired by the person also claiming under the mortgagee in this particular case, but I have preferred to base my judgment on this legal point upon the broader ground that the conveyance by the mortgagee operates in the way I have mentioned. Of course, in what I have said I do not mean to suggest for one moment that the mortgagee may so deal with a mortgaged property as to infringe the rights of his mortgagor; so long as he *bonâ fide* sells a part of the property, I think he can sell it with the legal incidents attaching to the conveyance in granting it.

His lordship then considered the evidence, and, holding that there had been an infringement of the plaintiff's right to light, granted an injunction against Turner with costs.

*Alexander, Q.C.*, and *Tindal Robertson*, who had taken no part in the former argument, but had served on Turner a third-party notice under R. S. C., ord. 16, r. 55, applied for their costs against him as between solicitor and client, and referred to *Howard* v. *Lovegrove*, 19 W. R. 188, L. R. 6 Ex. 43, and were allowed them by the court on the ground that, under the circumstances, Hackman was justified in severing his defence.

*Judgment for the plaintiff.*

Solicitors, *Mason, Soper, & Wood; Alfred Slater; Lowndes*, for *Griffith*, Brighton.

---

Chan. Div. Buckley, J. — Aug. 8.

*In re* ROBINSON.
CLARKSON *v.* DIXON. (*a.*)

*Trustee—Charges for time and trouble—Will—Trustees' remuneration clause.*

*A will provided that "Any trustee and executor hereunder, being a solicitor or other persons engaged in any profession or business, shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of my estate . . . whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person."*

*Held, that a trustee was not entitled to charge generally for his time and trouble in the management of the estate, but only for work done in the course of his profession or business.*

In re Fish, [1893] 2 *Ch.* 413, 41 *W. R. Dig.* 236, *distinguished.*

The question in this case was as to the remuneration of trustees, and arose under the will of Mr. John Peter Robinson, the well-known hosier and draper of Oxford-street, London.

The testator appointed five persons as his executors and trustees, of whom one, Mr. Clarkson, was an architect, one, Mr. Rabbidge, a chartered accountant, one, Mr. Hitchens, a solicitor, and the two others were engaged in the business of the testator.

The will provided that the children should be

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

entitled to the residuary estate in equal shares. The trustees had power to postpone the sale and conversion of the estate and to manage it meanwhile. Towards the end the will contained the following clause: "I direct that the said William Hitchens shall be the solicitor to my estate and to my trustees and executors in the management and administration of my estate and carrying out of the trusts, powers, and provisions of this my will. And also that he, and any trustee and executor hereunder being a solicitor or other person engaged in any profession or business, shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of my estate, and carrying out the trusts, powers, and provisions of this my will, whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person." This, with slight alteration, is the power for the purpose given in Key and Elphinstone's Precedents in Conveyancing.

The testator died in October, 1895, leaving children, some of whom were infants, and the share of one was settled. His estate was of great value, the personalty being sworn for probate at more than a million pounds, and there being besides real estate of large value. It comprised many leasehold buildings.

The trustees and executors brought the action for admistration of the estate under the direction of the court, and in December, 1898, the court directed the usual accounts and inquiries, and the master made his certificate, and therein disallowed certain items of the trustees' accounts amounting altogether to nearly £1,900. These items related partly to professional work done for the estate, as for preparing plans for buildings by Mr. Clarkson, and by making up various accounts in connection with the estate by Mr. Rabbidge, and partly of the charges of the executors for attendances at their meetings when they transacted the business of the estate, and certain other charges for loss of time in other transactions connected with the estate.

The case now came on for further consideration upon prepared minutes which proposed that the items disallowed by the master should be allowed.

*H. Terrell, Q.C.*, and *MacSwinney*, for the plaintiffs.—Trustees are allowed to charge not only for their professional services, but also for their trouble under a clause such as this: *In re Fish*, [1893] 2 Ch. 413, 41 W. R. Dig. 236. The words "or other charges," and "whether in the course of ordinary business or not" are very wide and intended to enable the trustees, if professional or business men, to charge for their time and trouble in the administration of the estate.

*Astbury, Q.C.*, and *Brabant*, for some of the defendants and parties attending; and

*Methold*, for the remaining defendants, adopted the arguments of the plaintiffs, and stated they considered it for the benefit of the persons they represented that the charges made should be allowed, as the estate was greatly benefiting by the attention and management of the trustees.

BUCKLEY, J.—I think that under the clause in question a trustee may charge for work done, whether done in the ordinary course of business or not in the ordinary course of business; or to put it another way, the charge may be made if the work is done in the course of his profession or business, whether it is done in the ordinary course or not in the ordinary course. This becomes more plain from the next part of the clause, "and although not of a nature strictly requiring the employment of a solicitor or other professional person." The question is, whether what has been done has been done in the course of his profession or business, and, if that is so, then he may make his usual charges in that profession or business, notwithstanding that he is a trustee or executor. We have not to see whether it has been done in the ordinary course of the profession or business, but whether it has been in fact done in the course of the profession or business, and if so the clause is satisfied. I have been referred to *In re Fish*. In the construction of one will the language of another is not a good guide. I have to construe this will, and not that in *In re Fish*. In that case the remuneration clause contains the words "including all business of whatever kind not strictly professional, but which might have been performed or would necessarily have been performed in person by a trustee not being a solicitor." Directly you get such words, you have words which show that everything which the trustee does personally he is entitled to be paid for, and the Court of Appeal said that under that clause the trustee was entitled to be paid for his trouble. I have looked carefully to see whether there are any such words in the will before me, but I cannot see any which show that the trustee is to be paid for his trouble without reference to his usual charges. It has been argued that under the clause if a person is engaged in a profession or business he is to be paid for his trouble, but if he is not so engaged he is not to be paid. I do not think that that is a sensible conclusion. Then it is said that the allowances asked for would be beneficial to the infants interested. I have not been shown this. I think that the Master should allow only those charges I have indicated.

Solicitors, *Capron, Hitchins, Brabant, & Hitchins; Dangerfield, Blythe, & Hodgson.*

---

Chan. Div. } July 9-13, 16-19, 27.
Buckley, J. }

ASSETS DEVELOPMENT CO. v. CLOSE BROTHERS. (*a.*)

*Practice—Costs—Higher scale—Special ground—Allegation of fraud—Ord. 65, r. 9.*

*The mere fact of an allegation of fraud being made in an action by the unsuccessful party is not a special ground for obtaining costs on the higher scale under ord. 65, r. 9, even when the amount at stake is large and the questions of law and fact raised are difficult.*

This was an action to set aside or vary an agreement made in May, 1898, between the plaintiff company and the defendants, Close Brothers, as the result of previous transactions of a long and complicated character.

The story began in 1895, when the plaintiff company was formed, and when a scheme was set on foot by the agents of another company, called in the trial the "B. C. D. A." Co., for making a railway from Skagway in the State of Washington or the Province of British Columbia (the territory being in dispute between the two countries) to the White Pass, and thence to the Yukon River, for the purpose of providing access to the Klondike Goldfields.

Various concessions were obtained from the Dominion of Canada and the Province of British

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Columbia, and a separate company was formed for each separate territory through which the railway was to pass.

These rights were, in January, 1898, agreed to be purchased by the plaintiff company. And at the same time the defendants, Close Brothers, advanced the sum of £10,000 to the plaintiff company upon the security of an agreement by the plaintiffs to repay the sum, and to transfer certain shares in one of the companies to the lenders.

After various later transactions an agreement dated the 16th of May, 1898, was made between the plaintiff company and the defendants, Close Brothers, for the transfer by the company of certain shares in the other companies and in a company about to be formed, and thereupon the debt of £10,000 was to be released.

The plaintiff company alleged that they had been induced to enter into this agreement by false representations, and that the effect of the agreement of the 16th of May, 1898, and of a later agreement entered into by them upon the same representations, had been to lessen by £50,000 certain moneys payable to them, and to vest certain shares in the defendants, Close Brothers, without consideration. They, therefore claimed to have the agreement of May, 1898, set aside or varied, and to be declared entitled to certain shares held by defendants.

The trial lasted nine days, although no evidence was given on behalf of the defendants; and the judgment occupied more than thirty folio pages of print. The learned judge gave judgment for the defendants, Close Brothers, with costs. They thereupon applied for the costs to be taxed upon the higher scale under ord. 65, r. 9.

*Sir Edward Clarke, Q.C., Warmington, Q.C.*, and *Austen Cartmell*, for the defendants.—The case deals with a large amount of money; it has caused great expense because the allegation of the plaintiffs who have failed is that practically a conspiracy existed in America, and the allegation of fraud involved a large number of persons. The charge was so unfounded that it has been rejected without any evidence being called by the defendants, and it would be a hardship to give the defendants only costs upon the lower scale, leaving them to bear the burden of defending themselves from a baseless charge. It may be that neither the large pecuniary amount at stake nor the difficulty of the questions raised is a special ground standing by itself; but here in addition is a charge of fraud. Costs on the higher scale have been allowed in *Harrison* v. *Leutner*, 31 W. R. 837, 24 Ch. D. 594, and in *Pooley's Trustee* v. *Whetham*, 34 W. R. 689, 33 Ch. D. 111, at p. 120. [His lordship referred to *Williamson* v. *North Staffordshire Railway Co.*, 32 Ch. D. 399, 34 W. R. Dig. 44, and *Paine* v. *Chisholm*, 39 W. R. 353, [1891] 1 Q. B. 531, at p. 534, where costs on the higher scale were refused.]

*Haldane, Q.C., Astbury, Q.C.*, and *Martelli*, for the Plaintiffs, referred to the *American Braided Wire Co.* v. *Thompson*, 38 W. R. 329, 44 Ch. D. 274, 296.

*Swinfen Eady, Q.C., Younger, Q.C.*, and *Bryan Farrer*; *H. Terrell, Q.C.*, and *Jessel*, for other parties.

July 27.—BUCKLEY, J.—I wish it were in my power in every case to make the unsuccessful litigant indemnify the successful against costs, but it is not so. There is a scale of costs which is allowed, and my only power to enlarge that is under circumstances which are defined in ord. 65, r. 9. Under that rule I can allow costs on the higher scale if on special grounds arising out of the nature or importance or the difficulty or urgency of the case I think that such allowance ought to be made. That is the only power I have. In *Williamson* v. *The North Staffordshire Railway Co.*, Cotton, L.J., said (32 Ch. D. at p. 402) that he had great difficulty in understanding the meaning of the rule. I share the difficulty. Now I have the guidance of the Court of Appeal to this extent, that *Williamson* v. *The North Staffordshire Railway Co.* plainly decided that the fact that the amount in dispute is large, and the fact that the questions of fact and law to be determined are difficult, does not bring the case within the rule. I must, therefore, disregard that which Sir Edward Clarke urged, that the preparation of the brief is a matter of great difficulty or labour. It would be so in all cases which involved difficult questions of fact and law. The Court of Appeal says that that is not enough. That is not a special ground, and you must have a special ground. In the case of *Paine* v. *Chisholm* Lord Esher says this: "The conditions, therefore, on which such an order may be made are these: first, there must be something in the nature and importance of the case, or there must be difficulty or urgency in it; and then there must also be special grounds arising therefrom for making the order." Now the special ground put forward here is that the statement of claim alleges fraud and misrepresentation, and attributes to the defendants fraudulent conduct. Is that sufficient alone, or is it not? I do not see in the fact that the fraud is alleged that there necessarily arises a special ground, so that the party in the wrong ought to pay more. I think the meaning of the rule is that there is a special ground where the nature of the case, or the importance of the case, necessitates the plaintiff spending more money, in that he has to call a more expensive class of witnesses. Upon that footing it has been held in patent cases that where the evidence given by the successful party is that of expert witnesses who have to be paid according to their professional experience and capacity, that that is a special ground arising from the nature of the case. One can lay hold of something there, but I do not find myself in a position to lay hold of anything from the mere fact that fraud is alleged, and to say that that is a special ground for the plaintiff paying more. On these grounds, it appears to me, I ought to refuse this application. In the case of *Paine* v. *Chisholm*, which was a case of fraudulent misrepresentation as to the sale of a public-house, the Court of Appeal refused costs on the higher scale. That is, therefore, a case in which, although fraud was alleged, the higher scale was refused. But I do not know that *Paine* v. *Chisholm* went as far as I am going here. The judgment went on the fact that there was no difficulty in getting up the case, that it was an ordinary sort of case. I do not say at all that this is an ordinary sort of case, it has involved a great deal of investigation; but according to *Williamson* v. *North Staffordshire Railway Co.*, the fact that the amount at stake is so large and the questions of fact and law so difficult is not enough. Adding to that that fraud is alleged, if it be a simple case, is not enough. It seems to me I must hold consistently with those two decisions of the Court of Appeal that the mere fact here that fraud is alleged is not a special ground within ord. 65, r. 9. I therefore give the costs on the lower scale.

Solicitors, *Watson-Thomas & Co.*; *Longbourne, Stevens, & Co.*; *Lee & Pembertons.*

Chan. Div.
Buckley, J. } July 24.

BLACKBURNE v. HOPE EDWARDES. (a.)

*Settlement—Rent-charge—Term to secure—Arrears of rent-charge—Whether raisable by sale of inheritance.*

*A legal rent-charge was by deed charged upon and payable out of land, and besides the usual powers of distress and entry, a term was limited by the deed to the use of trustees upon the usual trusts if the rent-charge fell into arrear by mortgage or demise for all or part of the term, or by other reasonable means to raise the arrears.*

*Held* (*applying* Hall *v.* Hurt, 2 *Joh. & Hem.* 76, 10 *W. R. Ch. Dig.* 5), *that the limiting of the term negatived the right to have arrears raised by a sale of the inheritance.*

Action.

By an indenture of settlement executed on the 22nd of July, 1867, previously to and in anticipation of the marriage of William John Hope Edwardes and Emily Blackburne, the father of the said W. J. Hope Edwardes (hereinafter called the settlor) granted to trustees and their heirs certain farms and lands in the county of Salop, to hold the same to the use, intent, and purpose that the said W. J. Hope Edwardes should have a rent-charge of £500 during his life, and from and after his decease that the said Emily Blackburne in case she should become his widow and her assigns might receive and take during her life the like annual sum or yearly rent-charge of £500 to be charged upon, issuing, and payable out of the said hereditaments thereby assured. And by the said settlement the usual powers of distress and entry and perception of rents and profits for securing payment of the said rent-charges and arrears thereof were limited to the said W. J. Hope Edwardes and E. Blackburne and their assigns respectively. And subject to and charged with the said rent-charges and the said powers and remedies for enforcing payment thereof, the said hereditaments were limited to the use of the said trustees, their executors, &c., for the term of ninety-nine years from the said marriage, and from and after the expiration of the said term, and in the meantime subject thereto and to the trusts thereof, to the use of the settlor, his heirs and assigns. And the said term was limited to the said trustees upon the usual trusts that if either of the said rent-charges should be in arrear for sixty days they should out of the rents and profits, or by mortgage or demise of the said hereditaments for all or part of the said term, or by bringing actions against the tenants for recovery of rents and profits, or by other reasonable ways or means, raise and pay the said rent-charges and all arrears thereof, and all costs, charges, and expenses sustained by reason of the non-payment thereof.

The marriage took place in July, 1867, and the said W. J. Hope Edwardes, the husband, died in the following September, leaving the said E. Blackburne, then E. Hope Edwardes, his widow. She by indenture dated the 1st of August, 1873, assigned the said rent-charge given to her by the settlement of the 22nd of July, 1867, to the plaintiff and another assignee, who has since died. The said rent-charge was paid in full until 1895, when it fell into arrear, and it appeared that the amount of arrears at the present time exceeded £1,200. It also appeared that the net rents available for payment of the rent-charge were insufficient to pay the same owing to the decrease in the rentals caused by agricultural depression, and that there was no prospect of any improvement.

This was an action for payment of the arrears of the rent-charge, and to have the amount thereof raised by sale of the land charged, and the action was brought against the present trustees of the will of the settlor, who had long been dead, and against the tenant for life and remainder men, devisees of the land, which was limited in strict settlement by the said will.

*H. Terrell, Q.C.*, and *Rutherford*, for the plaintiff.—The plaintiff has a legal rent-charge, and is therefore entitled to a sale of the property charged, to realize it.

*Astbury, Q.C.*, and *Brinton*, for the defendants.—Where a term is created for security the remedy is against the term, and not against the inheritance: *Hall* v. *Hurt*, 2 Joh. & Hem. 76, 10 W. R. Ch. Dig. 5. In *Taylor* v. *Taylor*, 22 W. R. 349, L. R. 17 Eq. 324, Hall, V.C., refused to apply *Cupit* v. *Jackson*, 13 Price 721, where a sale had been ordered, because the land was in settlement. The court has a discretion in the matter, whether the *corpus* is or is not charged: *Hambro* v. *Hambro*, 43 W. R. 92, [1894] 2 Ch. 564, and *In re Tucker*, *Tucker* v. *Tucker*, 41 W. R. 505, [1893] 2 Ch. 323.

They also cited Davidson's Conveyancing, vol. 3, pt. 1 (3rd ed.), pp. 315*n*, 447; *Champernoon* v. *Gubbs*, 2 Vern. 382; and Elphinstone on Interpretation, r. 19, p. 89. [BUCKLEY, J., referred to *Scottish Widows* v. *Craig*, 30 W. R. 463, 20 Ch. D. 208.]

*Edward Ford*, for the trustee of the term.

*H. Terrell*, in reply.—*Taylor* v. *Taylor* was decided upon the principle of *Graves* v. *Hicks*, 11 Sim. 536, but see *Horton* v. *Hall*, 22 W. R. 391, L. R. 17 Eq. 437, where a sale was ordered by Hall, V.C.

He also cited *Hooper* v. *Cooke*, 20 Beav. 639, 4 W. R. Ch. Dig. 90. [*Astbury*.—That case was appealed (Davidson's Conveyancing, vol. 3, pt. 1 (3rd ed.), p. 315*n*), and no determination was come to on appeal.]

BUCKLEY, J.—The decision of Wood, V.C., in *Hall* v. *Hurt* supplies a principle which is a guide to me that I ought to follow in this case. It is admitted by both sides that it would not be convenient to raise the arrears or to keep down future payments of the annuity by dealing with the term. The rent-charge is clearly a charge upon the lands themselves. The limitations are legal limitations of a rent-charge and rights to distrain and enter and receive and take the rents and profits, and discharge arrears thereout, and of a term. The question is a pure question of the construction to be placed upon the deed containing these limitations. Is the charge on the inheritance intended to be enforced by sale of the inheritance? There are numerous reported cases, and one of the earliest is *Cupit* v. *Jackson*. The result of the cases is that the plaintiff is *primâ facie* entitled to a sale of the inheritance, but the court has a discretion in the matter. The court would refuse to order a sale in certain cases. By way of illustration I may refer to *Graves* v. *Hicks*, where in the opinion of the court it was advisable to wait for a time, and *Tucker* v. *Tucker*, where North, J., instanced the case of the amount of arrears being small. That shows the sort of discretion which the court exercises where there is no term. But the question is, what is the effect of the term that is limited by the deed creating this rent-charge? In *Hall* v. *Hurt* a term was vested in trustees to raise a sum of £5,000 charged on an estate, and Wood, V.C., was of opinion that the term was created for the purpose of avoiding a sale of the fee. That was a decision on the construction of a will, but it

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

is a guide to me in the present case, and shows that I ought to see whether the existence of the term is consistent with the right to have a sale of the inheritance. There is express power to raise the arrears out of the term, and I hold, that is not consistent with a right to have them raised out of the inheritance. I say, like Wood, V.C., in *Hall* v. *Hurt*, looking at the whole scope and contents of this deed, my impression is that the freehold was not intended to be sold, but the term was created for that purpose, with the view of avoiding a sale of the fee. I therefore refuse to make an order for sale.

Solicitors, *Chester & Co.*, for *Peele & Peele*, Shrewsbury; *Field, Roscoe, & Co.*, for *Greenall & Buckton*, Warrington; *Rowcliffe, Rawle, & Co.*, for *P. & J. Watson*, Bury.

---

C. C. R.
(Mathew, Lawrance, Wright, Kennedy, and Darling, JJ.) July 28.

THE QUEEN v. STREETER. (*a.*)

*Criminal law—Receiving stolen goods—Property stolen by wife from husband—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 91—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.

*A woman and her paramour were indicted under the Larceny Act*, 1861, *for stealing certain goods, and also for receiving the same knowing them to have been stolen. The goods were the property of the woman's husband. The woman was found guilty of stealing the goods, and the man of receiving them.*

*Held, that, as the stealing by a woman of her husband's goods did not amount to a felony either at common law or by virtue of the Larceny Act*, 1861, *but was only made criminal by the Married Women's Property Act*, 1882, *the man could not properly be convicted under section* 91 *of the Larceny Act*, 1861, *of the offence of receiving.*

Reg. *v.* Smith, 18 *W. R.* 932, *L. R.* 1 *C. C. R.* 266, *followed.*

Case stated by the chairman of the West Sussex Quarter Sessions.

Ellen Tickner and William Streeter were tried for larceny in a dwelling-house of some household goods, a sewing-machine, and £27 in money. A count for receiving, in the usual form, was added to the indictment.

It appeared from the evidence that the defendant Ellen Tickner was living with her husband, James Tickner, to whom she had been married twenty-six or twenty-seven years, at Stammerham, near Horsham. The defendant William Streeter was lodging with them.

On the 21st of April, 1900, James Tickner turned Streeter out of the house.

On the 11th of May, Ellen Tickner packed, and sent by the carrier to Horsham, two boxes labelled "Streeter, passenger to Brighton," which the carrier handed to Streeter at Horsham Station.

Ellen Tickner shortly afterwards left her husband's house while he was at work, and joined Streeter at Southwater Station on the line to Brighton. They were subsequently found living together as man and wife at Farnham.

James Tickner, after his wife's disappearance, missed the money and goods referred to in the indictment, and gave information to the police which led to the arrest of the prisoners.

At the time of the arrest the missing goods were found in the boxes which Ellen Tickner had sent to Streeter, and £27 in money was found in Streeter's box, the key of which was found in Ellen Tickner's purse.

There was no evidence of any of the goods being missed before Ellen Tickner's departure.

At the close of the case for the prosecution, counsel for Streeter submitted that, as regarded him, there was no case, inasmuch as, on the first count, there was no evidence against him; and upon the second count, even if it were proved that Ellen Tickner had committed a felony against her husband, under the provisions of section 12 and section 16 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), by taking away his goods, yet Streeter could not be indicted for receiving the goods knowing them to be stolen, as that statute had not made such receiving a felony; that under section 91 of the Larceny Act, 1861, only persons who received goods the stealing of which amounted to a felony, either at common law or under the provisions of that Act, could be indicted as receivers, and that, as the stealing by a wife of goods belonging to her husband was not a larceny at common law or under the Larceny Act, no receiver of such goods could be indicted for a felony, and the attention of the chairman was called to the case of *Reg.* v. *Smith*, 18 W. R. 932, L. R. 1 C. C. R. 266.

The chairman left the case to the jury, but reserved the point.

After hearing evidence on behalf of the prisoners, the jury found the prisoner Ellen Tickner guilty upon the first count, and the prisoner William Streeter not guilty on the first count, and guilty on the second count.

The question for the decision of the court was, whether, upon the facts set out above, Streeter could be indicted for receiving goods stolen by Ellen Tickner from her husband.

*Raven*, for the prisoner Streeter.—The conviction is bad. Streeter was indicted under section 91 of the Larceny Act, 1861, and no conviction can be obtained under that section unless the stealing of the property received amounts to a felony either at common law or by virtue of that Act. Stealing by a wife from a husband is not such a felony (*Reg.* v. *Kenny*, 25 W. R. 679, 2 Q. B. D. 307); it is made an offence by the Married Women's Property Act, 1882, ss. 12, 16. A similar question arose in *Reg.* v. *Smith* as to the receiving of partnership property stolen by a partner, the stealing of which was made criminal by the Larceny Act, 1868, and was decided in favour of the prisoner. [He was stopped.]

*Graham-Campbell*, for the prosecution.—*Reg.* v. *Smith* was adversely commented on in Stephen's Digest of the Criminal Laws, art. 383 (5th ed.), p. 320 note, and it ought not to be extended to a case arising under a different statute.

He also referred to *Reg.* v. *Caspar*, 2 Moo. C. C. 101.

MATHEW, J.—The conviction in this case must be quashed. The point is really concluded by the decision in *Reg.* v. *Smith*. Formerly there were two cases in which an indictment for larceny could not be preferred. The first case was that of a wife taking the goods of her husband, and the second was that of a partner taking the goods of the partnership. Both these cases have been brought within the criminal law by Act of Parliament, the case of a partner by the Larceny Act, 1868, and that of a wife by the Married Women's Property Act, 1882, ss. 12, 16.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

The question which we have to determine is, whether the present case comes within the terms of the Larceny Act, 1861, s. 91, so as to render the male prisoner liable to be convicted of receiving. The material words of that section are as follows: "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen . . . shall be guilty of felony." Here the act of the woman in taking her husband's property, which would not have been a felony either at common law or by virtue of the Larceny Act, 1861, has been made a criminal offence by another Act, the Married Women's Property Act, 1882, ss. 12 and 16, but this does not bring it within the words, "either at common law or by virtue of this Act"—that is, the Larceny Act, 1861. *Reg.* v. *Smith* was a case in which partnership property had been stolen by a partner and received by the prisoner, the stealing being a criminal offence by virtue of the Larceny Act, 1868, and it was held that the prisoner could not be convicted of receiving under the Larceny Act, 1861, s. 91. Our decision must be to the same effect—that is, that the prisoner cannot be convicted under the Larceny Act, 1861, of receiving property stolen by a wife from her husband.

LAWRANCE, J., concurred.

WRIGHT, J.—I agree that this prisoner could not properly be convicted under the Larceny Act, 1891, but in future cases it seems that there might be an indictment for receiving at common law.

KENNEDY and DARLING, JJ., concurred.

*Conviction quashed.*

Solicitors for prisoner, *Biggs, Roche, Sawyer, & Co.*, for *Buckwell & Berkeley*, Brighton.

Solicitors for prosecution, *Preston, Stow, & Preston*, for *Rawlison & Butler*, Horsham.

---

C. C. R.
(Mathew, Lawrance, Wright, Kennedy, and Darling, JJ.) July 28.

THE QUEEN v. BUTTON. (a.)

*Criminal law—False pretences—Remoteness—Competitor in handicap race—False statements as to previous performances as a runner—Attempt to obtain prize.*

*The defendant was convicted of attempting to obtain prizes for foot-races by false pretences. At the trial it was proved that entries for two races at an athletic meeting were made in the name of one Sims, and that such entries contained correct statements as to the recent performances of Sims as a runner, including a statement that he had never won a race. The entries were not written either by Sims or by the defendant. At the meeting the defendant ran in the races in the name of Sims. By reason of the statements in the entries he obtained long starts, and won both races. He was in fact a superior runner and a previous winner. After the races he falsely stated, in reply to questions put to him by the handicapper, that he really was Sims, and that the statements in the entries were true statements as to his performances. He did not apply to have the prizes handed over to him.*

*Held, that there was evidence for the jury of an attempt to obtain the prizes by false pretences, and that the attempt was not too remote from the pretence; and that the defendant was properly convicted.*

Reg. v. Larner, 14 *Cox C. C.* 497, *disapproved.*

Case stated by the Recorder of Lincoln.

The prisoner was charged with attempting to obtain goods by false pretences.

On the 26th of August, 1899, there were athletic sports at Lincoln, for which prizes were given. Among the contests were a 120 yards race and a 440 yards race, in respect of each of which a prize was given of the value of ten guineas.

Among the names sent in for these two contests was the name of "Sims, C., Thames Ironworks A.C.," and two written forms of entry were sent in to the secretary of the sports, containing (as appeared to be usual) a statement as to the last four races in which Sims had run, together with a statement that he had never won a race. These forms were not sent by Sims, nor were they in his handwriting, and he knew nothing of them. They were, however, signed in his proper name, and with his true address, and contained a correct amount of his last four performances. The forms were proved to be not written by the prisoner.

The performances of Sims were very moderate, and, as a fact, he was only a moderate runner, and as a result the supposed Sims was given by the handicapper of the sports a start of 11 yards in the 120 yards race and a start of 33 yards in the 440 yards race.

Sims was ill at Erith when the races were run, and was not at Lincoln at all, and he was personated by the defendant, who was a fine performer and won both contests very easily.

The suspicion of the handicapper being aroused, he asked the defendant, after the 120 yards race, whether he was really Sims, whether the performance given in the entry form was really his, and whether he had never won a race. To these questions the defendant answered that he was Sims, that the performances were his own, and that he had never won a race. All these statements were untrue, and in particular he had won a race at Erith in his own name. The handicapper was called as a witness, and swore that he would not have given the defendant such favourable starts if he had known his true name and performances.

These facts were all admitted, and no evidence was called to contradict them. It was, however, suggested for the defence that the defendant might have done it for "a lark," or might have possibly done it in order to keep himself in good training. In summing up the case to the jury the recorder told them that if the defendant did it for "a lark," without any criminal intent, and without intending to get the prizes, they ought to find him not guilty; but that if he made the false representations wilfully, intentionally, and fraudulently, with intent to obtain the prizes, they ought to find him guilty of attempting to obtain them by false pretences.

The jury found a verdict of guilty.

It was contended for the defendant, on the authority of *Reg.* v. *Larner*, 14 Cox C. C. 497, that the obtaining the prizes was too remote from the false representation and that he ought to be acquitted.

The recorder overruled the objection, but agreed to state this case.

A case decided by Lindley, J., at Nottingham Assizes appeared to be contrary to *Reg.* v. *Larner*.

The questions of law for the opinion of the court were:

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

(1) Whether the recorder had summed up the case correctly to the jury.

(2) Whether the attempt to obtain the prizes was too remote from the pretence.

*J. P. Hughes*, for the defendant.—The conviction is bad. There was no completed offence; even if the defendant represented Sims's performance as his own for the purpose of obtaining longer starts there is nothing to show that he did this with any fraudulent intention. He never applied for the prizes, and until he did that, he had a *locus pœnitentiæ* even if he ever intended to obtain them (which was not proved). [MATHEW, J.—These are questions of fact, and are disposed of by the verdict.] The intention to obtain the prizes is too remote from the false pretence. What the defendant really obtained was the good starts. His winning the races was due to his good running. *Reg.* v. *Larner* (in which the Common Serjeant directed the jury after consultation with Stephen, J.) is a strong authority against the conviction.

He also cited *Reg.* v. *Eagleton*, 4 W. R. 17, 6 Cox. C. C. 559; *Reg.* v. *Gardner*, 4 W. R. 526, 7 Cox. C. C. 136.

*Montague Shearman* and *T. Hollis Walker*, for the prosecution, was not called upon to argue.

MATHEW, J.—This conviction must be upheld. The case of *Reg.* v. *Larner*, 14 Cox. C. C. 497, is relied upon as an authority for the defendant. In that case the question was one of fact, and the Common Serjeant appears to have directed the jury according to his impression of the view of the law taken by Stephen, J., whom it appears from the report he had consulted; but that case appears to have been differed from by Lindley, J., in a case tried before him at the Nottingham Assizes, and I am clearly of opinion that Lindley, J., was right. The questions in the present case were pure questions of fact—namely, whether the intention of the defendant, when he entered for the races, was to obtain the prizes, and whether he made the false representations with that intention. It appears that he represented himself to be a man who had never won a race, and he was handicapped on the faith of that statement, as is shown by the evidence given by the handicapper; but it also appears that his statement was false, for he had won races. Then it was suggested that he competed in the name of Sims, as it is put in the case, "for a lark"; but that question was for the jury, and they have negatived the suggestion. It was also suggested that his coming in first in the races was owing to his own good running; but it was also owing, in part at least, to the false pretences, by means of which he obtained a longer start than he would have had if his true name and performances had been known. It is also said that some other act had to be done in order to make the offence complete, and that he could not rightly be convicted because he had not applied for the prizes, and that the criminal intention was exhausted. The argument is exceedingly subtle, but unsound. In fact, he was found out before he had the opportunity of applying for the prizes, as no doubt he otherwise would have done. The pretences which the prisoner made were not too remote, and the conviction was good.

LAWRANCE, J., concurred.

WRIGHT, J.—I am of the same opinion. If nothing more had been shown than that the defendant had entered for the races in a false name, possibly the case might have been different, but here there was proof of distinct false pretences as to matters of fact.

KENNEDY and DARLING, JJ., concurred.

*Conviction affirmed.*

Solicitors for defendant, *Tolhurst, Lovell, & Clinch*, Gravesend.

Solicitor for prosecution, *A. L. Rayner*.

[THE END.]

THE

# WEEKLY REPORTER DIGEST

OF ALL THE

## CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

FROM THE 24TH OF OCTOBER, 1899, TO THE 12TH OF AUGUST, 1900.

VOL. XLVIII.

LONDON: 27, CHANCERY LANE, W.C.

1900.

# A DIGEST

OF ALL THE

# CASES DECIDED IN ENGLAND,

FROM

THE 24TH OF OCTOBER, 1899, TO THE 12TH OF AUGUST, 1900,

AS REPORTED IN

## VOL. XLVIII. OF THE WEEKLY REPORTER, 1899-1900;

AND IN

## CERTAIN OTHER LEGAL REPORTS DURING THE SAME PERIOD,

TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

---

*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; Q.B.D., the Queen's Bench Division; BKCY., the Queen's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved.

*** *This Digest will contain at the end thereof a Tabular Index of the Names of all Cases Reported up to the end of August,* 1899, *as well in this Volume* (48) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports are given in this Digest.*

---

ADMINISTRATION:—

1. *Estate duty—Appointed fund—Residuary estate—"Testamentary expenses"—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 9 (1).—A fund appointed by will under a power of appointment does not pass to the executors as such within the meaning of the Finance Act, 1894, and is therefore chargeable with estate duty.

Estate duty is included in "testamentary expenses."—TREASURE, RE, WILD *v.* STANHAM, *Ch D. Kekewich, J.*, 696.

2. *Estate duty—Settlement estate duty—Will—Incidence of duty—Settled legacy—General estate—Construction—Finance Act,* 1896 (59 & 60 *Vict. c.* 28), *s.* 19.—A testatrix by her will directed that "my debts and funeral and testamentary expenses, including all duties payable by law out of my estate," and including the duties payable on certain annuities and legacies which she had bequeathed duty free, should be paid out of a fund which constituted her residuary general estate.

Held, that the words "all duties payable by law out of my estate" meant "duties payable by law out of my residuary general estate," and did not include settlement estate duty on a settled legacy, and were not "an express provision to the contrary" within the meaning of section 19 of the Finance Act, 1896.—LEWIS, RE, LEWIS *v.* SMITH, *Ch.D. Kekewich, J.*, 426; [1900] 2 Ch. 176; 69 L. J. Ch. 406; 82 L. T. 291.

3. *Insufficient estate—Abatement of annuities—Married woman—Restraint on anticipation—Capital value of annuity—Legal personal representative.*—Where a married woman was entitled restrained from anticipation, to an annuity, from an insufficient estate, and agreed to an abatement thereof,

the capital value of the annuity abated by an order of the court being laid out in the purchase of an annuity; and where she died before the purchase of the annuity,

Held, that the capital of the abated annuity should be paid to her legal personal representative, and formed part of her estate.—ROSS, RE, ASHTON *v.* ROSS, *Ch.D. North, J.*, 264; [1900] 1 Ch. 162; 69 L. J. Ch. 192; 81 L. T. 578.

4. *Practice — Parties — Devisees — Heir-at-law — Costs—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65). —A summons was taken out by the executors of a testator, who died after the Land Transfer Act, 1897, came into operation, for the determination of the question whether, under the terms of the will, a certain piece of freehold land was included in a specific devise, or went to the heir-at-law. The will contained no general devise of real estate.

The devisees and the heir-at-law were made respondents.

Held, that the land went to the heir-at-law; the devisees had made their claim and failed, and were in the same position as if they had brought an action under the old law. The costs of the heir-at-law, therefore, would be taxed as between party and party, and paid by the devisees.—PEEL, RE, WOODCOCK *v.* HOLROYD, *Ch.D. Kekewich, J.*; 81 L. T. 504.

5. *Separate account fund in court—Assignment of —Notice—Equity against assignee.*—Where a fund in court in an administration suit is carried to a separate account it is released from the general questions in the cause, and marked as being subject only to the questions arising on the particular matter specified in the heading of the account, and the persons specified in the heading are to be regarded as the owners of the fund.

Where a fund standing to a separate account is specifically assigned for value by the person entitled thereto according to the heading of the account,

Held, that the assignor's liability towards other parties to the suit for breach of trust in respect of the estate generally cannot be enforced against the separate account fund in the hands of its assignee for value without notice. Notice that the assignor was a trustee and defendant in a suit for an account in which his fund might be made answerable in case of default, is not sufficient to affect the assignee.—EDGAR *v.* PLOMLEY, *P.C.*; [1900] A. C. 431; 82 L. T. 573.

6. *Testamentary expenses—Administration expenses —Costs of probate action—Estate duty.*—The expression "testamentary expenses" includes estate duty.

A testator, after giving the income of his residue to his wife for life, directed his executors, after his widow's death, out of the residue to pay "my widow's funeral and testamentary expenses and debts." The testator's wife survived him, and died leaving what purported to be a will. B., one of the two next-of-kin of the widow, brought an action in the Probate Division for a grant of letters of administration of the widow's estate to him. The judge pronounced against the will, but made no order as to costs. Letters of administration were subsequently granted to Y., the other next-of-kin of the widow, with the assent of B. The widow's estate consisted entirely of personalty. Upon summons to determine what costs and expenses ought to be allowed out of the testator's estate as testamentary expenses of the widow,

Held, that costs and expenses properly incurred in the administration of the estate of the intestate widow were within the meaning of the term "testamentary expenses," and that there must be allowed as such testamentary expenses the costs of B. of the probate action and also the estate duty payable on the death of the widow.—CLEMOW, RE, YEO *v.* CLEMOW, *Ch.D. Kekewich, J.*, 541; [1900] 2 Ch. 182; 69 L. J. Ch. 522; 82 L. T. 550.

7. *Testamentary expenses—Costs of ascertaining identity of legatees—Costs out of residue—Ord.* 65, *r.* 14*b*.—The costs of ascertaining the identity of the legatees of pecuniary bequests are "testamentary expenses," and where there is a general direction to pay funeral and testamentary expenses out of the residuary estate they are payable thereout, and not out of the pecuniary legacies.

*In re Groom*, [1897] 2 Ch. 407, discussed.—BAUMGARTEN, RE, BEVAN *v.* ROSENBAUM, *Ch.D. Farwell, J.*; 82 L. T. 711.

8. *Trustee carrying on testator's business—Tort by trustee—Damages—Indemnity—Claim to indemnity out of estate by person recovering damages against the trustee.*—Where a trustee is entitled to indemnity from his testator's estate in respect of damages for a tort committed by him in carrying on testator's business, the person entitled to such damages from the trustee may prove for them against the testator's estate direct. — RAYBOULD, RE, RAYBOULD *v.* TURNER, *Ch.D. Byrne, J.*, 301; [1900] 1 Ch. 199; 69 L. J. Ch. 249; 82 L. T. 46.

See also Bankruptcy, 18; Limitation Statutes, 5; Lunacy, 2; Partition, 1; Probate, 8.

ADMIRALTY:—

1. *Practice—Damages—Unpaid balance of—Action* in rem—*Arrest—Bail—Release—Judgment—Practice —Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 15— *Writ of* fieri facias.—A collision occurred in the River Thames between a British and a foreign vessel. The owners of the British vessel commenced an action *in rem* and arrested the foreign vessel, the owners of which, domiciled abroad, appeared, and, having put in bail for the full value of the vessel and her freight, she was released. The foreign vessel was subsequently found alone to blame, and the decree in the usual form, in the case of owners who have appeared, condemned the defendants and their bail in damages and costs. The damages proved to be in excess of the amount of the bail, and the plaintiffs, in respect of this balance, sued out a writ of *fieri facias* under which the foreign vessel was seized. On application to the court the sheriff was ordered to withdraw.

Held, that the owners of the foreign vessel had, by appearing, rendered themselves personally liable, and, therefore, payment of the balance could be enforced under section 15 of 24 Vict. c. 10 by a writ of *fieri facias* against any of their goods and chattels, including the released vessel, within the jurisdiction.

*The Dictator*, [1892] *P.* 304, followed.—"GEMMA," THE, *C.A.*; [1899] P. 285; 81 L. T. 379.

2. *Practice—Ship—Action of restraint—Bail bond for safe return of vessel—Forfeiture—Discretion of court.*—A bail bond given in an action of restraint was conditioned for the safe return of the vessel to the port of Liverpool. On the termination of the voyage the vessel did not return to Liverpool, but put into the port of Dundee, outside the jurisdiction of the English Admiralty Court, from whence she was sent under a charter-party on a fresh voyage.

On the application of the plaintiff, Barnes, J., made an order, declaring the bond to be forfeited.

Held, that the order was right.—"CAWDOR" THE, *C.A.* 293; [1900] P. 47; 69 L. J. P. 23; 81 L. T. 705.

3. *Practice — Ship* — Caveat *warrant — Arrest — Personal undertaking to put in bail—Release—Condemnation in damages and costs occasioned by arrest—Rules of the Supreme Court, ord.* 29, *r.* 18.—The plaintiffs in an action *in rem* against a foreign vessel caused the vessel to be arrested by the marshal, notwithstanding that a *caveat* warrant had been taken out and an undertaking given by the defendants' solicitors to put in bail in the suit or pay money into court within three days of its institution. At the time of the arrest the vessel was not under the arrest of the court in any other action, and was about to leave the port where she was then lying.

The defendants, on the day after the arrest, applied to the court for the vessel to be released and that the plaintiffs should be condemned in damages and costs. At the hearing of the application the plaintiffs never objected in any way that the personal security of the defendants' solicitors was inadequate.

Held, that the vessel must be released and the plaintiffs condemned in the damages and costs occasioned by the arrest.—"CRIMDON," THE, *P.D. & Ad.D.* 623; [1900] P. 171; 69 L. J. P. 103; 82 L. T. 660.

4. *Ship—Limitation of liability—Foreign ship—Foreign certificate of registry—Deduction of crew space—Sections* 79, 84, 210, 503, *and 6th schedule of the Merchant Shipping Act,* 1894.—The owners of a Danish ship are not entitled in limiting their liability to deduct crew space from the gross tonnage, although the tonnage regulations of the Merchant Shipping Act, 1894, have been adopted by Denmark, and according to the Danish certificate of registry the crew space is stated therein and it is proved that the dimensions of crew space have been cut up over the hatchway. To entitle a ship to such deduction it is necessary to prove that the certificate mentioned in the third paragraph of the 6th schedule of the Merchant Shipping Act, 1894, has been given by a surveyor of ships to the collector of customs.—"CATHAY," THE (No. 2), *P.D. & Ad.D.*; 69 L. J. P. 89; 82 L. T. 823.

5. *Ship—Limitation of liability—Ship not exceeding fifteen tons burden—Exemption from registry—Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 3, *sub-section* 1.—The meaning of the words "not exceeding fifteen tons burden" in section 3, subsection 1, of the Merchant Shipping Act, 1894, is not exceeding a net register tonnage of fifteen tons.

Judgment of Barnes, J. (47 W. R. 288), affirmed. —"BRUNEL," THE, *C.A.*, 243; [1900] P. 24; 69 L. J. P. 8; 81 L. T. 500.

6. *Ship—Limitation of liability—Sum paid into Admiralty Division—Actions under Lord Campbell's Act in the Queen's Bench Division—Transfer of actions.*—The owners of a ship, on which great loss of life had occurred in consequence of the negligence of their servants, obtained in the Admiralty Division an order limiting their liability to £15,400, and they paid that sum into the Admiralty Division. Actions under Lord Campbell's Act having been commenced against the owners in the Queen's Bench Division,

Held, that there was no reason for transferring such actions to the Admiralty Division.—ROCHE *v.* LONDON AND SOUTH-WESTERN RAILWAY CO., *C.A.*, 1; [1899] 2 Q. B. 502; 81 L. T. 315.

7. *Ship—Limitation suit—Free pass by railway and steamer — Conditions of non-liability — Claim against fund—Loss of life—Loss of luggage—Lord Campbell's Act* (9 & 10 *Vict. c.* 93) — *Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 503.—A free pass, obtained by an official of another railway company for himself and wife, from the London and South-Western Railway Co., for the journey from London to Jersey, referred, on the face of it, to the following condition printed on the back: "That it shall be taken as evidence of an agreement that the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused, that may be sustained by the person or persons using this pass." Through the negligence of the servants of the railway company, and during the transit from Southampton to the Channel Islands, the steamer stranded, and the official was drowned. His own, and his wife's, luggage were also lost.

The widow on behalf of herself and infant children claimed, against the fund paid by the railway company into court in a limitation suit, for the loss of her husband and father of the children. The registrar disallowed the claim.

Held, that, in respect of the loss of life, as the widow and children could only claim under Lord Campbell's Act, where, if death had not ensued, the party injured would have been entitled to maintain an action for damages, the conditions on which the free pass was granted, and which the deceased must, from his official position, be taken to have known, included the sea passage as well as the land transit, and barred the claim:

Held, also, that in respect of the claim by the widow, as administratrix of her husband, for the loss of his personal effects, and in her own right, for the loss of her luggage, the condition attaching to the pass equally precluded any claim, for the London and South-Western Railway special Act of 1848—under sections 47, 48, 49 of which (made perpetual by an Act of 1860) the company is empowered to maintain steamers—is not controlled by section 31 of the subsequent Railway Clauses Act, 1863, extending to steamers the provisions of section 7 of the Railway and Canal Traffic Act, 1854.

The words "or other things whatsoever on board the ship" in section 503, sub-section 1 (*b*), of the Merchant Shipping Act, 1894, include passengers' luggage.—"STELLA," THE, *P.D. & Ad.D.*; [1900] P. 161; 69 L. J. P. 70; 82 L. T. 390.

ADULTERATION:—

1. *Food and drugs—"Chewing chum"—Paraffin wax—Sale of Food and Drugs Act,* 1875 (38 & 39 *Vict. c.* 63), *ss.* 3, 6.—On the hearing of two informations under sections 3 and 6 of the Sale of Food and Drugs Act, 1875, it was proved or admitted before the justices that the appellant was a shopkeeper, carrying on business at 5, P.-road, T., where he retailed sweets and groceries.

On the 13th of May, 1899, the respondent visited the appellant's shop, and purchased some "chewing chum." Each of the packets of "chewing chum" was labelled "B. & Co.'s chewing. This must not be eaten. For chewing only." The respondent, after looking at the packets and reading the labels, asked the price, and bought three pennyworth. It was proved, or admitted, that the "chewing chum" was sold as an article to be chewed and not as an article to be eaten. It could not be dissolved by the saliva of the mouth, nor could it be masticated by the teeth. It was, however, capable of being swallowed whole, although it was not intended to be swallowed. Paraffin wax was one of the ingredients, and each packet contained 8·3 per cent. thereof. The wax was an essential ingredient. Paraffin wax if received into the stomach was

injurious to health, and the quantity of wax in the packets was sufficient to make the article as a sweet injurious to health if passed into the stomach. If swallowed, therefore, it was injurious to health, but if it was used in the manner in which it was intended to be used—namely, for chewing—it was not in any way injurious to health. The justices convicted the appellant.

Held, that on the facts the justices were wrong. —BENNETT *v.* TYLER, *Q.B.D.*; 81 L. T. 787.

2. *Food and drugs—Compounded drug—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 7.—A sale to the prejudice of the purchaser of a compounded drug, which is not of the nature, substance, and quality of the article demanded, is an offence under section 6 of the Sale of Food and Drugs Act, 1875, and proceedings for the recovery of a penalty may be taken under that section.—BEARDSLEY *v.* WALTON & Co., *Q.B.D.*; [1900] 2 Q. B. 1; 69 L. J. Q. B. 344; 82 L. T. 119.

3. *Food and drugs — Margarine — Evidence — Analyst's certificate—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 14, 21, 25—*Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 6, 7, 12.—L., a retail grocer, sold to the appellant from a tub marked "pure butter," a certain quantity of margarine without delivering it in a package marked with the word "margarine" as required by section 6 of the Margarine Act, 1887. The sample sold was, on analysis, found to contain 10 per cent. of foreign fat not butter fat. L. having satisfied the justices that he had been sold the margarine by the respondents with a warranty that it was pure butter, the appellant took out a summons against the respondents for selling margarine to L. without the word "margarine" being marked on the package containing the article. At the hearing, the analyst's certificate obtained in the former proceedings against L. was tendered in evidence against the respondents.

Held, that the certificate was not evidence against the respondents and should be rejected.—TYLER *v.* KINGHAM, *Q.B.D.*; [1900] 2 Q. B. 413; 69 L. J. Q. B. 630.

4 *Food and drugs—Milk—Ten per cent. added water—Milk exceptionally good—Trifling offence.*—The respondent was charged with selling milk contrary to section 6 of the Food and Drugs Act, 1875.

At the hearing of the information the certificate of the analyst was produced and proved on behalf of the appellant, and showed as follows: "I, the undersigned public analyst for the county of Essex, do hereby certify that I received on the 5th of June, 1899, a sample of milk. . . . I am of opinion that the same contained the parts as under: Fat, 3·55 parts; non-fatty solids, 7·46 parts; water, 88·99 parts; total, 100·00. I am therefore of opinion that this milk contains 10 per cent. of added water."

The justices received the certificate of the analyst as sufficient evidence of the facts as herein stated, but it appeared to them that the milk was exceptionally good, the butter fat being above normal, and, having regard to all the circumstances, they thought that, though the charge was proved, the offence was of so trifling a nature that it was inexpedient to inflict any punishment, and they therefore dismissed the information.

Held, remitting the case to the justices, that if the milk was exceptionally good after the adulteration they need not convict, but if it was only exceptionally good before, the offence was one for which they should convict.—BANKS *v.* WOOLER, *Q.B.D.*; 81 L. T. 785.

5. *Food and drugs—Procedure—Offence under Sale of Food and Drugs Act*, 1879—*Repeal of procedure section—Power of amendment—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 38 (2)—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 19.—Where an Act creating an offence is kept in force, and the section providing procedure is only repealed, and other procedure is provided by the repealing Act, although an offence is committed while the repealed section is in force, if proceedings are not taken until after the repeal takes effect, they are governed by the requirements of the repealing Act.

In such a case the old form of procedure is not kept alive by section 38 (2) of the Interpretation Act, 1889, as to offences committed under the earlier Act.

The non-fulfilment of the requirements of section 19 of the Sale of Food and Drugs Act, 1899, is not a matter capable of amendment under Jervis' Act. —BATT *v.* MATTINSON, *Q.B.D.*; 82 L. T. 800.

6. *Food and drugs—Sample—Mode of dividing sample—Analysis—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 14.—Where a purchase for the purpose of analysis is made of several articles of food or drugs at the same time, each article purchased must be divided into three parts and dealt with as provided in section 14 of the Sale of Food and Drugs Act, 1875.

Where a purchase is made of six bottles of the same article of food or drug each bottle is for the purposes of the Act a separate article, and, therefore, it is not a sufficient compliance with the requirements of section 14 for the purchaser to divide them into three lots of two bottles each without opening any of the bottles, and to hand one lot to the analyst and one to the seller, and to retain one himself.—MASON *v.* COWDARY, *Q.B.D.*; [1900] 2 Q. B. 419; 69 L. J. Q. B. 667; 82 L. T. 802.

7. *Food and drugs—Warranty—Contract to supply milk over an extended period—Necessity of written warranty with each particular delivery—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 25.—On information by a medical officer of health, H., a dairyman, and his servant were respectively charged with unlawfully causing to be sold and selling milk as "new milk" which was not new milk, contrary to section 6 of the Sale of Food and Drugs Act, 1875. At the hearing an agreement in writing was put in as an answer to the complaints under section 25 of the Sale of Food and Drugs Act, 1875, and section 20 (4) of the Sale of Food and Drugs Act, 1899, and it was proved that the milk had been purchased as new milk, and that it was sold in the same state as when it was purchased; and that the defendants had no reason to believe at the time the milk was sold it was otherwise than pure milk. On analysis the article sold was found to contain 10 parts added water to 90 parts milk.

By the aforesaid agreement S. agreed to sell to H. "one thousand gallons of milk weekly in such quantities as arranged, the milk to be pure new milk, delivered at ." Then followed the names of the stations and prices per gallon, and the dates of delivery, ranging from the 21st of January, 1899, to the 20th of January, 1900. The question was whether in this agreement there was or was not a written warranty within the meaning of section 25 of the Sale of Food and Drugs Act, 1875.

Held, that there was nothing to show that the

agreement for the delivery of the milk covered the particular milk in question.

In order to support a defence under section 25, there must be something more than a general warranty; there must be something to show that the warranty covers the particular article, and that the article was purchased with a warranty.—ROBERTSON *v.* HARRIS, *Q.B.D.*, 571; [1900] 2 Q. B. 117; 69 L. J. Q. B. 526; 82 L. T. 536.

ADVANCEMENT.—See Will, 2.

AGENT.—See Arbitration, 5; Bankruptcy, 8; Company, 32; Contract, 15; Frauds, Statutes of, 2; Principal and Agent, 1, 2; Stock Exchange, 1-3; Vendor and Purchaser, 3, 20.

ANNUITY:—

*Deed—Construction—Charge on moiety of tenant in common—Right of distress—Rent of whole less than annuity—Power to distrain for full amount.*—By his will, dated November, 1831, J. W. devised certain lands and premises to his daughters A. and H. as tenants in common in tail. A. married H. A. and H. the defendant.

In 1858 by a deed of settlement on her marriage H. disentailed her moieties, and settled them upon trust to pay the income to the defendant for his life or until he became bankrupt, and then for the issue of the marriage, and in default of issue (which was the case) in default of appointment for her next-of-kin. H. died in 1863, and the defendant became bankrupt in 1878, and thereupon A. became entitled to the whole.

In 1881 a deed was executed between A., her husband and the defendant, whereby A. with the assent of her husband, in contemplation of the defendant's second marriage, agreed to grant to the defendant an annuity of £300 charged upon the moieties, shares, and premises comprised in the marriage settlement of 1858 payable out of the rents and profits and income thereof respectively. And by that deed if the annuity should be in arrear the defendant could enter and distrain upon all or any of the said moieties, shares, or premises, and hold them and receive and take the rents and profits thereof until the arrears were satisfied.

The rental value of the undivided moiety has been of late years quite insufficient to satisfy the annuity, the profits of the whole hardly amounting to that sum.

Held, that, although there was power to distrain on the entirety of the lands the deed gave him no power to distrain for more than one-half of the rents and profits of the whole.—ASHWIN v. BULLOCK, *Q.B.D.*; 81 L. T. 48.

See also Administration, 3; Inland Revenue, 2.

APPOINTMENT.—See Power, 1-5; Will, 15, 16.

APPORTIONMENT.—See Landlord and Tenant, 25.

APPRENTICE.—See Master and Servant, 1.

ARBITRATION:—

1. *Award—Enlargement of time—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *ss.* 9, 24—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 180, *sub-section* 9.—The court has power, under section 9 of the Arbitration Act, 1889, to enlarge the time for making an award under the Public Health Act, 1875, at any time.

Section 9 of the Arbitration Act is not inconsistent with section 180, sub-section 9, of the Public Health Act.

*Warburton* v. *Haslingden Local Board,* 48 L. J. Q. B. 451, 27 W. R. Dig. 11, approved.

*In re Mackenzie and the Ascot District Gas Co.,* 34 W. R. 487, 17 Q. B. D. 114, overruled.—KNOWLES *v.* BOLTON (MAYOR), *C.A.*, 433; [1900] 2 Q. B. 253; 69 L. J. Q. B. 481; 82 L. T. 229.

2. *Award—Validity—Evidence taken on matters not referred—Jurisdiction.*—In an action to enforce an award, the defendants pleaded that the sum awarded included matters not referable to the arbitrators under the terms of the contract, and in respect of which, therefore, the arbitrators had no jurisdiction.

Held, that, as it appeared that the matters actually referred were those contained in the submission, the award was not bad, either (*a*) on the face of it, for not stating that matters not referred had been rejected; or (*b*) because the arbitrators had taken evidence on matters not referred, the defendants failing to prove that such matters were irrelevant to the inquiry, or were in fact included in the award, which was for a lump sum.

Held, further, that a counterclaim for liquidated damages by the defendants for delays not allowed in writing by their engineer-in-chief must be dismissed, for the refusal to allow delays was itself, by the terms of the contract, subject to arbitration, and capable of being dealt with by the arbitrators in their award without sending the matter back to the engineer.—FALKINGHAM *v.* VICTORIAN RAILWAYS COMMISSIONERS, *P.C.*; [1900] A. C. 452; 82 L. T. 506.

3. *Costs of reference—Local government—Transference of district—Local Government Act,* 1888, *s.* 62 (3)—*Lands Clauses Act,* 1845, *s.* 34.—By a Local Government Board's order part of the plaintiffs' district was transferred to the district of the defendant council, and the parties being unable to agree to an arbitrator to adjust a difference between them, one was appointed by the Local Government Board, under section 62 (2) of the Local Government Act, 1888. By his award he directed the defendants to pay the plaintiffs a certain sum, and directed the costs of the award—viz., £10 10s., should be paid by both parties in equal shares. No mention was made of the costs of the reference.

Subsequently he determined the costs of the reference to be £34 2s. 10d., and the costs of the taxation to be £4 4s., but did not direct that the defendants were to pay these sums.

In an action to recover these sums from the defendants,

Held, that the arbitrator having made no direction by whom these sums should be paid, they could not be recovered from the defendants.—SOUTH MIMMS RURAL DISTRICT COUNCIL *v.* BARNET URBAN DISTRICT COUNCIL, *Q.B.D.*; 82 L. T. 421.

4. *Lands Clauses Acts—Costs—Lands Clauses Act,* 1845, *ss.* 23, 34, 38.—An offer made by the promoters of an undertaking to purchase under section 38 of the Lands Clauses Act, 1845, is not abrogated by a notice given by the claimant under section 23 of his desire to have the compensation settled by arbitration. But if the sum offered by the promoters was not less than that awarded by the arbitrators, the claimant must bear his own costs incident to the arbitration.—LASCELLES *v.* SWANSEA SCHOOL BOARD, *Q.B.D.*; 69 L. J. Q. B. 24.

5. *Master and servant—Staying proceedings—Action for damages—Contract for service—Arbitration clause—Wrongful dismissal—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *s.* 4.—A contract for the employ-

ment of the plaintiff by the defendants as their agent for the sale of maize and other products for seven years, at a remuneration by commission, provided that "any dispute arising in connection with" the contract should be referred to arbitration pursuant to the arbitration clause in the bye-laws of the Liverpool Corn Trade Association. The arbitration clause in those bye-laws provided that "all disputes arising out of transactions connected with the trade" should be referred to arbitrators, and that neither contracting party should bring any action against the other in respect of any dispute until the dispute had been settled by the arbitrators. Disputes as to the plaintiff's conduct as agent were subsequently referred arbitrators, who made an award adverse to the plaintiff, whereupon the defendants dismissed him. The plaintiff then brought an action against the defendants for damages for wrongful dismissal.

Held, reversing Phillimore, J., that the dispute in the action was within the arbitration clauses in the contract and bye-laws, and that the defendants, having always been "ready and willing" to refer the dispute to arbitration, were entitled to have the action stayed under section 4 of the Arbitration Act, 1889.

*Renshaw* v. *Queen Anne Mansions Co.*, [1897] 1 Q. B. 662, followed.

*Davis* v. *Starr*, 41 Ch. D. 242, explained.—PARRY *v.* LIVERPOOL MALT CO., *C.A.*; [1900] 1 Q. B. 339; 69 L. J. Q. B. 161; 81 L. T. 621.

6. *Railway—Contract to construct—Clause referring all matters to consulting engineer—Point of law—Discretion of court to order arbitrator to state special case—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 19.—By a contract for the construction of a railway for a lump sum it was provided that, "in the event of any dispute or question arising as to the intent and meaning of any part of the specification . . . or the interpretation, meaning, or effect of the clauses and conditions of the contract, or as to any other matter or thing whatever connected with or arising out of the contract or incidental thereto or not thereby provided for, such questions or disputes should be referred to the consulting engineer, whose decision should be conclusive and binding on both parties."

The cost of construction was greatly increased by the necessity of blasting rock instead of excavating earth, and the contractor claimed a large sum beyond the contract price, alleging that the contract provided for excavation of earth only.

This claim was referred to the consulting engineer as arbitrator.

Held, that, as a substantial and serious point of law arose upon the construction of the contract, the case was one in which the court would, in the exercise of its discretion, order the arbitrator to state a special case for the opinion of the court under section 19 of the Arbitration Act, 1889.—NUTTALL *v.* LYNTON AND BARNSTAPLE RAILWAY CO., *C.A.*; 82 L. T. 17.

7. *Railway—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 35—*Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.—Upon an application to compel a railway company to take up an award properly made under the Lands Clauses Consolidation Act of 1845, the question as to whether compensation should be paid under that or other Acts cannot be entertained.

Objections of this character should be made in the action to enforce the award.

*Reg.* v. *London and North-Western Railway Co.*, [1899] 1 Q. B. 921, affirmed.—LONDON AND NORTH-WESTERN RAILWAY CO. *v.* WALKER, *H.L.*, 384; [1900] A. C. 109; 69 L. J. Q. B. 367; 82 L. T. 93.

8. *Staying proceedings—Interested arbitrator.*—Under an agreement matters in dispute were to be referred to the sole arbitration of X., whose decision was to be final and binding. On the 13th of June a motion was made raising the question whether an action brought by one of the parties to the arbitration should be allowed to proceed, and the motion was dealt with on the assumption that the arbitration should go on. After one or two appointments before X., an application was made to remove X. from being arbitrator on the ground that he was a gentleman at the bar who had constantly been employed by solicitors whose conduct would have to be considered by the arbitrator. At the time of the motion of the 13th of June all the circumstances were known to the plaintiff. No charges whatever were made against X. When X. was originally named as arbitrator it was known to the plaintiff's solicitors that X. was habitually employed by the solicitors whose conduct might come before the arbitrator, but they were told, as was the fact, that he had not been consulted in this particular matter. For the plaintiff it was said that the arbitrator ought to be a perfectly unbiassed person. For the defendant it was said that this rule does not apply to the case of an arbitrator named in the contract.

Held, that the motion must be dismissed with costs.—BRIGHT *v.* RIVER PLATE CONSTRUCTION CO., *Ch.D. Cozens-Hardy, J.*; 82 L. T. 793.

9. *Submission to three arbitrators—Power of court to stay action—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.—Section 4 of the Arbitration Act, 1889, applies to all submissions, including those in which the reference is to three arbitrators.

*In re Smith & Service and Nelson & Sons*, 39 W. R. 117, 25 Q. B. D. 545, *distinguished.*—MANCHESTER SHIP CANAL CO. *v.* PEARSON, *C.A.*, 689.

See also Local Government, 8; Practice, 15.

ASSIGNMENT.—See Administration, 5; Contract, 5; Practice, 8.

AUCTIONEER.—See Inland Revenue, 1.

BANKER:—

1. *Bill of exchange—Cheque—Crossed cheque—Receipt of payment for customer—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.—A rate collector had been for many years in the habit of taking cheques which he received in payment of rates to a branch bank of the defendants and getting them to cash the cheques, but he did not keep any account with the defendants. Having fraudulently obtained a cheque from the plaintiffs by falsely pretending that a rate had been made, he took the cheque to the branch bank in accordance with his usual practice. The cheque was drawn on a London bank and was made payable to the collector or order, and was crossed generally and marked "Not negotiable." The defendants cashed the cheque and sent it up to their head office in London for collection, and it was duly presented and paid. In an action to recover the amount of the cheque,

Held, that the proper inference to be drawn from the facts was, first, that the collector was a customer of the defendants; and, secondly (Vaughan Williams, L.J., doubting as to this), that the defendants received payment of the cheque for him; and therefore the defendants, having acted in good faith and without negligence, were protected from liability by section 82 of the Bills of Exchange Act, 1882.

Judgment of Bigham, J. (*ante*, p. 144), affirmed. —GREAT WESTERN RAILWAY CO. *v.* LONDON AND COUNTY BANKING CO., *C.A.*, 662; 69 L. J. Q. B. 741; 82 L. T. 746.

2. *Negligence—Order in writing for payment of money—Trover—Conversion—Measure of damages—Money had and received—Bills of Exchange Act*, 1882 (45 & 46 *Vict.* c. 61), *ss.* 3 (1) (2), 11 (2), 73, 82—*Inland Revenue Act*, 1883 (46 & 47 *Vict.* c. 55), *s.* 17. —An order in writing, directing a bank to pay to the plaintiffs or their order a sum of money conditionally upon the signature by the plaintiffs of a receipt form at the foot of the document, was stolen from the plaintiffs and taken to the defendant bank for collection on behalf of a customer of theirs. The signature of the plaintiffs had been forged, both on the indorsement and on the receipt, but both signatures were badly written and the name of one of the plaintiffs was written as "Trench" instead of Junior. The defendant bank, without making any inquiries, received the order, collected the amount from the paying bank, and placed it to the credit of their customer. The plaintiffs subsequently gave notice to the defendant bank that the order had been stolen, and claimed the amount received by the defendant bank. The account of the customer of the defendant bank had been drawn upon in the interval, but nothing had occurred to disentitle the defendant bank from cancelling the credit given to their customer.

Held, that the defendant bank had been guilty of negligence, and consequently could not avail itself of the benefit of section 82 of the Bills of Exchange Act, 1882, as enlarged by section 17 of the Inland Revenue Act, 1883; and that the plaintiffs could recover the amount from the defendant bank as money had and received to the use of the plaintiffs.

*Semble* (per A. L. Smith and Vaughan Williams, L.JJ.), that the plaintiffs could also recover the amount as damages for the conversion of the order. —BAVINS *v.* LONDON AND SOUTH-WESTERN BANK, *C.A.*, 210; [1900] 1 Q. B. 270; 69 L. J. Q. B. 164; 81 L. T. 655.

3. *Separate accounts—Deposit of securities for debt due on one account—Rights of third parties.*—Securities belonging to the clients of a firm of stockbrokers were deposited with a bank to secure a debt due from the stockbrokers to the bank. The stockbrokers had two accounts with the bank—a loan and a current account. This debt was due on the loan account, but there was no agreement that the securities were deposited to secure the loan account exclusively. The stockbrokers became bankrupt. At the date of the bankruptcy they had a balance in their favour on the current account, which was at any rate partly made up of money they had received from clients for investment. The bank did not set off the balance due on the current account against the indebtedness on the loan account, but sold the securities and discharged the debt.

Held, that the securities were deposited to secure the indebtedness of the stockbrokers to the bank, and that this indebtedness was the amount due on all their accounts. Consequently, the clients of the stockbrokers were not entitled to be repaid out of the balance on the current account money which had been paid by them to the stockbrokers for investment and paid by the stockbrokers into their current account.

Decision of Byrne, J. (*ante*, p. 62, [1899] 2 Ch. 556), reversed.—MUTTON *v.* PEAT, *C.A.*, 486; [1900] Ch. 79; 69 L. J. Ch. 484; 82 L. T. 440.

BANKRUPTCY:—

1. *Act of bankruptcy—Assignment of property for the benefit of creditors generally—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 4, *sub-section* (1) (*a*)—*Deeds of Arrangement Act*, 1887 (50 & 51 *Vict.* c. 57), *s.* 19.—Where the act of bankruptcy alleged in a petition is a deed of assignment for the benefit of creditors generally, a receiving order ought not to be made if the deed relied upon is for the benefit of trade creditors only. The expression "creditors generally" must be considered to mean "all creditors."—PHILLIPS, RE, BARTON, EX PARTE, *Bkcy*; [1900] 2 Q. B. 329; 69 L. J. Q. B. 604; 82 L. T. 691.

2. *Discharge—Suspending discharge—Bankrupt without means or prospects—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 51), *s.* 28—*Bankruptcy Act*, 1890 (53 & 54 *Vict.* c. 71), *s.* 8.—An order suspending a bankrupt's discharge until a dividend of 10s. in the pound has been paid, ought not to be made unless there is a reasonable prospect that some funds or property will be forthcoming, and will be available for payment of the debts of the bankrupt.—MARLEY *v.* MARLEY, *Q.B.D.*; 82 L. T. 692.

3. *Execution—Completion by seizure and sale—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 45—*Bankruptcy Act*, 1890 (53 & 54 *Vict.* c. 71), *s.* 11.—A creditor put in execution against a debtor, and withdrew from possession on receiving £40 in part payment of his debt and an undertaking to pay the remainder by instalments. A receiving order was made against the debtor before the remainder of the debt had been paid.

Held, that the creditor, not having completed the execution by seizure and sale, was not entitled to retain the £40 as against the trustee in the bankruptcy.—FORD, RE, OFFICIAL RECEIVER, EX PARTE, *Bkcy.*, 173; [1900] 1 Q. B. 264; 69 L. J. Q. B. 74; 81 L. T. 648.

4. *Execution creditor—Sheriff, sale by—Proceeds of sale—Landlord—Rent in arrear—Lien—Priority—Payment by sheriff—Indemnity—Title to proceeds of execution—Official receiver—Trustee—"Goods of a debtor"*—8 *Anne*, c. 14 (*c.* 18 *in Rev. Stat.*), *s.* 1—*Bankruptcy Act*, 1890 (53 & 54 *Vict.* c. 71), *s.* 11—*Appeal—Trustee in bankruptcy—Costs.*—Where under an execution the sheriff sells the goods of the judgment debtor, and subsequently, under section 11 of the Bankruptcy Act, 1890, receives from the official receiver notice of bankruptcy proceedings commenced against the debtor since the sale, together with a demand for payment of the proceeds of sale, he is entitled to retain out of the proceeds and pay the landlord of the premises on which the execution was levied any arrears of rent due to him from the debtor, not exceeding the amount of one year's rent, even though he, the sheriff, has not received notice of the landlord's claim until after the sale, and notwithstanding that the sale has deprived the landlord of the lien given him on the goods themselves by section 1 of 8 Anne, c. 14 (c. 18 in Revised Statutes).

The right of the landlord to be paid out of the proceeds of sale in the hands of the sheriff, where no bankruptcy intervenes—a right established by the practice uniformly adopted under the statute of Anne and recognized by judicial authority long before the present law of bankruptcy—is not affected by section 11 of the Bankruptcy Act, 1890. The expression "the goods of a debtor" in that section does not include the goods of a judgment debtor, which are by the statute of Anne impounded until the landlord is paid; nor are the

The defendant, Sarah Jenkins, borrowed from the claimant prior to the 29th of April, 1899, at various times sums of money amounting to £40. On that date it was agreed that the claimant should advance her a further sum of £50, and that she should give a bill of sale on her farm stock to secure the sum of £90; and a bill of sale was thereupon executed and the £50 advanced. In the bill of sale the consideration was stated to be "the sum of £90 now due and owing," and the grantor, who farmed the farm herself, was merely described as "Sarah Jenkins, of Ynysgwas Farm, in the county of Glamorganshire, married woman." In the schedule the farm stock was described as "two horses, four cows."

An execution having been levied by the plaintiff upon the goods comprised in the bill of sale, the claimant claimed the goods, and the bailiff interpleaded. The county court judge held the bill of sale to be good, and gave judgment for the claimant. The plaintiff appealed.

Held (following *Carpenter* v. *Deen*, 23 Q. B. D. 566, 38 W. R. Dig. 22), that the words "two horses, four cows," were not such a specific description of the farm stock as to satisfy section 4 of the Bills of Sale Act, 1882, and therefore they must be excluded from the schedule.

Held, also (*sed dubitante*), that the bill of sale was void, on the ground that the consideration was not truly stated, since the bill omitting to acknowledge the receipt of the £50 then advanced was not in accordance with the form prescribed by the Act.

Held, also, that the point raised as to the sufficiency of the description of the grantor's occupation must be decided in favour of the validity of the document — DAVIES *v.* JENKINS, *Q B D.*, 286; [1900] 1 Q. B. 133; 69 L. J. Q. B. 187; 81 L. T. 788.

2. *Consideration—True statement—Money "now paid"—Promissory note not yet due—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.—A bill of sale stated the consideration therefor to be a sum of money "now paid" by the grantee to the grantor. Of the money paid by the grantee to the grantor a part was, in pursuance of a previous agreement between them, applied by the grantor to the retirement of a promissory note then current upon which the grantor and grantee were jointly and severally liable to a third party.

Held, that as the liability, to the satisfaction of which the money was agreed to be applied, was a liability to a third person and not to the grantee, the fact that the liability was not a debt already due did not render it obligatory to set out in the bill of sale the agreement as to the application of the money, and that the consideration of the bill was not untruly stated.—WILTSHIRE, RE, EYNON, EX PARTE, *Bkcy.*, 256; [1900] 1 Q. B. 96; 69 L. J Q. B 145; 81 L. T. 616.

3 *Payment by instalments—Authority to sell mortgaged property—Sale before instalments were due—Interest subsequent to sale.*—Where repayment under a bill of sale was to be made by monthly instalments extending over a certain period, and where before the expiration of that period the mortgagee by agreement with the mortgagor sold the security, and deducted from the purchase-money the principal and interest due to him up to the end of the period.

Held, that the mortgagee could only claim the principal and the interest up to the date the security was realized.—WEST *v.* DIPROSE, *Ch.D. Cozens-Hardy, J.*, 389; [1900] 1 Ch. 337; 69 L. J. Ch. 169; 82 L. T. 20

4. *Registration—Validity—Affidavits—Description of grantor's occupation—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10 (2).—A married woman living apart from her husband was employed as manager of a dressmaking business at a weekly salary. In a bill of sale of which she was the grantor, and in the affidavit filed on registration, she was merely described as a married woman.

Held, that the registration was bad because her occupation was not described.—KEMBLE *v.* ADDISON. *Q.B.D.*, 331; [1900] 1 Q. B. 430; 69 L. J. Q. B. 299; 82 L. T. 91

5. *Statutory form—Time of payment—Validity—Deviation from statutory form—"Stipulated time of payment"—Covenant to pay "on or before" a named day—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9. —By a bill of sale, given as security for money, the grantor agreed to pay the principal "on or before" the 1st of November.

Held, that this amounted to an agreement to pay on a fixed day, with a provision for the defeasance of the security (at the option of the grantor) on payment at an earlier date, and that the bill of sale was, therefore, "in accordance with" the form given in the schedule to the Bills of Sale Act, 1882, and was valid.

The provision in the statutory form that there must be a "stipulated" time of payment means that the time at which payment is to become obligatory upon the grantor must be fixed.—DE BRAAM *v.* FORD. *C.A.*; [1900] 1 Ch. 142; 69 L. J. Ch. 82; 81 L. T. 568.

6. *Validity—Form—Covenant to produce last receipt for rents, rates, and taxes "when called upon" —Power to seize on breach of any covenant—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9.—A bill of sale contained a covenant by the grantor to produce "when called upon" his last receipts for rents, rates, and taxes, and a proviso giving power to seize and sell on breach of any covenant. It also contained the usual proviso that the chattels included under the bill of sale should not be liable to seizure for any other cause than those mentioned in section 7 of the Bills of Sale Act, 1882.

Held, that the covenant to produce "when called upon" must be read as subject to the importation, in the subsequent proviso, of section 7 of the Act, and that consequently the bill of sale contained no power of seizure for non-production of the receipts except without reasonable excuse after demand in writing, and that it was a valid bill of sale.—BULLOCK, RE, WARD, EX PARTE, *Q.B.D.*, 46; [1899] 2 Q. B. 517 81; L. T. 268.

BOND:—

*Bond to secure loan—Breach of condition—Interest from date of breach—Damages*—4 & 5 *Anne*, *c.* 16, *ss.* 12, 13—*Husband and wife—Loan to husband of wife's separate property—Statute of Limitations*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 5.—Interest is payable as interest, and not as damages, under a bond having a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, even though no express mention of interest is made in the bond. The fact that the bond is conditioned for payment of principal at, and of interest up to, a certain date does not preclude interest being payable subsequently to that date in accordance with the before-stated rule.

Acting within the provisons of a marriage settlement, the trustees of the settlement lent the trust fund in 1852 to the husband on the security of his bond, conditioned for repayment of the sum

advanced six months after date, with interest thereon at £4 per cent. This interest was payable under the trusts of the settlement to the wife for life, and to the husband for life after her death. Husband and wife lived together in perfect amity. The wife died in 1876, and the husband in 1896. The husband had never paid the sum secured by the bond, or any part thereof, and had never paid any interest on the same.

Held, that, under the circumstances, the hand to pay and the hand to receive the interest having been the same, no payment over was necessary; and that, therefore, the Statute of Limitations did not run, and the bond was still subsisting.

Held, also, that, having regard to all the circumstances of the case, the husband must be considered to have kept possession of the trust fund in the capacity of a *quasi*-trustee, and, that being so, the Statute of Limitations could not in any case have run in his favour.

Decision of Byrne, J. (*ante*, p. 71, [1899] 2 Ch. 561), affirmed.—DIXON RE, HEYNES *v.* DIXON, *C.A.*, 665; 69 L. J. Ch. 609.

**BREAD:—**

*Sale of, otherwise than by weight*—3 *Geo.* 4, *c.* 106, *s.* 4.—An inspector employed by the London County Council sent a man to purchase a loaf of bread at the respondent's shop. The man entered the shop and asked for a twopenny loaf, and was accordingly served by the respondent with a loaf for which he paid twopence. The loaf, before being handed to him, was not weighed by anyone in the shop in his presence, nor was any statement made to him as to its weight. On being weighed by the inspector, it was found to be 2¾oz. short of a 2lb. loaf. The loaf was similar in shape and appearance to loaves which are usually sold as 2lb. loaves.

Held, on a summons being taken out against the respondent under section 4 of the Bread Act of 1822, for selling bread otherwise than by weight, that it was no answer to the charge that the purchaser asked for a loaf of a specified value, and did not ask for a loaf of any particular weight.—LONDON COUNTY COUNCIL *v.* READ, *Q.B.D.*, 393; [1900] 1 Q. B. 288; 69 L. J. Q. B. 39; 81 L. T. 452.

**BURIAL.**—See Ecclesiastical Law, 2.

**BYE-LAW.**—See Local Government, 1, 10, 20; Market, 1.

**CANADA, LAW of:—**

1. *British Columbia—Cattle—Powers of provincial legislature*—Ultra vires—*British Columbian Cattle Protection Acts*, 1891, 1895 (54 *Vict.* c. 1; 58 *Vict.* c. 7).—The provision in the British Columbian Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is *ultra vires* of the provincial parliament.

*Canadian Pacific Railway Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A. C. 367, distinguished. — MADDEN *v.* NELSON AND FORT SHEPPARD RAILWAY CO, *P.C.*; [1899] A. C. 626; 81 L. T. 276.

2. *British Columbia—Corporation—Liability of—Accident to bridge under corporate control—Bye-law—British Columbia Municipal Act*, 1892 (55 *Vict.* c. 33). —The appellant corporation having, under 55 Vict. c. 33, *de facto* taken over the care and control of a certain bridge,

Held, that their acts with regard to it were *primâ facie* competent corporate acts. It would lie on the corporation to show clearly that any acts done by their officers under their direction were *ultra vires* and illegal, and that conclusion could not be reached merely by reason of their not having passed a bye-law under 55 Vict. c. 33 actually vesting the bridge in them.

In an action to recover damages from them for a fatal accident caused by the breaking down of the said bridge over which a tramcar containing the deceased was running,

Held, that the finding of the jury that an act done by their officer had materially weakened the beam which afterwards broke amply justified a verdict against them; and that the liability, if any, of the tram company for passing an extraordinarily heavy weight over it not having been before the jury, could not be raised in appeal.—VICTORIA CORPORATION *v.* PATTERSON, SAME *v.* LANG, *P.C.*; [1899] A. C. 615; 81 L. T. 270.

3. *British Columbia—Naturalization and aliens—Chinamen—Legislative power*—Ultra vires—*British North America Act*, 1867 (30 & 31 *Vict.* c. 3) *s.* 91, *sub-section* 25, *and s.* 92, *sub-sections* 10, 13—*British Columbia* "*Coal Mines Regulation Act*, 1890" (53 *Vict.* c. 33), *s.* 4.

Held, that section 4 of the British Columbian "Coal Mines Regulation Act, 1890," which prohibits Chinamen of full age from employment in underground coal workings, is in that respect *ultra vires* of the provincial legislature.

Regarded merely as a coal-working regulation, it would come within section 92, sub-section 10, or section 92, sub-section 13, of the British North America Act. But its exclusive application to Chinamen who are aliens or naturalized subjects establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by section 91, sub-section 25, in regard to "naturalization and aliens." — UNION COLLIERY CO. OF BRITISH COLUMBIA *v.* BRYDEN, *P.C.*; [1889] A. C. 580; 81 L. T. 277.

4. *Gas—Right to stop supply of gas generally—Canada Act* (12 *Vict.* c. 183), *s.* 20—*Construction—Gasworks Clauses* (*Imperial*) *Act*, 1847 (10 & 11 *Vict.* c. 15).—Held, that, by the true construction of section 20 of the Canada Act (12 Vict. c. 183), borrowed from the Gasworks Clauses Act, 1847 (Imperial Parliament), the appellant company is authorized to cease supplying the respondent with gas at any of his houses on his neglect to pay its bill for any one of them. There is nothing in the section to limit the authority of the company to the particular building in respect of which there has been default, and such a limitation cannot be implied.—MONTREAL GAS CO. *v.* CADIEUX, *P.C.*; [1899] A. C. 589; 81 L. T. 274.

5. *Insurance, life—Validity of life policy—Lawful holder—Civil Code of Lower Canada, art.* 2590.—In an action on a policy of life insurance,

Held, that the plaintiff was not a lawful holder. As "the protector of the deceased whenever he stood in need of protection," he had not an insurable interest in his life within the meaning of article 2590 of the Civil Code of Lower Canada.

Held, further, that a condition in the policy that the same should, on the lapse of a year or upwards during which premiums have been regularly paid, become incontestable is no answer to an objection founded on the terms of the Code.—ANCTIL *v.* MANUFACTURERS' LIFE INSURANCE CO., *P.C.*; [1899] A. C. 604; 68 L. J. P. C. 123; 81 L. T. 279.

6. *Lower Canada—Civil Code. art.* 1233 (1), (6), (7)—"*Commercial matters*"—"*Notice to produce*"—"*Commencement of proof in writing*"—*Stock Exchange*

— *Authority to broker.* — A person who gives authority to stockbrokers to do business for him on the Stock Exchange must be taken, in the absence of evidence to the contrary, to have employed them on the terms of the Stock Exchange, and therefore to have authorized the sale of his shares on failure to supply them with the requisite funds.

In an action by stockbrokers against their principal to recover the balance of their account in respect of sales and purchases of shares for private speculation on his account,

Held, (1) that such transactions were "commercial matters" within article 1233 of the Civil Code of Quebec, which the plaintiffs might prove by oral evidence given by themselves; (2) an admission by the defendant that he employed the plaintiffs as his stockbrokers, and that they bought and sold something for him, is a sufficient "commencement of proof in writing" under article 1233 (7) to let in oral evidence of the particulars; and (3) that article 1233 (6) authorizes reception of secondary evidence of bought and sold notes in possession of the adverse party without a notice to produce — FORGET *v.* BAXTER, *P.C.*; [1900] A. C. 467; 82 L. T. 510.

7. *Quebec—Advances—Purchase of land by husband in names of wife and daughter—Account by mandatory before action — Civil Procedure Code, s.* 6. — The appellant after his wife's death, sued the respondent, his daughter, to recover as creditor of herself and his wife's estate moneys which he alleged he had advanced to purchase properties in Quebec, to which the respondent was entitled either in her own right or under his wife's will.

Held, on the evidence, that he had failed to establish his claim.

*Quære*, if the advances made as his wife's mandatory were in the nature of gifts, whether gifts were valid by the Quebec law or by section 6 of the Code of Civil Procedure.—EDDY *v.* EDDY, *P.C.*; [1900] A. C. 299; 69 L. J. P. C. 58.

8. *Quebec—Intoxicating liquors—Canada Temperance Act,* 1864 (27 & 28 *Vict. c.* 13), *s.* 17—*Construction.*—There having been numerous convictions of the respondent, with accumulated penalties amounting to 1,400dols., for having on various occasions sold intoxicating liquor, and thereby committed offences under the Canada Temperance Act of 1864, a *certiorari* was granted in one case by the superior court, on the ground that by the true construction of section 17, which provides that two or more offences by the same party may be included in the same complaint, a penalty of 100dols. was sufficient for all offences under the Act during the limitation period of three months prescribed by section 15,

Held, that, in the absence of express words to that effect, section 17 must be construed as permissive merely, and not imperative.—WENTWORTH *v.* MATHIEU, *P.C.*; [1900] A. C. 212; 69 L. J. P. C. 11; 82 L. T. 161.

CAPE of GOOD HOPE, LAW of:—

*Act of State—Concessions granted before cession—Rights after annexation—Jurisdiction of municipal courts—Crown Liabilities Act,* 1888 (51 & 52 *Vict. No.* 37).—Held, that the appellants as grantees of concessions made by the paramount chief of Pondoland cannot, after the annexation of Pondoland by her Majesty, enforce against the Crown the privileges and rights conferred.

Annexation is an act of State, and any obligation assumed under a treaty to that effect, either to the ceding sovereign or to individuals, is not one which municipal courts are authorized to enforce.

The Crown Liabilities Act, 1888, permits such an action to be brought, but it does not empower the court to make a declaration of right.

*Secretary of State for India in Council* v. *Kamachee Boye Sahaba*, 13 Moo. P. C. 22, followed.—COOK *v.* SPRIGG, *P.C.*; [1899] A. C. 572; 81 L. T. 281.

CHARITY:—

1. *Charitable trust—Charitable foundation—Voluntary association—Inn of Chancery.*—By a deed of feoffment made in 1618 it was witnessed that the grantors having an intent that a capital messuage which had for many years by the allowance of the grantors been used and employed as an Inn of Chancery for the furtherance of the study and practice of the common laws of the realm of England and during that time had been well governed by the Principal and Rules, might be assured and settled as the same should for ever thereafter continue and be employed as an Inn of Chancery for the furtherance of the practisers and students of the common laws of the realm as aforesaid, and that the Principal, Rules, and other gentlemen of the society might from thenceforth be assured of a certain estate therein, did principally for that purpose, intent, and consideration, and in consideration of £600 paid by the Principal and Rules for and on behalf of themselves and the rest of the gentlemen of the society, grant, enfeoff, and confirm the capital messuage to trustees, and it was thereby agreed by and between the parties thereto that the true intent and meaning thereof was that the messuage should be continued and employed as an Inn of Chancery for the good of the gentlemen of the society and for the benefit of the commonwealth as aforesaid and not otherwise, nor to any other use, intent, or purpose. The society was a voluntary independent unincorporated society of lawyers and law students, governed by a council consisting of a Principal and members called Rules, which made its own regulations respecting the election or admission, rights, privileges, payments, obligations, and conduct of its members, and the management of its property, which could not be compelled to elect new members, and to which no person had a right to claim admission.

In an action by certain members of the society against the remaining members and the Attorney-General for the determination of the question whether the property so vested in trustees by the deed of 1618 was subject to a charitable trust or belonged absolutely to the members for the time being of the society,

Held, that the property was subject to a trust for charitable purposes.—SMITH *v.* KERR, *Ch.D. Cozens-Hardy, J.*; 82 L. T. 795.

2. *Highway—Repair of road—Road transferred to local authority—Failure of trust.*—The testator bequeathed £3,000 upon trust to build galleries in a church and to construct a causeway, and directed that £40 a year should be laid aside for the repairs of the galleries and the road as there should be occasion, and as the trustees should think fit, and gave the residue after these things were performed to other objects. An additional sum of £40 a year out of the funds was subsequently ordered by the Court of Chancery to be applied to the repairs of the road. The road had recently come under the control of a county council and a district council, so that the obligation to repair it rested on these bodies.

Held, that this circumstance did not put an end to the trust, and that so much of the £80 a year as was available for the repairs of the road ought to be paid to the councils.—ATTORNEY-GENERAL *v.*

DAY, *Ch.D. North, J.*; [1900] 1 Ch. 31; 69 L. J. Ch. 8; 81 L. T. 806.

3. *Unknown origin—Dispute as to objects—Letter of Charity Commissioners—Final determination—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 70 (2).—In consequence of disputes as to the proper objects of a charity and of an application made to them by the defendant, who was a trustee, the Charity Commissioners caused a local inquiry to be held, and subsequently wrote to the defendant stating their views on the matter. No appeal was brought against their decision.

Held, that the letter constituted a determination of the commissioners under section 70, sub-section 2, of the Local Government Act, 1894, and was conclusive upon the question.—ATTORNEY-GENERAL *v.* HUGHES, *Ch.D. Cozens-Hardy, J.*, 150; 81 L. T. 679.

4. *Will—Gift limited to old and worn-out clerks of firm—Amalgamation of firms.*—A gift to form a fund for the purpose of pensioning off the "old and worn-out clerks" of a firm is a good charitable bequest, and the court will direct a scheme for its administration.—GOSLING, RE, GOSLING *v.* SMITH, *Ch.D. Byrne, J.*, 300.

See also Common Lodging-House, 1, 2.

CLUB.—See Licensing Law, 7.

COMMON LODGING-HOUSE:—

1. *Charitable institution—House containing cubicles—Persons congregated together—Danger of spread of disease—Necessity for registration and inspection—Common Lodging Houses Act*, 1851 (14 & 15 *Vict. c.* 28), *s.* 7.—The respondent kept a house (containing, *inter alia*, 128 single-bedded cubicles) for the reception of male lodgers of the poorer class, each inmate being accommodated with the use of a single-bedded cubicle to sleep in and the use of certain common rooms, at a charge of from 6d. to 8d. a night. Drunken or disorderly persons, or persons suspected to be of the criminal class or verminous, were excluded; but, with these exceptions, the house was open to any male who paid the above charge. The house was not carried on by the respondent for profit, and efforts were made by him to find situations for any inmates and to befriend them in sickness. The majority of the usual inmates were of the class that frequented common lodging-houses, but some were of a better class.

Held, that the house was a common lodging-house within the meaning of the Common Lodging Houses Acts, 1851 and 1853, and that the respondent had been guilty of the offence of keeping a common lodging-house without having his name registered as the keeper thereof.

*Logsdon v. Booth, ante*, p. 266, [1900] 1 Q. B. 401, discussed.—LOGSDON *v.* TROTTER, *Q.B.D.*, 365; [1900] 1 Q. B. 617; 69 L. J. Q. B. 312; 82 L. T. 151.

2. *Charitable institution—Salvation Army shelter—Non-registration—Penalty for keeping—Common Lodging Houses Act*, 1851 (14 & 15 *Vict. c.* 28)—*Common Lodging Houses Act*, 1853 (16 & 17 *Vict. c.* 41), *s.* 3.—The respondent had opened and kept a lodging-house for men of the poorest class, known as a Salvation Army shelter, which, though not kept for the purpose of gain, was conducted upon business principles. The house was not registered, nor had it been inspected and approved by the local authority in accordance with section 3 of the Common Lodging Houses Act, 1853.

The facts as found in the case were substantially the same as those in *Booth* v. *Ferrett*, 38 W. R. 718, 25 Q. B. D. 87, and the magistrate held himself bound by that decision, and dismissed the summons against the respondent charging him with the offence of keeping an unregistered common lodging-house.

Held, that *Booth* v. *Ferrett* was wrongly decided, and that these shelters, being of a class of lodging-house in which persons of the poorer sort were received for short periods, and, although strangers to one another, were allowed to inhabit one common room, were common lodging-houses; and therefore the magistrate should have convicted the respondent.—LOGSDON *v.* BOOTH, *Q.B.D.*, 266; [1900] 1 Q. B. 401; 69 L. J. Q. B. 131; 81 L. T. 602.

COMPANY:—

1. "*Company acting in execution of public duties*"—*Company incorporated by Act of Parliament to manage pier and harbour—Paying a dividend out of profits—Commercial company—Limitation of action—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *Title*, *s.* 1 (a).—A company incorporated by private Act of Parliament for the purposes of completing and maintaining a pier and harbour, and empowered to raise money by rates and dues to be applied for those purposes, and also for the purpose of paying to the shareholders a yearly dividend limited in amount, is a commercial company, and is not a company acting in the execution of statutory or other public duties within the benefit of the Public Authorities Protection Act, 1893.

The *dictum* of Jeune, P., in *The Ydun*, [1899] P. 236, 47 W. R. Dig. 166, followed.—ATTORNEY-GENERAL *v.* MARGATE PIER AND HARBOUR COMMISSIONERS, *Ch.D. Kekewich, J.*, 518; [1900] 1 Ch. 749; 69 L. J. Ch. 331; 82 L. T. 448.

2. *Debentures—Floating security—Sale of part of the securities—Injunction.*—The holders of debentures in a company had a floating security over the property of the company, which consisted of a business carried on in three distinct branches. Power was reserved to the company in the trust deeds to sell the business carried on at one of the three branches, and to take shares in other similar companies.

Held, that the debenture-holders could not restrain the company from getting rid of one of the three businesses, as it was being done in good faith and for the benefit of the company.—METROPOLITAN BANK OF ENGLAND AND WALES *v.* VIVIAN & Co., *Ch.D. Cozens-Hardy, J.*, 636; 82 L. T. 674.

3. *Debentures — Winding up — Debenture-holder's action—Judgment—Transfer—Right of transferee to registration—Cross-claim by company against transferor—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 131.—Where debentures are issued subject to the condition that the principal and interest were to be paid without regard to any equities between the company and the original or any intermediate holder thereof, a transferee for value in good faith, after judgment in a debenture-holder's action, is entitled to payment of dividends in respect of his debentures, although the company had an equitable claim against the transferor. — GOY & Co., RE, FARMER *v.* GOY & Co., *Ch.D. Stirling, J.*, 425; [1900] 2 Ch. 149; 69 L. J. Ch. 481.

4. *Debenture-holders — Receiver — Debt due from French company—Unsecured creditor—Attachment of French debt—Contempt of court.*—Receivers were appointed in three actions by debenture-holders of all the property of an English company, the de-

fendants in the action. Among the assets of the company was a debt due from a French firm. After the date of the appointment of receivers, another English company, P. & Co., holding a dishonoured acceptance of the defendant company, took proceedings in France and according to French law to attach the debt due from the French firm. The plaintiffs in the debenture-holders' action moved to restrain P. & Co. from obtaining payment of this debt.

Held, that, although the debenture-holders had, according to English law, a charge upon all the assets of the company, including the French debt, yet there was no equity in favour of the debenture-holders as against P. & Co., and the debenture-holders could not restrain P. & Co. from asserting and enforcing their rights according to French law.

Held, further, that, though receivers had been appointed, the mere order of the court did not put the receivers in possession of the foreign property; something else had to be done, and until that had been done in accordance with foreign law, any person not a party to the suit who took proceedings in a foreign country was not guilty of contempt.—MAUDSLAY, RE, MAUDSLAY *v.* MAUDSLAY, *Ch.D. Cozens-Hardy, J.*, 568; [1900] 1 Ch. 602; 69 L. J. Ch. 347; 82 L. T. 378.

5. *Director—Contracts—Interest of director in contracts—Disclosure—Profits—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *Table A.*—The articles of association of a railway company provided for the vacation of his office by a director concerned in the profits of any contract with the company unless he declared in writing the nature of his interest, but that "no director shall vacate his office by reason of his being a member of any corporation, company, or partnership which has entered into contracts with, or done any work for, the company, or by reason of his being interested, either in his individual capacity or as a member of any company, corporation, or partnership in any adventure or undertaking in which the company may also have an interest."

The railway company sought to make the estate of a director liable for profits received by him by reason of contracts made with the company by a company and firm in which he was interested, but which interest he had not disclosed.

Held, following *Imperial Mercantile Credit Association* v. *Coleman*, 18 W. R. 570, L. R. 6 Ch. App. 558 (not overruled on this point in 21 W. R. 696, L. R. 6 H. L. Cas. 189), that the exception in the article applied, and that the action must be dismissed, there being no liability to account for profits received by reason of contracts made with the railway company.—COSTA RICA RAILWAY CO. v. FORWOOD, *Ch.D. Byrne, J.*, 553; [1900] 1 Ch. 756; 69 L. J. Ch. 408.

6. *Director—Dividends—Loss of capital*—Ultra vires—*Negligence—Fraud—Reliance of director on officers of company—Statements honestly made—Damage—Statute of Limitations.*—If the annual receipts of a company exceed the annual outgoings, dividends may be declared out of such excess of receipts, notwithstanding that there has been a loss of paid-up capital of the company. Even a limited banking company is not prohibited by law from paying dividends unless its paid-up capital is intact.

If a director make misstatements to his shareholders, he is liable for the consequences unless he can show that he made them honestly believing them to be true, and took such care to ascertain the truth as was reasonable at the time.

What constitutes reasonable care, and how far a director is justified in trusting his subordinates, are questions of degree in each case. The fact that if a director had made inquiries he might have discovered that he was being deceived is not in itself sufficient to prove that he did not act with reasonable care.

Articles of a company gave the company a lien on the shares of any shareholders who were indebted to the company. The directors were empowered to make advances to shareholders with or without security, but no advance was to be made to a director without security. Advances were made to directors, the only security being the lien on their shares conferred on the company by the articles.

Held, that, in point of law, the shares might be accepted as security if the board of directors considered them sufficient as regarded value.

A liquidator of a company, representing shareholders, is not debarred from recovering moneys which have been improperly paid by way of dividend by the fact that the claims of all creditors of the company have been satisfied.—NATIONAL BANK OF WALES, RE, CORY'S CASE, *C.A.*, 99; [1899] 2 Ch. 629; 81 L. T. 363.

7. *Director—Remuneration—Yearly payment—Apportionment.*—The articles of association of the defendant company provided that "The directors shall be paid out of the funds of the company, by way of remuneration for their services, and exclusive of travelling expenses, the sum of £125 per annum, per director, and such further sums as shall from time to time be determined by the company in general meeting, and the same shall be divided among them in such proportion and manner as the directors by agreement may determine, and in default of such determination, equally. The said sum of £125 per annum may be increased, but not diminished, by the company in general meeting."

Held, that a director could not recover in respect of his services as director for any period less than a completed year.—INMAN *v.* ACKROYD, *Q.B.D.*; 82 L. T. 621.

8. *Director—Wrongful allotment of shares—Measure of damages.*—Allotments of shares were made *ultra vires* to directors or their nominees.

Held, that the measure of damages was the value of the shares at the date when the shares were allotted to the directors.—SHAW *v.* HOLLAND, *C.A.*, 680; [1900] 2 Ch. 305; 69 L. J. Ch. 621; 82 L. T. 782.

9. *General meeting—Conditional notice—Validity of notice.*—The articles of association of a company required thirty days' notice of every general meeting. On the 19th of February the company issued a notice of an extraordinary general meeting for the 23rd of March following, at which a resolution for reduction of capital was to be proposed. In the same document the company also gave notice of an extraordinary general meeting for the 7th of April, at which the said resolution, if passed at the first meeting, should be confirmed. The notice then continued: "Should the said resolution not be passed by the requisite majority at the meeting to be held on the 23rd of March, due notice will be given to the shareholders that the meeting on the 7th of April, of which notice is now given, will not be held."

Held, that the notice convening the second meeting was valid.—ESPUELA LAND AND CATTLE CO., RE, *Ch.D. Byrne, J.*, 684.

10. *Memorandum—Alteration of memorandum—*

*No capital—Jurisdiction—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-section* 1—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1, *sub-section* 1.—The High Court has jurisdiction to sanction an alteration in the memorandum of association of a registered company with unlimited liability, because it has also jurisdiction to wind it up.—NORTH OF ENGLAND IRON STEAMSHIP ASSOCIATION, RE, *Ch.D. Cozens-Hardy, J.*, 604; [1900] 1 Ch. 481; 69 L. J. Ch. 211; 82 L. T. 598.

11. *Memorandum of association—Alteration of—Objects—Reconstruction—Rights of dissentient shareholders—No opposition—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 51—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.—The memorandum of association of a limited company stated its objects to be: (*a*) To purchase a certain steamship, the building of which had already been contracted for; (*b*) on the sale or loss of that steamship, or other the steamship for the time being, to acquire any other steamship, but there shall only be built one steamship at the same time; (*c*) to employ the steamship in or for any trade or work of any kind; (*d*) to carry on the business of steamship owners, with power to sell, let, charter, or otherwise dispose of the steamship; (*e*) to do all such other things as may be incidental to the attainment of the above objects.

Shortly after its incorporation the company purchased the steamship referred to and carried on business until 1898, when the steamship was totally lost, and thereupon the company had a new steamship built.

In 1899, by special resolution, the company resolved that for (*a*), (*b*), (*c*), (*d*), and (*e*) of the memorandum of association there be substituted: (*a*) To acquire by purchase, exchange, or otherwise, steamships, vessels, lighters, or other seagoing craft, or any shares or share as such, with power to sell, let, charter, or otherwise dispose of the property, and to carry on as a joint-stock company limited the management, working, and using of such property, and to do all such other things as may be found expedient in connection therewith; (*b*) to pay for any purchase of the company by cash, paid-up shares, bills, debentures, or other consideration, and to draw, accept, and negotiate bills or other documents, and to borrow or raise money on security of any of the property of the company; and (*c*) to contract for the rendering of salvage or towage services; and presented a petition under the Companies (Memorandum of Association) Act, 1890, for the confirmation by the court of the special resolution. There were no debenture-holders; the only creditor consented; and there was evidence that the proposed extension of the objects of the company was necessary to enable it to carry on its business more efficiently.

Held, that the court had jurisdiction under the Companies (Memorandum of Association) Act, 1890, to confirm the proposed alteration; and although, having regard to its extensive nature, it would be more properly effected by a reconstruction under the Companies Act, 1862, yet, as there was no opposing shareholder, the only creditor consented, no one was prejudiced, and the heavy expense of reconstruction would be avoided, the court made the order asked for.—BERNICIA STEAMSHIP CO., RE, *Ch.D. Cozens-Hardy, J.*; 69 L. J. Ch. 194; 81 L. T. 816.

12. *Promoters—Directors—Sale by promoters to company—No independent board—Duties of directors—Validity of contract—Breach of trust—Misrepresentation—Voidable contract—Rescission—Change of position.*—There is no obligation on promoters of an intended company to furnish the company with an independent board of directors, if the truth is disclosed to the persons who are induced to join the company. Consequently, if a company is avowedly formed with a board of directors who are not independent, but who are stated to be the intended vendors, or agents of the intended vendors, of property to the company, the company cannot set aside an agreement entered into by the directors for the purchase of such property simply because they are not an independent board.

In the absence of fraud, the right to rescind such a contract on the ground of misrepresentations contained in the prospectus of the company cannot be enforced where the property has been worked so as to materially alter the position of the parties.

Directors who act within their powers and honestly for the benefit of the company, and with reasonable care, discharge both their legal and equitable duties to the company. The fact that they are both promoters and directors will not necessarily be held to prove that it was impossible for them to discharge their duties to the company, at any rate in a case where there was full disclosure of their position.

A syndicate formed a company to buy certain property of the syndicate. The directors of the company were the directors of the syndicate, and before a prospectus was issued they entered into an agreement with the syndicate to buy the property. A prospectus was subsequently issued, which disclosed the fact that the directors were vendors, but contained misrepresentations of fact. The company bought and worked the property. Subsequently fresh directors were appointed, and they commenced an action against the syndicate for misrepresentation. The company continued to work the property after the action had commenced.

Held, by Lindley, M.R., and Collins, L.J. (Rigby, L.J., *dissentiente*), that the company were not entitled to rescission merely on the ground that the contract had been entered into without independent advice, and that the working of the property by the company had so altered the position of the parties as to deprive the company of its right to rescission on the ground of misrepresentations contained in the prospectus. The directors of the company, having acted *intra vires* and with reasonable care and honesty for the benefit of the company, were not liable to make good any loss the company might have sustained through entering into the agreement with the syndicate.—LAGUNAS NITRATE CO. *v.* LAGUNAS NITRATE SYNDICATE, *C.A.*, 74; [1899] 2 Ch. 392; 81 L. T. 334.

13. *Promoters—Secret profit—Liability to account.*—A limited company was being wound up, and part of its property consisted of land and buildings used for exhibitions, which were subject to debentures for £100,000, and a mortgage for £10 000, the incumbrances exceeding the value of the property. A "syndicate" was formed to buy the land and buildings with a view to a resale. The appellant was a member of the syndicate, and was also one of four "trustees" with power to do whatever was necessary for the purchase and resale, and to purchase as an *interim* investment debentures of the old company, and the four trustees agreed to become directors of a new company if formed. They bought up the debentures and the mortgage at a price much below the amount which they realized, and thus made a profit of £20,000. The syndicate

bought the property for £140,000, and resold it to a new company, of which the four trustees were directors, for £180,000. The prospectus stated that "profits made by the syndicate from *interim* investments were excluded from the sale to the company."

Held (affirming the judgment of the Court of Appeal reported as *In re Olympia*, [1898] 2 Ch. 153, 46 W. R. Dig. 32), that there was no sufficient disclosure of the profit made on the debentures, and that the four directors were liable to replace their share of the £20,000 as a secret profit for which they were jointly and severally liable.—GLUCKSTEIN *v.* BARNES, *H.L.*; [1900] A. C. 240; 69 L. J. Ch. 385; 82 L. T. 393.

14. *Prospectus — Misrepresentation — Misleading statement—"Untrue statement"—Director—Promoter—Shareholder — Contract — Rescission — Damages — Compensation—Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3, *sub-section* 1—*Contract by company, directors, or promoters—Omission from prospectus—Concealment — "Fraudulent" prospectus — Waiver clause in prospectus or application form—Catching conditions—Notice—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.—A misleading statement in a prospectus is an "untrue statement" within section 3, sub-section 1, of the Directors' Liability Act, 1890. The liability imposed by that section for any untrue statement in a prospectus is absolute and is in no way affected by the consideration whether the statement was untrue in the sense in which it was used by those who issued the prospectus. Persons issuing a prospectus containing an untrue statement can only escape liability under the statute by proving that they had "reasonable ground" for believing the statement to be true in fact.

Section 38 of the Companies Act, 1867—which enacts that every prospectus shall specify the dates and names of the parties to any contract entered into by the company or the promoters, directors or trustees thereof, and that any prospectus not specifying the same shall be deemed "fraudulent" on the part of the promoters, directors and officers of the company knowingly issuing the same—cannot be evaded by a general waiver clause in the prospectus, or in a form of application for shares, to the effect that a subscriber for shares shall waive all claim for non-compliance with the section. A waiver clause, to be effectual as against a subscriber must fairly disclose the circumstances which confer the rights which by the clause he agrees not to enforce.

The court will refuse to give effect, as against a shareholder, to a "tricky" waiver clause in a prospectus or application form, upon the same principles as are applicable to catching conditions of sale as between vendor and purchaser or to general words in releases.

Judgment of Kekewich, J. (47 W. R. Dig. 33), affirmed.—GREENWOOD *v.* LEATHER SHOD WHEEL Co., *C.A.*; [1900] 1 Ch. 421; 69 L. J. Ch. 131; 81 L. T. 595.

15. *Quorum—Articles of association.*—The articles of association of a company provided (38) that the number of members of the council of administration (which was invested with power to conduct the affairs of the company) should not be less than three; (42) that the continuing council might act notwithstanding any vacancy; and (53) that the council might determine the quorum necessary for the transaction of business.

The number of members of the council became reduced to two. It was alleged that the council had passed a resolution fixing the quorum at three.

Held, that even if the resolution had been passed, a security given by the two members of the council in favour of persons who had no knowledge or notice of the irregularity was valid.

*Kirk* v. *Bell*, 16 Q. B. 290, distinguished.—BANK OF SYRIA, RE, OWEN AND ASHWORTH'S CLAIM, WHITWORTH'S CLAIM, *Ch.D. Wright, J.*; [1900] 2 Ch. 272; 69 L. J. Ch. 412.

16. *Reconstruction—Filing of reconstruction agreement—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—An agreement effecting the reconstruction of a company, by which it is provided that, in consideration of the transfer of the assets of the old company, the liquidator of the old company should be entitled to have allotted to him or his nominees 200,000 10s. shares of the new company, on which 7s. 6d. was to be deemed paid up, on applying within two months from the date of the agreement and making a small additional payment, was filed with the Registrar of Joint-Stock Companies. Application was made for 6,500 of these 200,000 shares under such option.

Held, that, by the filing of the reconstruction agreement, section 25 of the Companies Act, 1867, had been sufficiently complied with.

*Elsner and Macarthur's case*, 44 W. R. 361, [1895] 2 Ch. 759, followed.—TRANSVAAL EXPLORING Co. *v.* ALBION GOLD MINES, *Ch.D. Byrne, J.*, 108; [1899] 2 Ch. 370.

17. *Reconstruction scheme—Sanction of court—Underwriting agreements—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161—*Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104).—A company having passed special resolutions for a voluntary winding up and the adoption of a scheme of arrangement with their debenture-holders, the scheme was assented to by the statutory majority of the debenture-holders as provided by the Joint Stock Companies Arrangement Act, 1870.

The scheme provided (*inter alia*) that a new company should be formed, and that the liquidator should enter into an agreement with that company for the transfer to it of the undertaking and assets of the old company; that the new company should issue debenture stock to the debenture-holders of the old company in satisfaction of their debentures; that every shareholder in the old company should be entitled to claim a share in the new company in respect of each share held by him in the old company; that the new company should not be bound to allot any share unless the member entitled thereto should, within three weeks of the sanction of the scheme by the court, claim his allotment and make a specified payment on account of the liability thereon; and that as regarded unclaimed shares the liquidator should use his best endeavours to sell the same, and should divide the net proceeds of sale rateably among the non-claiming members of the old company. Subject to the provisions of the scheme, the new company was to take over and discharge all the liabilities of the old company and to indemnify the old company.

Among the special resolutions passed by the shareholders of the old company was one which authorized the directors and the liquidator or either of them to "procure underwriting for all or any of the capital of the new company, on such terms and conditions as they or he may approve, and to pay for the same out of the assets of the company."

In pursuance of this resolution the liquidator entered into two agreements with persons who agreed to apply for and take up all the shares in the new company which should not be taken up by

the shareholders in the old company, in consideration of a commission of 3d. per share on all the shares of the new company, 250,000 in number.

No shareholder of the old company had given a notice under section 161 of the Companies Act, 1862, requiring the liquidator to purchase his shares.

Upon a petition under the Joint Stock Companies Arrangement Act, 1870, for the sanction of the court to the scheme,

Held, by Cozens-Hardy, J., that the underwriting agreements were illegal, and that the court ought not to sanction the scheme.

The Court of Appeal sanctioned the scheme on the undertaking of the liquidator (1) to pay the unsecured creditors of the old company in full out of the assets in his hands; (2) not to act upon the resolution as to underwriting, and to procure the cancellation of the underwriting agreements, and (3) that three shareholders of the old company who opposed the scheme should, if they elected within three days to dissent from the special resolutions passed by the company, be entitled to all the statutory rights of dissentient shareholders under sections 161 and 162 of the Companies Act, 1862.—CANNING JARRAH TIMBER CO., RE, *C.A.*; [1900] 1 Ch. 708; 69 L. J. Ch. 416; 82 L. T. 409.

18. *Reconstruction scheme—Validity—Limited time for application for shares by old shareholders—Shares at the disposal of new company—Application after the limited time—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.—A scheme for liquidation and reconstruction of a limited company, which provides, as part of the consideration for the sale of the assets, for the issue to members of the old company of shares in the new company, but also provides that to obtain the shares members must apply within a limited time (*e.g.*, twenty-one days) after receiving notice, that shares not applied for within that time shall be otherwise allotted, and generally that all the shares shall be at the disposal of the new company, is authorized by section 161 of the Companies Act, 1862. A member of the old company, therefore, who, having by accident omitted to make an application in due time, applies for shares after the limited period has expired, and is refused an allotment, is not entitled to an injunction to restrain the two companies and the liquidator from carrying out such a scheme without providing for the claim of such member.

Decision of Kekewich, J., reversed.

*Dicta* of Lord Esher, M.R., in *Nicholl* v. *Eberhardt Co.*, 61 L. T. Rep. 489, 38 W. R. Dig. 46, dissented from.—BURDETT-COUTTS *v.* TRUE BLUE (HANNAN'S) GOLD MINE, *C.A.* 1; [1899] 2 Ch. 616; 81 L. T. 29.

19. *Shares—Deceased member—Notices—Calls—Special resolutions—Forfeiture—Fully paid-up shares—Vendor's shares—Company's lien.*—Notices addressed to a member at his registered place of address in the books of a company are not invalidated by the fact that the company was aware, at the time the notices were sent out, that such member was dead, so long as his executors have not been registered as the holders of the shares of such member. A limited company formed with articles which confer no lien on fully paid-up shares has, under the Companies Act, 1862, s. 50, power to alter the articles so as to impose a lien and restrictions on the transfer of those shares by members indebted to the company, and such lien and restriction can be imposed in respect of debts contracted before and existing at the time of the alteration of the articles, as well as in respect of debts subsequently contracted.

In the absence of a special bargain, there is no distinction between fully-paid shares allotted to the vendor by the company and any other fully-paid shares; and, consequently, the altered articles apply to vendor's shares.

Order of Kekewich, J. (47 W. R. 568, [1899] 2 Ch. 40), varied.—ALLEN *v.* GOLD REEFS OF WEST AFRICA, *C.A.*, 452; [1900] 1 Ch. 656; 69 L. J. Q. B. 266; 82 L. T. 210.

20. *Shares—Forfeited shares—Past member—Reduction of capital—Special resolution—Irregularity—Order of court confirming resolution—Certificate of registration of order—Companies Act*, 1862, *ss.* 38, 51—*Companies Act*, 1867, *ss.* 9, 11, 15, 16.—It was provided by the articles of association of a company that any member whose shares had become forfeited should nevertheless be liable to pay all calls owing at the time of forfeiture. The defendant's shares were forfeited, and more than a year afterwards the company went into liquidation, and an action to recover the amount of unpaid calls due at the time of forfeiture was brought against the defendant.

Held, that notwithstanding the provisions of section 38 of the Companies Act, 1862, the defendant was liable, not as a contributory, but as a debtor to the company.

Where the resolution to confirm a previous resolution for the reduction of capital did not comply with section 51 of the Companies Act, 1862—there not being an interval of fourteen days between the passing of the two resolutions—but an order of court had been made under section 11 of the Companies Act, 1867, in accordance with the resolutions, and the Registrar of Joint-Stock Companies had certified the registration of the order of the court under section 15 of that Act,

Held, that the certificate was conclusive that the resolutions for the reduction of capital had been duly passed.—LADIES' DRESS ASSOCIATION *v.* PULBROOK, *C.A.*; [1900] 2 Q. B. 376; 69 L. J. Q. B. 705.

21. *Shares—Fully paid up—Certificate of incorporation—Contract—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.—The certificate of incorporation of a company was dated the 9th of August, 1870. A contract under which the vendor to the company was to receive a certain number of fully-paid shares was signed on the 21st of October and registered on the 27th of October, 1870. The vendor had subscribed for the same number of shares in the memorandum of association. It was held in the case of *Dalton Time Lock Co.* v. *Dalton*, 66 L. T. Rep. 704, 40 W. R. Dig. 40, that the certificate of incorporation operated as the issue of the shares signed for in the memorandum of association.

Held, that, in the special circumstances of the case, relief would be granted to the personal representative of the vendor; and the court ordered the company to file a memorandum, which should operate as a sufficient contract in writing within the meaning of section 25 of the Companies Act, 1867, and as if it had been duly filed at or before the issue of the shares.—WHITEHEAD BROTHERS, RE, *Ch.D. Cozens-Hardy, J.*, 585; [1900] 1 Ch. 804; 69 L. J. Ch. 607; 82 L. T. 670.

22. *Shares—Fully paid—Contract—Companies Act*, 1867, *s.* 25.—On the 6th of December, 1894, a written agreement was made between a syndicate and H., as trustee for an intended company, whereby it was agreed that the vendors should sell, and the company should purchase, a property called Millwood, in the Cape Colony, which was fully described, and that as consideration for the

sale H., as the trustee for the intended company, should on or before the 15th of December allot to the vendors, or as they might direct, 22,500 fully-paid shares of 10s. each in the intended company, and should also allot to the vendors, or as they might direct, 277,493 shares of 10s. each in the intended company upon each of which 8s. should be deemed to have been paid. This agreement was never filed with the Registrar of Joint-Stock Companies. The company was registered on the 6th of December, 1894, and on the 11th of December the directors resolved to adopt the agreement. On the 12th of December an agreement in writing was made between the syndicate (called the vendors) and the company which provided that the company would forthwith allot to the vendors, or their nominee or nominees, 22,500 fully-paid shares of 10s. each in the company, and should allot to the vendors, or as they might direct, 277,493 shares of 10s. each in the company upon each of which 8s. should be deemed to have been paid "as mentioned in an agreement dated the 6th of December, 1894. In consideration of the allotment of such shares as aforesaid the vendors will forthwith thereafter give to the company possession of the premises more particularly mentioned in the said agreement. In all other respects the said agreement is hereby confirmed." On the 19th of December, 1894, another agreement in writing was made between the company and the syndicate, which provided that, in consideration of the syndicate agreeing to give the company immediate possession of "the lands and premises situate in the mining district of Millwood, in the Cape Colony, more particularly mentioned and referred to in an agreement dated the 6th of December, 1894, made between the syndicate and H., as trustee for the company," the company should forthwith allot to the syndicate, or to their nominee or nominees, 22,500 fully-paid shares of 10s. each in the company, and for all purposes the said shares should be deemed fully-paid shares in the company. The syndicate should, with all possible expedition, procure the lands and premises to become vested in the company free from all incumbrances. Both the contracts of the 12th of December and the 19th of December were filed with the Registrar of Joint-Stock Companies—the first on the 13th of December and the second on the 28th of December. On the 2nd of January, 1895, 1,406 shares of 10s. each were allotted and issued as fully paid to Markham and Darter respectively as nominees of the syndicate. The company being in liquidation,

Held, that the filed contract of the 19th of December was a sufficient compliance with the requirements of section 25 of the Companies Act, 1867, or that at any rate the two contracts of the 12th of December and the 19th of December were sufficient.

Decision of Wright, J. (47 W. R. 509, [1899] 1 Ch. 414), affirmed.—AFRICAN GOLD CONCESSIONS Co., RE, MARKHAM AND DARTER'S CASE, *C.A.*; [1899] 2 Ch. 480; 68 L. J. Ch. 724; 81 L. T. 145.

23. *Shares—Issue of fully-paid shares—Registered contract—Statement of mode of payment otherwise than in cash—Sufficient statement of consideration—Property purchased described merely by reference to prior contract—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—Where the contract registered under section 25 of the Companies Act, 1867, on the issue of fully paid-up shares, merely described (by way of recital of a prior contract entered into between the vendor and a trustee for the company) the property sold as "certain leasehold messuages, shops, and premises, together with the goodwill of the several businesses carried on by the vendor upon the same, together with the machinery, plant, horses, vans, carts, fixtures, and fittings used in connection with the said several businesses."

Held, that the contract sufficiently complied with the requirements of the section.

Judgment of Romer, J. (47 W. R. 27), affirmed.

*In re Maynards (Limited)*, 46 W. R. 346, [1898] 1 Ch. 515, overruled.—FROST & Co., RE, *C.A.*, 39; [1899] 2 Ch. 207; 68 L. J. Ch. 544; 80 L. T. 849.

24. *Shares—Partly paid-up shares—Sufficiency of filed contract—Statement of nature of consideration—Character of transaction—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).—A mere recital in a contract filed under section 25 of the Companies Act, 1867, stating that, by an unfiled contract, "the vendors agreed to sell and the company to purchase the property in the agreement now in recital mentioned for the consideration and on the terms and conditions therein expressed and contained," is not a sufficient statement of the consideration.

The filed contract must at least state generally the nature of the consideration, and not merely set forth the character of the transaction.

*In re S. Frost & Co. (Limited)*, 47 W. R. 27, [1898] 2 Ch. 556, on appeal *ante*, p. 39, [1899] 2 Ch. 207, commented on.—WATSON (ROBERT) & Co., RE, *Ch.D. Kekewich, J.*, 40; [1899] 2 Ch. 509; 81 L. T. 85.

25. *Shares—Registered contract—Shares subscribed for in memorandum—Sale to company for similar number of shares—Identity of shares—Relief—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.—A company was formed to take over the business of D., and it was agreed that D. should sell the business to the company for 4,069 fully-paid shares. On the formation of the company D. signed the memorandum of association for 4,069 shares. Subsequently a contract setting out the terms of the sale to the company was duly filed in accordance with section 25 of the Companies Act, 1867. There was evidence that the shares for which D. signed the memorandum were considered by all parties to be the same as those issuable to him under the contract.

Held, on a motion under the Companies Act, 1898, s. 1, for an order for filing a fresh contract, that the court had no power to grant the relief.

*In re Jarvis & Co. (Limited)*, 47 W. R. 186, [1899] 1 Ch. 193, followed.—DAWNAY, RE, *Ch.D. Kekewich, J.*, 600.

26. *Shares—Share certificate—Duty of director—Putting to rest—Estoppel—Conduct—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 31.—The duty of examining and checking share certificates issued by a company may as a rule be properly left to the secretary. In that case a director is not estopped from denying the accuracy of a certificate passed at a board meeting at which he is present.

Whether the same rule applies to a director who signs the certificate, *quære*.

A certificate, though inaccurate, estops the company from denying its accuracy against any person relying on it, including (unless it is based on a forged transfer lodged by him) the person to whom it is issued, and that person, if put to rest by the certificate, so as to lose his remedy against his broker or transferor, is entitled to damages against the company.

The onus of proving that there is no present effective remedy against the broker or transferor lies on the person put to rest by the certificate; the

onus of proving that there was no effective remedy at the date of the certificate lies on the company.

*Knights* v. *Wiffen*, L. R. 5 Q. B. 660, 665, and *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396, followed and applied.

*Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D. 188, distinguished.—DIXON *v.* KENNAWAY & Co., *Ch.D. Farwell, J.*; [1900] 1 Ch. 833; 69 L. J. Ch. 501; 82 L. T. 527.

27. *Shares—Subscribers to memorandum of association—Liability on shares—Payments on allotment—Special bargain—Directors—Breach of duty.*—Subscribers to a memorandum of association of a company limited by shares are only liable by virtue of their subscription to pay up the amount of their shares as and when called up.

It follows that, in the absence of any special agreement or article requiring a subscriber of a memorandum of association to make some payment on subscription or allotment, nothing is payable by him as a subscriber in respect of his shares until calls are made on them.

Where, however, directors who were subscribers to the memorandum of association of a company allotted to themselves the shares set opposite their names in the memorandum without payment on allotment, but required payment on allotment from other shareholders, and then proceeded to make a further call on the shares without paying the allotment money on their own shares,

Held, that, as the other shareholders had not known or sanctioned the directors obtaining the advantage of deferring their own contributions to the company at the expense of the other shareholders, there was a distinct breach of duty on the part of the directors, and that they were bound to pay up the allotment moneys in the same manner as the other shareholders.

Decision of Cozens-Hardy, J., [1899] 2 Ch. 302, reversed.—ALEXANDER *v.* AUTOMATIC TELEPHONE Co., *C.A.*, 546; [1900] 2 Ch. 56; 69 L. J. Ch. 428; 82 L. T. 400.

28. *Winding up—Contributory—Action for payment of calls—Summons for leave to enter final judgment—Affidavit—Leave to defend—Misrepresentation—Rescission—Proceedings taken before commencement of winding up.*—A shareholder who, in an action for calls brought against him by a company, obtains leave to defend an application to enter final judgment under order 14 on an affidavit which sets up misrepresentation as a ground of defence, and states that he intends to counterclaim for rescission, has done all that can reasonably be expected in the way of commencing legal proceedings to establish his right to repudiate his shares.

He is not made, therefore, too late for relief owing to a petition for the winding up of the company being presented before delivery of his defence and counterclaim.—GENERAL RAILWAY SYNDICATE, RE, WHITELEY'S CASE, *C.A.*, 440; [1900] 1 Ch. 365; 69 L. J. Ch. 250; 82 L. T. 134.

29. *Winding up—Costs—Practice—Instructions for brief—Trial of issue of fact before judge—Originating summons—R.S.C.*, 1883, *ord.* 71, *r.* 1*a*; *Appendix N, items* 81, 82, 82*a*.—A petition was presented for the compulsory winding up of a company which was already in voluntary winding up; but at the hearing the judge made no order except that the question was to be tried as on a summons under section 138 of the Companies Act, 1862, "costs reserved"; he also fixed a certain date for the trial. On that date witnesses were examined, and the judge decided substantially in favour of the applicant with costs. No summons had so far been taken out, and on drawing up the order the registrar required a summons to be taken out in the voluntary winding up. As an originating summons had previously been taken out by the liquidator for a private examination under section 115 of the Act of 1862, on which an order had been made for an examination and reserving "liberty to apply," the registrar directed that the summons to be taken out and mentioned in the order was to be an ordinary and not an originating summons. On taxation the registrar disallowed the costs of instructions for brief.

Held, that as the direction for trial treated the summons as issued in a "pending cause or matter," within the meaning of R. S. C., 1883, ord. 71, r. 1*a*, the summons was not an originating summons; that although, if Appendix N to the rules, item 81, was construed strictly, it referred to an issue of fact directed to be tried as such, yet on taxation substance was to be regarded, and in substance the trial was of an issue of fact before a judge; and that the costs of instructions for the brief of the applicant's counsel must be allowed.—CONSOLIDATED EXPLORATION AND FINANCE Co., RE, *Ch.D. Wright, J.*; [1899] 2 Ch. 599; 81 L. T. 522.

30. *Winding up—Creditor—Director—Fees—Apportionment.*—The fact that a creditor of a company is also a contributory entitles him to make an application under section 138 of the Companies Act, 1862, in respect of a claim in which he is concerned only as creditor.

Where the articles of association provided that "the directors shall be paid out of the funds of the company as follows—namely, a sum of £100 per annum to each ordinary director by way of remuneration for their ordinary services,"

Held, that the fees were for a whole year's services, and were not apportionable.—CENTRAL DE KAAP GOLD MINES, RE, *Ch.D. Wright, J.*; 69 L. J. Ch. 18.

31. *Winding up—Creditor's petition—Right of creditor to winding-up order for his own benefit only.*—When a company is insolvent and has no assets distributable amongst its creditors generally other than debenture-holders, an unpaid creditor of the company is not entitled to a compulsory winding-up order which would benefit himself only, but which would not benefit the general body of creditors.—GREENWOOD & Co., RE, *Q.B.D.*, 607; [1900] 2 Q. B. 306; 69 L. J. Q. B. 751; 82 L. T. 843.

32. *Winding up—Debentures—Receiver—Agency—Jurisdiction.*—Where debentures by way of mortgage over the whole property of a company give power to the debenture-holders to appoint a receiver without stating that he is the agent of the company or what he is to do with any surplus which may come into his hands after paying the debenture-holders, such receiver is the agent of the debenture-holders only, and not of the company.

The liquidator of a company cannot by summons in the winding up obtain an order to make a receiver of it account for any surplus in his hands, as the court has no jurisdiction to consider the matter. If he wishes to enforce such a claim, he must bring an action against the receiver in the ordinary way.—VIMBOS, RE, *Ch.D. Cozens-Hardy, J.*, 520; [1900] 1 Ch. 470; 69 L. J. Ch. 209; 82 L. T. 597.

33. *Winding up—Discovery of documents—Income tax returns—Misfeasance summons—Public department—Discretion of judge—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 115.—Section 115 of the

Companies Act, 1862, gives a discretion to the judge which will not be interfered with *primâ facie* by the Court of Appeal.

Accordingly the judge of first instance having in his discretion refused an application by the liquidator of a company for production of certain balance-sheets of the company, which had been deposited with the district surveyor of taxes for the purpose of income tax returns, on an affidavit by the secretary of the Board of Inland Revenue that in the opinion of the board such production was injurious to the public interest,

Held, that this decision would not be reviewed by the Court of Appeal.—HARGREAVES, RE, *C.A.*, 241; [1900] 1 Ch. 347; 69 L. J. Ch. 183; 82 L. T. 132.

34. *Winding up — Fraudulent preference — Discharging legal obligation—Payment to satisfy conscience—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.—If a company make a preferential payment to a creditor within three months of winding up (which by section 164 of the Companies Act, 1862, is equivalent to an act of bankruptcy), not from a sense of legal obligation, but from a sense of moral obligation, such payment is a fraudulent preference. —BLACKBURN, RE, BUCKLEY'S CASE, *Ch.D. Wright, J.*, 186; [1899] 2 Ch. 725; 81 L. T. 520.

35. *Winding up —Jurisdiction—Compulsorily or voluntary—Shareholder's petition — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79 (5), 129 (3), 145—*Directors' meeting—Formalities.*—An order to wind up a company compulsorily will be made on the petition of a paid-up shareholder notwithstanding the fact that an extraordinary resolution to wind up voluntarily has been passed under section 129 (3) of the Companies Act, 1862.

After a committee of investigation had reported in favour of proceedings for misfeasance being taken against the directors, an extraordinary resolution was passed to wind up the company voluntarily, and steps were taken to dissolve the company and destroy the books. The company was ordered to be wound up compulsorily on the petition of a holder of a paid-up share. The extraordinary resolution was also held ineffectual because the notices summoning the meeting had been issued by the secretary without the authority of a resolution of the directors duly assembled at a board.—HAYCRAFT GOLD REDUCTION AND MINING CO., RE, *Ch.D. Cozens-Hardy, J.*; [1900] 2 Ch. 230; 69 L. J. Ch. 497.

36. *Winding up—Jurisdiction—Voluntary winding up—Creditors' wishes—Discretion of court—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 91, 145, 149.—The voluntary winding up of a company is no bar to a compulsory order if the general body of the creditors desire it, although no individual creditor proves in accordance with section 145 of the Companies Act, 1862, that his rights will be prejudiced by a voluntary winding up.

In such a case the right of the general body of the creditors to have effect given to their wishes under sections 91 and 149 is untouched by section 145, although the *primâ facie* right of an individual creditor to a compulsory order, *ex debito justitiæ*, is restricted by that section.

*In re West Hartlepool Ironworks Co.*, L. R. 10 Ch. 618; *In re Gold Co.*, 11 Ch. D. 701; and *In re The Varieties (Limited)*, [1893] 2 Ch. 235, followed.—BISHOP & SONS, RE, *Ch.D. Farwell, J.*; [1900] 2 Ch. 254; 69 L. J. Ch. 513; 82 L. T. 756.

37. *Winding up—Liquidator—Notice of proposed appointment of particular person—Subsequent appointment, without previous notice, of another person—Validity.*—It is competent for a company, after passing a resolution for voluntary winding up, to proceed forthwith, without previous notice of intention, to the election of a liquidator; and this general power will not be abrogated even in cases in which notice has been given of intention to elect a particular person as liquidator, and such person is not elected.

Decision of Kekewich, J., *ante*, p. 200, reversed.—TRENCH TUBELESS TYRE CO., RE, BETHELL *v.* TRENCH TUBELESS TYRE CO., *C.A.*, 310; [1900] 1 Ch. 408; 69 L. J. Ch. 213; 82 L. T. 247.

38. *Winding up — Misfeasance — Director — Unauthorized payment of capital to shareholders—Ultra vires act—Order on directors to refund—Right of indemnity from shareholders.* — The directors of a shipping company, having received a sum of money under a policy of insurance on one of the company's ships which had become a total loss, distributed the money among the shareholders, who had notice of the facts and consented to the distribution. Subsequently the company was wound up. An order was made in the winding up under section 10 of the Companies (Winding-up) Act, 1890, declaring that the payments to the shareholders were payments in reduction of the capital of the company, and were unlawful, and the directors were ordered to repay the amount to the liquidator.

Held, that the directors were entitled to recover from the shareholders the money paid to them.

Judgment of the Divisional Court (47 W. R. 282, [1899] 1 Q. B. 480) affirmed.—MOXHAM *v.* GRANT, *C.A.*, 130; [1900] 1 Q. B. 88; 69 L. J. Q. B. 97; 81 L. T. 431.

39. *Winding up— Official receiver—Liquidator—Jurisdiction.*—In making a compulsory winding-up order on a creditor's petition the court cannot appoint as permanent liquidator any person other than the official receiver, for at that stage of the proceedings the creditors have not in fact been consulted in the manner contemplated by the Companies (Winding-up) Act. 1890.—REID & SONS, RE, *Q.B.D.*; 69 L. J. Q. B. 736.

40. *Winding up—Order for public examination—Summons to discharge order—Time—Evidence of not being concerned in promotion of company—Admissibility.*—A summons to discharge an order for public examination under section 8 of the Companies (Winding-up) Act, 1890, must be made with promptness to be in time. Thus, an application made two months after the order was served is too late.

Decision of Wright, J. (*ante*, p. 185, [1899] 2 Ch. 773), affirmed.

*Per* Wright, J.—Evidence that the applicant did not take part in the formation or promotion of the company cannot be admitted in support of a summons to discharge the order, as that is the very question which it is the object of the examination to ascertain.—NATIONAL STORES, RE, *C.A.*; [1900] 1 Ch. 27; 81 L. T. 529.

41. *Winding up—Voluntary winding up—Liquidator—Subsequent supervision order—Remuneration of liquidator—Costs of solicitor—Priority—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 110, 133 (3), 144, 151—*Companies Winding-up Rules*, 1890, *r.* 31.—The costs of a solicitor properly incurred during the voluntary winding up a company are payable in priority to any remuneration awarded by the company to its liquidator.—SANITARY BURIAL ASSOCIATION, RE, WINGFIELD, EX PARTE, *C.A.*, 529; [1900] 2 Ch. 289; 69 L. J. Ch. 551; 82 L. T. 639.

42. *Winding up—Voluntary winding up—Reconstruction — Sale of assets — Dissentient member — Purchase of interest—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.—Where a company is being wound up voluntarily, and a shareholder has dissented from a sale to a new company, he cannot be deprived by the articles of association from having the benefit of the provisions of section 161 of the Companies Act, 1862, relating to the purchase of his interest.—PAYNE *v.* CORK CO., *Ch.D. Stirling, J.*, 325; [1900] 1 Ch. 308; 69 L. J. Ch. 156; 82 L. T. 44.

See also Bankruptcy, 8, 18, 19; Contract, 13; Landlord and Tenant, 7; Limitation Statutes, 2; Practice, 16, 42, 46; Solicitor, 13; Trustee, 4.

CONFLICT of LAWS:—

1. *Foreign judgment—Tort committed in foreign country—Judgment* in rem—*Approval of judgment by sovereign of the foreign country—Ratification of unlawful act.*—The plaintiffs shipped on a British ship ammunition for delivery at a port in Persia, or "optional Muscat."

While the ship was on her voyage the master, under instructions from the plaintiffs, altered the bill of lading and the marks on the goods so that the goods became deliverable at Muscat only.

The Sultan of Muscat a few days later issued proclamations giving notice that the importation into India or Persia of all munitions of war was illegal, and that by agreement with the British and Persian Governments ships of war of those two countries were authorized by him to search British and Persian vessels in Muscat waters, and to confiscate all munitions of war found on such vessels and intended for Indian or Persian ports.

The defendant, who was in command of a British ship of war, seized the plaintiffs' ammunition on the arrival in Muscat waters of the ship carrying it.

The Sultan appointed a court to inquire into the circumstances of the seizure, and this court decided that the plaintiffs' goods were intended for a Persian port, and were lawfully seized under the Sultan's proclamation. This decision was approved by the Sultan.

The plaintiffs afterwards brought an action for damages against the defendant for wrongfully seizing their goods, and the jury found that the goods when seized by the defendant were not for any Indian or Persian port, but for Muscat only.

Held, that there was no judgment *in rem* by the court at Muscat binding the plaintiffs in the present action, because there was no sufficient proof that that court was acting judicially, and because the decision of that court did not expressly affect the *status* of the goods.

*Semble*, that the courts would not give effect in England to a judgment *in rem* in a foreign court as to which there was no evidence of any public notice of the intention to hold the inquiry which resulted in the judgment.

Held, also, that as the seizure purported to have been done, not on behalf of the Sultan, but only by his permission, his approval of the decision of his court could not ratify the seizure so as to make it lawful by the law of Muscat.—FRACIS *v.* CARR, *C.A.*; 82 L. T. 699.

2. *Marriage — Validity — Marriage solemnized abroad before British consul—British subject and foreigner — Foreign decree of nullity — Consular Marriage Act*, 1849 (12 & 13 *Vict. c.* 68).—A marriage between a British subject and a foreigner solemnized abroad in accordance with the requirements of the Consular Marriage Act, 1849, is valid in England, although such marriage has been declared void by a foreign court.—HAY *v.* NORTHCOTE, *Ch.D. Farwell, J.*, 615; [1900] 2 Ch. 262; 69 L. J. Ch. 586; 82 L. T. 656.

See also Contract, 2; Domicil, 1, 2; Will, 14, 17

CONSPIRACY:—

*Besetting persons on board ship—Persons on board ship without licence from Board of Trade—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 7—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 111.—A shipping federation, which kept a depot ship for the purpose of receiving on board men intending to serve as seamen on vessels belonging to members of the federation, entered into contracts with certain persons whereby these persons were to remain on board the ship until engaged as seamen on board vessels belonging to members of the federation. These persons remained on board, but while on board they did not work as seamen or otherwise, though they received daily wages from the federation. The federation had no licence from the Board of Trade under section 11 of the Merchant Shipping Act, 1894, for engaging or supplying seamen to be entered on board ship. The respondents beset the ship with a view to compel these persons on the ship from remaining on board and fulfilling their engagements with the federation.

Justices having dismissed an information against the respondents under section 7 of the Conspiracy and Protection of Property Act, 1875, for besetting the ship, on the ground that the federation, in entering into these engagements without a licence from the Board of Trade, had contravened the provisions of section 111 of the Merchant Shipping Act, 1894, and that therefore the persons on board had no legal right to be there.

Held, that, whether the contracts made by the federation with the persons on board the ship were legal or illegal contracts, the men had a legal right to be on board the ship; that, therefore, there was a besetting of the ship within the meaning of the section, and that the respondents ought to have been convicted.—FARMER *v.* WILSON, *Q.B.D.*; 69 L. J. Q. B. 496; 82 L. T. 566.

CONTEMPT:—

1. *Abuse of judge in his conduct as judge—Power to punish on summary process.*—The publication in a newspaper, after the conclusion of a trial in court, of an article containing scurrilous abuse of the judge in his character of judge in the hearing of the case, is a contempt of court which may be punished by the court on summary process.—REG. *v.* GRAY, *Q.B.D.*, 474; [1900] 2 Q. B. 36; 69 L. J. Q. B. 502; 82 L. T. 534.

2. *In face of the court—Libel—Publication.*—The appellant who was neither printer nor publisher innocently and without any knowledge of the contents of a newspaper handed a copy to a friend.

Held, that there was no obligation on the appellant to make himself acquainted with its contents, and should scandalous matter reflecting on the court thus become known, these circumstances were not in themselves sufficient to justify a committal for contempt of court.

Committals for contempt of court by scandalizing the court itself have become obsolete in this country.—MCLEOD *v.* ST. AUBYN, *P.C.*, 173; [1899] A. C. 549.

See also Company, 4.

CONTRACT:—

1. *Audit—Finality of—Agreement—Charges of fraud—Costs.*—The appellant advanced £15,000 to the respondent, to be used in the business of the

respondent for five years. In return for the advance the appellant was to receive interest and 37½ per cent. of the profits of the respondent's business. The contract stipulated that there should be an annual audit of the respondent's business by the firm of M. & Co., accountants, and that their certificate as to the profits should be binding on both parties. For four years the respondent's books were audited by G., a member of the firm of M. & Co. Subsequently the appellant raised this action against the respondent for a judicial account on the ground that the audits had not been in terms of the agreement in respect that the auditor did not know that his estimate of the profits was to be binding on the appellant and respondent. G. swore in his evidence that he did not know of this agreement, and that if he had he would have made out the account in a somewhat different form.

Held, reversing the decision of the First Division of the Court of Session, (1898) 25 R. 661, that there must be a new account taken, the auditor being unaware that his audit was to be final between the parties.—TEACHER *v.* CALDER, *H.L.* (*Sc.*); [1899] A. C. 451.

2. *Conflict of laws—English law and law of South African Republic*—Locus solutionis.—Where a contract is made in a foreign country between two Englishmen, and is intended to be performed primarily in that foreign country, this fact is in itself sufficient, in the absence of evidence to the contrary, to prove an intention on the part of the parties that the contract shall be governed by the law of the foreign country.

Decision of Kekewich, J. (47 W. R. 681, [1899] 2 Ch. 173), affirmed.—SOUTH AFRICAN BREWERIES *v.* KING, *C.A.*, 289; [1900] 1 Ch. 273; 69 L. J. Ch. 171; 82 L. T. 32.

3. *Consideration of marriage — Representation — Testamentary intentions—"Share"—Performance.*—Testator wrote to the plaintiff, his intending son-in-law: "You are, of course, aware that, with my large family, E. (his daughter) will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in a comfortable independence if I leave her a widow." The plaintiff married the daughter, relying upon the letter. The testator, dying subsequently, leaving eight children, left E. a legacy much less than one-eighth of his estate.

Held, that, if the letter was an offer, the court would presume it to be accepted; and

Held, also, that the letter was not an offer resulting in a contract, but a mere statement of intention as to the future, and which, although relied on, gave no right either to specific performance or damages.

Held, also, that, if the letter imposed an obligation upon the testator, it was satisfied by the bequest of the legacy.—FICKERS, RE, FARINA *v.* FICKERS, *Ch.D. Cozens-Hardy, J.*, 250; [1900] 1 Ch. 331; 69 L. J. Ch. 161; 81 L. T. 749.

4. *Construction—Question of fact—Agreement to convey adjoining houses to different persons—Right of way over one tenement for apparent use of other tenement—Practice—Order* 54a.—By an agreement for the distribution of an estate left to the plaintiff, the defendant, and another, it was agreed that the "freehold house and premises known as Bedeburn, let to A. F.," should forthwith be conveyed to the plaintiff, and that the "freehold house and premises known as Stanley Villa, let to J. H.," should forthwith be conveyed to the defendant. These were adjoining houses, and the back of Bedeburn could only be approached by a private road at the side of and forming part of Stanley Villa, by which also the back of Stanley Villa was approached. This way had in fact been used by the tenants of both houses since the houses were built.

On a summons under order 54*a* to determine whether under the description of Bedeburn the plaintiff was entitled to a right of way over this private road,

Held, (1) that under the agreement the plaintiff was entitled to a conveyance of Bedeburn together with the ways, rights, and appurtenances to the premises belonging, and that, therefore, a roadway over a portion of Stanley Villa for the apparent use of Bedeburn would pass to the plaintiff; (2) that the court was not precluded from determining this question of fact by reason of the procedure being under order 54*a*.—NICHOLLS *v.* NICHOLLS, *Ch.D. Stirling, J.*; 81 L. T. 811.

5. *Equitable assignment—Notice—Undertaking to indorse and hand over cheque when received.*—A contract for the sale of flour contained the following: "I also agree to indorse the cheques from the asylum and hand over to you as received by me in payment of the accounts."

Held, that this constituted an equitable assignment of the moneys from the cheques as and when received from the asylum.—WEST *v.* NEWING, *Q.B.D.*; 82 L. T. 260.

6. *Evidence—Extrinsic evidence—Meaning of words used—Parol evidence to explain.*—Extrinsic evidence is always admissible, not to contradict or vary a written contract, but to apply it to the facts which the parties had in their minds and were negotiating about.

Therefore where S. undertook to do certain work on terms embodied in a letter of his to the appellants, and which "provided that S. should be allowed an additional percentage on the estimate of £35,000 in the event of his being able to reduce the total cost of the work below £30,000,"

Held, that evidence as to the meaning of the expressions "the total cost of the work" and "the estimate of £35,000" was admissible.—BANK OF NEW ZEALAND *v.* SIMPSON, *P.C.*, 591; [1900] A. C. 182; 69 L. J. P. C. 22; 82 L. T. 102.

7. *Fraudulent inducement—Concealment of identity—Materiality—Right to repudiate.*—The plaintiff, a money-lender whose reputation was such that the defendant would not have dealt with him, by fraudulently concealing his identity, induced the defendant to borrow money from him. On discovering the plaintiff's fraud, the defendant, within a reasonable time, repudiated the contract.

Held, that he was entitled so to do, the fraud being material to the inducement which brought about the contract.—GORDON *v.* STREET, *C.A.*, 158; [1899] 2 Q. B. 641; 69 L. J. Q. B. 45; 81 L. T. 237.

8. *Illegality—Corporation—Interest of member.*—The fact that a Commissioner of Sewers, or a member of the Court of Aldermen, or of the Common Council of the City of London, is interested or concerned in a contract made by the Commissioners of Sewers with a company by reason simply of his being a shareholder in such company, does not invalidate the contract.

City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), s. 42, and 1851 (14 & 15 Vict. c. cxi.), s. 53, 57, discussed and explained.—CITY OF LONDON ELECTRIC LIGHTING CO. *v.* LONDON (MAYOR), *Ch.D. Farwell, J.*; 82 L. T. 530.

9. *Illegality—Indemnifying a bail—Shares transferred to bail—Innocent transferor.*—It is just as

much contrary to public policy for a third party to indemnify a bail as it is for the prisoner himself to do so.

*Wilson* v. *Strugnell*, 7 Q. B. D. 548, 30 W. R. Dig. 50, and *Herman* v. *Jeuchner*, 33 W. R. 606, 15 Q. B. D. 561, considered.—CONSOLIDATED EXPLORATION CO. *v.* MUSGRAVE, *Ch.D. North, J.*, 298; [1900] 1 Ch. 37; 69 L. J. Ch. 11; 81 L. T. 747.

10. *Illegality — Remoteness — Uncertainty — Statutory confirmation—Contract to give "first refusal" of land—Interest in land—Purchasers with notice—Injunction—Manchester Ship Canal (Surplus Lands) Act*, 1893 (56 & 57 *Vict. c. lxxiii.*), *s.* 3.—Action by the Manchester Ship Canal Co. for an injunction to restrain the Manchester Racecourse Co. from selling their racecourse to the Trafford Park Estates (Limited), or any other person without first offering it to the Manchester Ship Canal Co. at the same cash price that the intending purchasers were willing to give, and to restrain the Trafford Park Estates (Limited) from completing an agreement to purchase the same until this had been done.

The action was based on an agreement of the 7th of March, 1893, entered into between the canal company and the racecourse company and scheduled to the Manchester Ship Canal (Surplus Lands) Act, 1893, by which it was "confirmed and declared to be valid and binding upon the parties thereto." The parties to the agreement were in each case defined to include their successors and assigns where the context so required or admitted.

Clause 3 of the agreement was as follows: "If and whenever the lands and hereditaments belonging to the racecourse company and now used as a racecourse shall cease to be used as a racecourse, or should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes, then and in either of such cases the racecourse company shall give to the canal company the first refusal of the aforesaid lands and hereditaments *en bloc*."

Held, (1) that the effect of the Act of 1893 was to give statutory validity to every clause of the agreement of 1893, so that no question of remoteness or uncertainty could arise; (2) that the racecourse company could not sell the racecourse without informing the canal company of the actual cash price offered by an intending purchaser, and offering it to the canal company at that price; (3) that this right of the canal company of first refusal could be enforced against an intending purchaser with notice.—MANCHESTER SHIP CANAL CO. *v.* MANCHESTER RACECOURSE CO., *Ch.D. Farwell, J.*; [1900] 2 Ch. 352.

11. *Implied warranty—Hire of chattel—Breach of warranty of fitness — Damage to third person—Remoteness.*—The defendant supplied sacks to the plaintiffs for the purpose of being used in unloading a cargo of peas from a ship. One of these sacks, while it was being hoisted full of peas from the hold of the ship, broke and fell and injured a man who was engaged in the work. The injured man recovered from the plaintiffs £25 damages and costs. The sack in question, when supplied by the defendant, was unfit for the purpose for which it was supplied.

Held, that the plaintiffs were entitled to recover, as damages for breach of warranty, the damages and costs which they had incurred.—VOGAN *v.* OULTON, *C.A.*; 81 L. T. 435.

12. *Impossibility of performance—Implied condition.*—By a contract made in October, 1899, the defendants sold to the plaintiffs a cargo of cotton-seed, to be shipped at certain Egyptian ports during the month of January, 1900, per steamship *Orlando*, and to be delivered to the plaintiffs in the United Kingdom. The contract provided that, "In case of prohibition of export, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof is to be cancelled." In December, 1899, *The Orlando* was, without default on the part of the defendants, stranded, and was so much damaged as to render it impossible for her to arrive at the ports of loading before the end of January; and on the 20th of December notice of that fact was given to the plaintiffs. Upon receipt of that notice the plaintiffs might have bought in the market another cargo of cotton-seed in substitution for that sold to them by the defendants, but they declined to do so. The market was rising, and by the end of January the market price had risen considerably above the point at which it stood at the time when the plaintiffs had notice of the stranding. The plaintiffs sued the defendants for breach of their contract, claiming as damages the difference between the contract price and the market price at the end of January.

Held, that the contract must be read as subject to an implied condition that, in the event of the ship not arriving at the ports of loading within the stipulated time in a fit state to receive the cargo, the contract should be treated as at an end; that the implication of that condition was not excluded by the clause expressly providing for the cancellation of the contract in the specified events; and that the defendants were not liable.—NICKOLL *v.* ASHTON, *Q.B.D.*; [1900] 2 Q. B. 298; 69 L. J. Q. B. 640; 82 L. T. 761.

13. *Offer—Acceptance by post—Withdrawal of offer before acceptance — Company — Shares —Companies Act*, 1862, *ss.* 35, 39, 62.—J. applied for shares in a company, but before the letter of allotment was posted—except by being delivered to a postman in a London street to be posted by him—a letter withdrawing his application was delivered at the company's registered office and opened by the secretary. By the rules of the post office town postmen are forbidden to take charge of letters for the post.

Held, that the withdrawal was received by the company before the allotment letter was posted, and that there was no contract by J. to take the shares.—LONDON AND NORTHERN BANK, RE, JONES, EX PARTE, *Ch.D. Cozens-Hardy, J.*; [1900] 1 Ch. 220; 69 L. J. Ch. 24; 81 L. T. 512.

14. *Penalty or liquidated damages—Contract in two separate parts.*—A contractor agreed with the owner of a house to carry out certain work for an electric light installation in the house in accordance with a certain specification for a fixed sum, and consented to pay £5 as liquidated damages for each day exceeding the number of days within which the work had to be completed.

By the specification the wiring was to be handed over to the owner of the house in faultless condition within twenty days from the signing of the contract, and the fittings (which the house owner was to supply) were to be fixed and handed over in similar condition within fourteen days of their delivery by the owner of the house to the contractor.

Held, that the £5 was agreed upon as liquidated damages for each day's delay in executing each part of the contract, the times limited in the contract being two separate periods at the expiration of each of which the damages began to accrue.—STEGMANN *v.* O'CONNOR, *C.A.*; 81 L. T. 627.

15. *Principal and agent—Authority of agent—*

*Lump sum — Variation — Ratification.*—Where the plaintiffs contracted with the agent of an absent shipowner to effect certain specified repairs (all confined to damage by stranding), and instead of doing the work as stipulated alleged that they had, on the agent's authority, done the equivalent thereto or better, and in the same contract stipulated that they should be paid for repairs due to deterioration at scheduled prices stated by them.

Held, that, it appearing that the agent's authority to their knowledge was limited to the said specified repairs, they could not recover on the contract, which was an entire one, and in its entirety had never been performed.

Held, further, that the fact of the shipowner having taken the ship as repaired and sold did not ratify the contract.

*Appleby* v. *Myers*, L. R. 2 C. P. 651, followed.—FORMAN *v.* THE SHIP "LIDDESDALE," *P.C.*; [1900] A. C. 190; 69 L. J. P. C. 44; 82 L. T. 331.

16. *Restraint of trade—Master and servant—Hay and corn dealers—Limit of space—No limit of time—Reasonableness—Assignment of benefit of contract—Injunction.*—The defendant was in the employ of the plaintiffs' predecessors in business, who were hay and corn dealers, as salesman and manager of one of their branches, at a salary of 24s. per week, with the use of four living rooms over the shop.

In consideration of a small increase by way of commission in his salary, he undertook in the event of ceasing to represent his employers "not to enter into business for myself, or with others, or with any other firm within a radius of two miles from the shop in which I have been engaged."

The agreement was written out on the firm's business paper, which stated the nature of the business.

Held, that the agreement must be construed with reference to the scope of the business, and not in a wide sense so as to render it void; that, although unlimited as to time, it was in the circumstances unreasonable; and that the plaintiffs were entitled to an injunction restraining a breach.—HOOD *v.* JONES, *Ch.D. Cozens-Hardy, J.*; 81 L. T. 169.

17. *Telegraphic code—Mistake*—Onus probandi.—Where parties have corresponded by means of a telegraphic code, it is for the plaintiff in an action for breach of contract to show that the offer made by him and accepted by the defendant is so clear that the defendant cannot be heard to say that he misunderstood it. It is not a matter for the court to construe.—FALCK *v.* WILLIAMS, *P.C.*; [1900] A. C. 176; 69 L. J. P. C. 17.

See also Company, 5, 12, 14, 21-26; Frauds, Statute of, 1-3; Inland Revenue, 25; Lunacy, 2; Married Woman, 4; Practice, 6; Principal or Agent, 2; Sale of Goods, 1, 2; Ship, 1, 6, 14; Vendor and Purchaser, 3.

CONVERSION.—See Banker, 2; Bankruptcy, 8; Trover.

CONVEYANCING ACTS.—See Landlord and Tenant, 9, 13, 15, 18, 19, 22; Merger, 2; Mortgage, 5, 7, 9, 13; Vendor and Purchaser, 5, 18, 23; Will, 6.

COPYHOLD.—See Limitation Statutes, 3.

COPYRIGHT:—

1. *Artistic copyright—Infringement by printer who is mere agent—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 6.—*International copyright—Infringement—Nature of remedies—International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *s.* 2, *sub-section* 3—*Minimum penalty—Costs.*—Printers who infringe artistic copyright, though only as mere agents, are equally liable with their principals to penalties under section 6 of the Fine Arts Copyright Act, 1862. An owner of international copyright is not restricted under section 2, sub-section 3, of the International Copyright Act, 1886, in case of infringement in a foreign country, to the remedies available for infringement in the country of origin. A farthing is the minimum penalty that will be inflicted in a court of justice. Where in an action for infringement of copyright the defendant is guilty of infringement, but the plaintiff is held not to be entitled to any remedy in a court of equity because of his own misconduct, the action will be dismissed without costs.—BASCHET *v.* LONDON ILLUSTRATED STANDARD CO., *Ch.D. Kekewich, J.*, 56; [1900] 1 Ch. 73; 69 L. J. Ch. 35; 81 L. T. 509.

2. *Infringement — Book — Sheet of Music—Perforated sheets for use in a mechanical instrument—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 15.—A copy is that which comes so near the original as to give every person seeing it the idea of the original. Things, therefore, which are used for purposes wholly and fundamentally distinct from those of their originals are not copies of such originals within the meaning of the Copyright Act, 1842. Nor do they become copies within the Act because they might possibly be used for the purposes of their originals, so long as no such use is either intended or made.

The plaintiffs were proprietors of the copyright of certain sheets of music. The defendants sold certain perforated sheets to be used as part of a mechanical instrument for the production of musical sounds. It was possible to read the notes of the perforated sheets. Certain words indicating time and expression, which were taken from the plaintiffs' sheets of music, were printed on the perforated sheets.

Held, (1) that the perforated sheets, being part of a mechanical instrument, were not copies of the plaintiffs' sheets of music within the meaning of the Copyright Act, 1842; and (2) that the plaintiffs' copyright was not infringed by the printed words on the perforated sheets, as these were only of use as directions for working the mechanical instrument.

Judgment of Stirling, J. (47 W. R. 554, [1899] 1 Ch. 836), affirmed on the first point, and reversed on the second point.—BOOSEY *v.* WHIGHT, *C.A.*, 228; [1900] 1 Ch. 122; 69 L. J. C. H. 66; 81 L. T. 571.

3. *Penalties—Number of offences—"Sum not exceeding £10"—Minimum sum—Artistic Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 6.—The copyright in certain pictures was infringed by the distribution of over a million copies, which altogether cost to produce not more than £120. Upon summons to fix the amount of the penalties payable under section 6 of the Artistic Copyright Act, 1862.

Held, that each copy constituted a separate offence, for which the minimum sum which the which the court could impose as a penalty was one farthing.—HILDESHEIMER *v.* FAULKNER, *Ch.D. Kekewich, J.*, 682.

4. *Verbatim report of speech—"Author"—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45).—A reporter who takes down a speech in shorthand and afterwards corrects it for publication, making the most accurate report he can of the speaker's words, is not an "author" within the meaning of the Copyright Act, 1842; though a reporter who recasts a speech, giving the substance of it in his own language, would be.

In the former case, therefore, neither the reporter

nor his assignee can acquire copyright in the report by first publication.—WALTER *v.* LANE, *C.A.*, 218; [1899] 2 Ch. 749; 81 L. T. 395.

CORPORATION.—See Contract, 8; Criminal Law, 1; Local Government, 2; Malicious Prosecution; Tramway, 1.

COSTS.—See Administration, 4, 6, 7; Arbitration, 3, 4; Company, 29, 41; Contract, 1; Copyright, 1, 3; County Court; Criminal Law, 1; Divorce, 20; Justices, 3; Local Government, 3, 7; Mortgage, 2; Partition, 3; Practice, 2, 13-23, 36, 41, 47; Railway, 5; Scotland, Law of, 1; Settlement, 6; Solicitor, 2-10, 13; Trustee, 3; Vendor and Purchaser, 6.

COUNTY COURT:—

*Costs—Remitted action—Judgment under order* 14 *for part of claim—Judgment for defendant in county court—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 113.—In an action brought in the High Court to recover £20 2s. as the price of goods sold and delivered, an order was made under order 14 by which leave was given to the plaintiffs to sign judgment for £8 14s. if that amount was not paid within seven days, and leave was given to the defendant to defend as to the residue of the claim, and it was ordered, under section 65 of the County Courts Act, 1888, that the action should be tried in the county court. The defendant paid the sum of £8 14s. under the order, and at the trial in the county court judgment was given for him, no order being made as to costs.

Held, that, the plaintiffs having succeeded in the action in recovering the sum of £8 14s. the defendant was not entitled to costs, although he had obtained judgment in the county court.—WRIGHT & SONS *v.* BULL, *Q.B.D.*; [1900] 2 Q. B. 124; 69 L. J. Q. B. 529; 82 L. T. 568.

See also Gas; Landlord and Tenant, 2; Practice, 2, 18.

CRIMINAL LAW:—

1. *Costs—Right of defendant to costs on acquittal—Municipal Elections (Corrupt and Illegal Practices) Act,* 1884 (47 & 48 *Vict. c.* 70), *s.* 30—*Corrupt Practices Prevention Act,* 1854 (17 & 18 *Vict. c.* 102), *s.* 12—*Corrupt and Illegal Practices Prevention Act,* 1883 (46 & 47 *Vict. c.* 51), *s.* 53.—Where an indictment is preferred by a private prosecutor under the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, for corrupt practices at a municipal election, the defendant, if acquitted, has the right to recover from the prosecutor the costs sustained by him by reason of such indictment.—REG. *v.* LAW, *Q.B.D.*, 411; [1900] 1 Q. B. 605; 69 L. J. Q. B. 348; 82 L. T. 145.

2. *Evidence—Evidence of accused person—Previous convictions and cross-examination as to—Prevention of Cruelty to Children Act,* 1894 (57 & 58 *Vict. c.* 41), *ss.* 1, 12—*Criminal Evidence Act,* 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *sub-section* (f); *s.* 6.—By section 1 (*f*) of the Criminal Evidence Act, 1898, it is provided that a person charged and called as a witness in pursuance of that Act shall not, with certain exceptions, be required to answer any question as to his previous conviction; and section 6 provides that "this Act shall apply to all criminal proceedings notwithstanding any enactment in force at the commencement of this Act. . . ."

The appellant was charged before a court of summary jurisdiction with an offence under the Prevention of Cruelty to Children Act, 1894, section 12 of which Act provides that in any proceeding against any person for an offence under that Act such person shall be competent, but not compellable, to give evidence. He gave evidence on his own behalf, and in cross-examination was asked whether he had been previously convicted of an offence under the same Act. He answered in the affirmative. The justices convicted him.

Held, that the evidence as to the appellant's previous conviction was not admissible, and therefore that the conviction was bad.

Section 1 of the Criminal Evidence Act, 1898, applied.—CHARNOCK *v.* MERCHANT, *Q.B.D.*, 334; [1900] 1 Q. B. 474; 69 L. J. Q. B. 221; 82 L. T. 89.

3. *False pretences — Remoteness — Competitor in handicap race—False statements as to previous performances as a runner—Attempt to obtain prize.*—The defendant was convicted of attempting to obtain prizes for foot-races by false pretences. At the trial it was proved that entries for two races at an athletic meeting were made in the name of one Sims, and that such entries contained correct statements as to the recent performances of Sims as a runner, including a statement that he had never won a race. The entries were not written either by Sims or by the defendant. At the meeting the defendant ran in the races in the name of Sims. By reason of the statements in the entries he obtained long starts. He was in fact a superior runner, and won both races. After the races he falsely stated, in reply to questions put to him by the handicapper, that he really was Sims, and that the statements in the entries were true statements as to his performances. He did not apply to have the prizes handed over to him.

Held, that there was evidence for the jury of an attempt to obtain the prizes by false pretences, and that the attempt was not too remote from the pretence; and that the defendant was properly convicted.

*Reg.* v. *Larner,* 14 Cox C. C. 497, disapproved.—REG. *v.* BUTTON, *C.C.R.*, 703.

4. *Husband and wife—Receiving stolen goods—Joint indictment—Separate receiving—Receiving part of stolen property*—24 & 25 *Vict. c.* 96, *s.* 94.—Coverture is no defence to a criminal charge. A husband and wife were jointly indicted for receiving stolen goods. There was evidence that the wife had received part of the stolen property from one of the thieves; there was no evidence that the husband was present at the time, and there was no evidence that the wife was acting under his compulsion.

Held, that the wife was properly convicted of receiving stolen goods.—REG. *v.* BAINES, *C.C.R.*; 69 L. J. Q. B. 681; 82 L. T. 724.

5. *Larceny—Beneficial owner—Co-owner—One of two or more beneficial owners—Misappropriation of fund by person interested therein*—31 & 32 *Vict. c.* 116, *s.* 1.—Any person who has an interest in a sum of money is a "beneficial owner" within the meaning of the Larceny Act, 1868 (31 & 32 Vict. c. 116), s. 1. Where, then, a number of persons have a right to have a fund applied to the extinction of their liability under a guarantee, these persons are all "beneficial owners," and any one of them who misappropriates the fund to his own use may be properly convicted of stealing it.

A. was a member and acted as the secretary of a committee which had guaranteed the expenses of an entertainment. He in the discharge of his duty obtained possession of the entrance moneys, and paid the amount into the banking account of one

B. Subsequently, by means of false representations, he obtained a cheque for the amount from B., cashed it, and absconded with the proceeds.

Held, that he was properly convicted under 31 & 32 Vict. c. 116, s. 1, of stealing moneys of which he with others was the beneficial owner.

Held, also, that a count in the indictment which charged that A. had stolen the moneys of the members of the committee was bad.—REG *v.* NEAT, *C.C.R.*; 69 L. J. Q. B. 118; 81 L. T. 680.

6. *Receiving stolen goods—Property stolen by wife from husband—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 91—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.—A woman and her paramour were indicted under the Larceny Act, 1861, for stealing certain goods, and also for receiving the same knowing it to have been stolen. The goods were the property of the woman's husband. The woman was found guilty of stealing the goods, and the man of receiving them.

Held, that, as the stealing by a woman of her husband's goods did not amount to a felony either at common law or by virtue of the Larceny Act, 1861, but was only made criminal by the Married Women's Property Act, 1882, the man could not properly be convicted under section 91 of the Larceny Act, 1861, of the offence of receiving.

*Reg.* v. *Smith*, 18 W. R. 932, L. R. 1 C. C. R. 266, followed.—REG. *v.* STREETER, *C.C.R.*, 702.

CROWN:—

*Prerogative—Right to remove proceedings to the Revenue side—Right to apply to stay proceedings.*—It is part of the prerogative of the Crown to have an action between its subjects in which the title or interests of the Crown is concerned, in whatever stage such action may be, removed from the county court into the Revenue side of the Queen's Bench Division; and, where an information is filed by the Attorney-General raising the same question as that to be decided in such an action, the Crown has the right to apply to have the action stayed until the information is determined, and such application may be made after judgment has been delivered in the action.—STANLEY OF ALDERLEY (LORD) *v.* WILD, *C.A.*, 242; [1900] 1 Q. B. 256; 69 L. J. Q. B 318; 82 L. T. 14.

See also Foreshore; Practice, 6.

DAMAGES.—See Company, 8; Contract, 11, 14; Divorce, 7; Landlord and Tenant, 11, 16; Nuisance, 1; Patent, 3, 4; Ship, 23-26; Vendor and Purchaser, 17, 25; Water, 1.

DEED.—See Railway, 6.

DIVORCE:—

1. *Desertion—Adultery by husband—Offer of forgiveness if discontinued—Continuance of adultery insisted on—Refusal by wife to continue cohabitation—Separation.*—To constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other; it is not always or necessarily the guilty party who leaves the matrimonial home.

A husband was committing acts of adultery which, on discovery by his wife, he admitted had continued from the time of the marriage, and he refused to discontinue these acts, although his wife said she could not live with him unless he did so; and they separated and lived apart for more than two years, when a suit was commenced by the wife for dissolution on the ground of adultery and desertion for more than two years.

Held, that the husband had been guilty of desertion.—SICKERT *v.* SICKERT, *P.D. & Ad.D.*, 268; [1899] P. 278; 81 L. T. 495.

2. *Desertion—Refusal by wife, without cause, of marital intercourse—Subsequent adultery of husband—Wife's desertion no bar to relief.*—A wife who without cause refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him if in consequence he refuses to live with her; in such case it is the wife who is guilty of desertion without reasonable cause. Desertion without reasonable cause for two years and upwards is no bar to a petition for judicial separation on the ground of subsequent adultery.—SYNGE *v.* SYNGE, *P.D. & Ad.D.*; [1900] P. 180.

3. *Judicial discretion—Adultery of the wife—Cruelty of the husband—Discretional bar—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Decree.*—The discretion conferred upon judges of the Divorce Court by section 31 of the Matrimonial Causes Act, 1857, is not an absolute or arbitrary, but a judicial discretion, and is intended to be exercised in conformity with the former practice of the House of Lords. Cruelty on the part of a petitioner, in order to bar a claim for a divorce, must either have led to the adultery of the respondent, or be entirely wanton and unprovoked in its character.

In considering what terms should be imposed upon a petitioner who has been found guilty of cruelty towards the respondent, the court takes into consideration all the facts of the particular case before it, and considers the interests not merely of the parties, but of the child or children (if any) of the marriage.

Where the means of the petitioner (husband) were very small and uncertain, and the respondent's parents, whose character and goodwill were unquestioned, had offered to look after the only child of the marriage, the court, in granting a decree, assented to an arrangement which had been arrived at between the parties subsequently to the verdict, whereby the formal custody of the child was given to the respondent and no allowance was ordered against the petitioner.—PRYOR *v.* PRYOR, *P.D. & Ad.D.*; [1900] P. 157; 69 L. J. P. 99.

4. *Nullity of marriage—Impotence—No possibility of children—Power to vary settlements—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 108), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.—The powers of the court under section 5 of the Matrimonial Causes Act, 1859, and section 3 of the Act of 1878, can be exercised in the case of a decree of nullity of marriage on the ground of impotence, and are not confined to cases where there are or might have been children.

The words "property settled" in section 5 of the Act of 1859 refer only to the property the benefit of which is by the marriage settlement conferred on the parties or their children in the ordinary way.

There is no power to bring into settlement a fund or estate which is not to come into settlement until a certain event happens—before it happens, in fact.

The ordinary practice of the court of ordering a settlement to be read as if a party to it were already dead is merely a convenient method of carrying out what otherwise the court has power to do, and cannot be used for the purpose of evading the rule as stated above.—DORMER (OTHERWISE WARD) *v.* WARD, *P.D. & Ad.D.*, 524; [1900] P. 130; 69 L. J. P. 65; 82 L. T. 469.

5. *Practice—Dismissal by consent.*—An application to dismiss a petition for dissolution by consent ought now to be made by summons in chambers

and not by motion in open court.—SLATER v. SLATER, *P.D. & Ad.D.*; 69 L. J. P. 48.

6. *Practice—Evidence—Admissibility—Adultery subsequent to date of petition.*—Evidence of acts of adultery subsequent to the date of the petition may be admitted for the purpose of showing what inference the court ought to draw from evidence of previous acts of familiarity.—WALES v. WALES, *P.D. & Ad.D.*; [1900] P. 63; 69 L. J. P. 34.

7. *Practice—Evidence—Onus of proof that respondent was a married woman—Damages.*—The onus of proof that the co-respondent knew that the respondent was a married woman lies on the petitioner; and in the absence of proof the jury should assume that co-respondent believed that the respondent was not a married woman. Damages, however, may be recovered from a co-respondent whether he knew the respondent was a married woman or not.—LORD v. LORD, *P.D. & Ad.D.*; 69 L. J. P. 54.

8. *Practice—Justices—Appeal—Notes of proceedings in court below—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).—Upon appeals under the Summary Jurisdiction (Married Women) Act, 1895, two copies of the notes of proceedings in the court below ought to be provided for the use of this court by the appellant, and the costs will be allowed on taxation.—WALTON v. WALTON, *P.D. & Ad.D.*, 622; [1900] P. 147; 69 L. J. P. 54; 82 L. T. 627.

9. *Practice—Justices—Appeal—Notes on proceedings in court below—Duties of magistrates' and justices' clerks—Right of either party to a copy of notes—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).—Upon the hearing of every summons under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the clerk to the magistrate or justices to make a note, not only of the evidence and of the decision arrived at, but also of the reasons for arriving at the decision, and to furnish a copy of the note upon the application of either party.—COBB v. COBB, *P.D. & Ad.D.*; [1900] P. 145; 69 L. J. P. 52; 82 L. T. 626.

10. *Practice — Justices — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39)—*Case remitted to justices—Wife's costs.*—A deed of separation is conclusive evidence on the question whether the husband has neglected to maintain his wife.

Where a wife has obtained a decision in her favour under the Summary Jurisdiction (Married Women) Act, 1895, and comes to the High Court to support it, she will have her costs.—MEDWAY v. MEDWAY, *P.D. & Ad.D.*, 622; [1900] P. 141; 69 L. J. P. 56; 82 L. T. 627.

11. *Practice—Justices—Desertion—Evidence—Proof of desertion—Antecedent circumstances—Summary Jurisdiction (Married Women) Act*, 1895.—On a certain date a wife, living apart from her husband, went to his house, accompanied by a policeman, and asked to be taken back. The husband refused. The wife took out a summons for desertion under the Summary Jurisdiction (Married Women) Act, 1895. At the hearing of the summons the justices refused to consider evidence tendered by the husband of circumstances prior to the date of the wife's demand and the husband's refusal, held that the refusal constituted desertion, and the husband ordered to pay weekly maintenance to the wife. The husband appealed.

Held, that the magistrates were wrong in rejecting the evidence tendered by the husband; that the refusal to take back the wife did not necessarily in itself amount to desertion; and that the case ought to be remitted to the justices.—WASSELL v. WASSELL, *P.D. & Ad.D.*; 81 L. T. 496.

12. *Practice—Justices—Rescinding separation order—"Fresh evidence"—Definition—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 7.—"Fresh evidence" within the meaning of the Summary Jurisdiction (Married Women) Act, 1895, *s.* 7, to confer jurisdiction to rescind a separation order previously made under section 4 must be such as would afford ground for a new trial or rehearing in any other class of case. It must be evidence which could not reasonably have been made available at the date of the order, or it must relate to something which has happened since the date of the order, and which affords ground for revision within the terms of the Act under which the order was made.—JOHNSON v. JOHNSON, *P.D. & Ad.D.*; [1900] P. 19; 69 L. J. P. 13; 81 L. T. 791.

13. *Practice — Marriage — Colonial marriage — Evidence.*—Where, upon the hearing of a petition to dissolve a marriage which had been celebrated in the Colony of Hong Kong, it was stated on behalf of the petitioner that the only legal expert available to give evidence of the validity of the marriage, according to the laws and ordinances of Hong Kong, demanded a prohibitive fee, the court gave leave to prove the marriage by reading an affidavit of an ex-Governor of the Colony, who was not a member of the legal profession, but who deposed that he was conversant with the laws and ordinances in force in the Colony.—COOPER-KING v. COOPER-KING, *P.D. & Ad.D.*; [1900] P. 65; 69 L. J. P. 33.

14. *Practice — Marriage — Proof of marriage—Marriage in Ireland—Copy of an entry in the register of marriages in Protestant Episcopalian Church of Ireland—Matrimonial Causes (Ireland) Act*, 1870, *ss.* 32, 33.—A copy of an entry in the register of marriages, duly certified by the clergyman of the church where the marriage so registered has been solemnized, is sufficient to prove a lawful marriage according to the rites and ceremonies of the Protestant Episcopalian Church of Ireland.—WHITTON v. WHITTON, *P.D. & Ad.D.*; [1900] P. 178.

15. *Practice—Petition for restitution of conjugal rights — Cross-petition for dissolution* — Onus probandi—*Right to begin.*—Where a wife petitioned for restitution of conjugal rights, and the husband in answer alleged that she had committed adultery, and in a cross-petition claimed a divorce on that ground,

Held, that the husband's counsel ought to begin.—SMITH v. SMITH, *P.D. & Ad.D.*; [1900] P. 66; 69 L. J. P. 44.

16. *Practice—Rehearing—Petition dismissed—New evidence.*—A husband's petition was heard before a judge alone and dismissed on the ground that the evidence was insufficient. Subsequently the petitioner obtained fresh evidence, and applied for a rehearing.

Held, that a rehearing ought to be granted on the ground that the fresh evidence was sufficient to warrant a reasonable probability of a different verdict in the first and second trials if the case were tried by a jury.—TAYLOR v. TAYLOR, *P.D. & Ad.D.*; 81 L. T. 494.

17. *Practice—Respondent of unsound mind not so found—No appearance—Notice to official solicitor.*—Where the respondent, the husband, in a suit for dissolution, was a person of unsound mind not so

found by inquisition, and the suit was *in formâ pauperis*, the court, before making the decree, required notice of the proceedings to be formally given to the official s licitor.—GILES *v.* GILES, *P.D. & Ad.D.*, 288; [1900] P. 17; 69 L. J. P. 26; 81 L. T 823.

18. *Previous suit for restitution of conjugal rights —Decree in restitution suit—Husband temporarily resident out of the jurisdiction—Service of decree—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68). —Where the respondent in a suit for restitution of conjugal rights was domiciled in this country, but temporarily resident in Ireland, was served in Ireland, and the court considered he was in a position to be able to comply with it, the court held that the service was good.—DICKS *v.* DICKS, *P.D. & Ad.D.*, 302; [1899] P. 275; 81 L. T. 462.

19. *Separation — Agreement — Intercourse while living apart—Evidence of cohabitation.*—Husband and wife entered into a deed of separation under which the husband covenanted to pay a weekly sum to the wife during their joint lives if they should so long live separate from one another. While they were living apart, acts of connubial intercourse took place. In an action by the wife to recover arrears of payments due under the deed,

Held, that the fact that intercourse had taken place was not of itself conclusive evidence that the separation had come to an end so as to make the deed of no effect.—ROWELL *v.* ROWELL, *C.A.*; [1900] 1 Q. B. 9; 69 L. J. Q. B. 55; 81 L. T. 429.

20. *Separation deed—Married woman—Suit to set aside deed—Practice*—Formâ pauperis *appeal—Costs.* —A deed of separation and annuity will not be set aside at the instance of the husband on the ground of fraudulent representations by the wife as to her innocence, which were discredited by the husband at the time of the execution of the deed; nor on the ground of subsequent adultery of the wife, when the deed contained no condition as to chastity.

Where an appellant *in formâ pauperis* is successful in a Privy Council appeal, such appellant is entitled to such costs of the appeal as he would be entitled to according to the rule which prevails in the House of Lords.—WASTENEYS *v*, WASTENEYS, *P.C.*; [1900] A. C. 446.

See also Peer.

DOMICIL:—

1. *Husband and wife—Matrimonial domicil—French law—Contract of marriage—Movable goods—Change of domicil—Community of goods.*—Two French subjects, born and domiciled in France, married there without a contract of marriage, and became, therefore, subject to the system of "community of goods." They afterwards acquired an English domicil, and the husband died in this country possessed of movable property.

Held, that the change of domicil did not affect the rights acquired by their marriage in France, and consequently the French law of "community of goods" was still applicable; so that the husband's power of disposition by will was limited to a moiety.

Decision of Court of Appeal. *In re De Nicols, De Nicols* v. *Curlier*, 46 W. R. 532, [1898] 2 Ch. 60, reversed.

*Lashley* v. *Hog*, 4 Paton's Sc. App. Cas. 581, distinguished.—DE NICOLS *v.* CURLIER, *H.L.*, 269; [1900] A. C. 21; 69 L. J. Ch. 109; 81 L. T. 733.

2. *Marriage according to French law—Community of goods—Subsequent English domicil—After-acquired real estate.*—The principle of the decision in *De Nicols* v. *Curlier, ante*, p. 269, [1900] A. C. 21, is applicable to real estate in England.

Where, therefore, two French subjects domiciled in France married there without a contract of marriage, and afterwards acquired an English domicil,

Held, that the rights acquired by the marriage under the French law of "community of goods" extended to freehold and leasehold property in England acquired by the husband, and therefore his power to dispose of them by will was limited to a moiety.—DE NICOLS, RE, DE NICOLS *v.* CURLIER, *Ch.D. Kekewich, J.*, 602; 82 L. T. 840.

See also Married Woman, 2; Master and Servant, 1; Settlement, 2; Will, 14-17.

*DONATIO MORTIS CAUSA:—*

*Possession—Dominion.*—In order to constitute a valid *donatio mortis causa*, the donor must not merely part with the possession of, but also with the dominion over, the thing given.

Held, that there had not been a valid *donatio mortis causa.*—DASH, RE, SOLICITOR TO THE TREASURY *v.* LEWIS, *Ch.D. Stirling, J.*, 694.

EASEMENT:—

1. *Light—Ancient lights—Obstruction—Alteration of dominant tenement—Abandonment—Evidence—Undertaking—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 1, 3, 4.—Where a substantial quantity of useful light, which would have passed through portions of old windows of a building if they still existed, now penetrated through the corresponding portions of new windows, the temporary use of interior boarding and shelving, by which a material interference with the light had been caused, is a mere discontinuance of user, and not an adverse obstruction or "interruption" within the meaning of sections 3 and 4 of the Prescription Act.

It is not necessary, in order to the acquisition of a right to the access of light under the said section 3, that the building should be occupied or fit for occupation during the specified period: *Courtauld* v. *Legh*, 17 W. R. 466, L. R. 4 Ex. 126, and *Collis* v. *Laugher*, 43 W. R. 202, [1894] 3 Ch. 659. Continuous user is not necessary: *Cooper* v. *Straker*, 37 W. R. 137, 40 Ch. D. 21. Fixedness and mobility of obstacles are elements to be considered, but the decision must turn on all the circumstances of each case.

Evidence of the intention of those who rebuild to preserve ancient lights is admissible (*Newson* v. *Pender*, 33 W. R. 243, 27 Ch. D. 43), but may be unnecessary (*Scott* v. *Pape*, 34 W. R. 465, 31 Ch. D. 554).

*Per* Stirling, J.—(1) Non-user which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of the right under the Prescription Act; (2) the user or non-user cannot be entirely determined by simply considering whether an obstacle interposed to the light is fixed or movable. —SMITH *v.* BAXTER, *Ch.D. Stirling, J.*, 458; [1900] 2 Ch. 138; 69 L. J. Ch. 437; 82 L. T. 650.

2. *Right of support—Adjacent land—Asphaltum or pitch.*—The right of support from adjacent land which will keep the surface from subsidence still exists, though the land supported consists of asphaltum, for the nature of the strata is an immaterial consideration.—TRINIDAD ASPHALT CO. *v.* AMBARD, *P.C.*, 116; [1899] A. C. 594; 81 L. T. 132.

3. *Right of way—Payment of rent—Uninterrupted*

*enjoyment of over forty years—Parol licence—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *s.* 2.—Where a licence to use a way across a yard was given by parol more than forty years before action brought, and where such licence was subject to the payment of an annual rent,

Held, that, in the absence of any proof of a "consent or agreement expressly given or made for that purpose by deed or writing," the uninterrupted enjoyment of the easement for over forty years gave an absolute and indefeasible right to the use of the way.—GARDNER *v.* HODGSON'S KINGSTON BREWERIES Co., *Ch.D. Cozens-Hardy, J.*, 469; [1900] 1 Ch. 592; 69 L. J. Ch. 368; 82 L. T. 455.

4. *Right of way—Pier constructed under statutory powers—Right to stray on and off pier—Rights of bathing, fishing, and other purposes of recreation—Dedication—Lost grant—Evidence of user—Intention—Obstructions and interruptions.*—The plaintiffs, the Improvement Commissioners of the River T., acquired certain lands and constructed a pier under statutory powers, the work being done at intervals between the years 1854 and 1891. The public were in the habit of using the pier as a promenade and for various purposes of pleasure and recreation, and the plaintiffs alleged that they never desired nor intended to prevent the public from so using it as a matter of favour. Finding, however, that a claim as of right was being set up, the plaintiffs on the 21st of December, 1897, placed barriers across the landward end of the pier, and ordered the pier to be closed for twenty-four hours. Thereupon the mayor and other officers of the adjoining borough of S. S., being refused admission, broke down the barriers and also certain permanent gates across the pier. The plaintiffs now sued them for the trespass. At the same time an action was brought against the commissioners in the name of the Attorney-General alleging that the said pier and the several parts thereof had been from time to time dedicated to the use of and accepted by the public as a common and public highway, and had been and were used by the public for the purposes of boating, bathing, fishing, embarking, disembarking, recreation, and other lawful purposes (with power to stray on and off the sands at the side of the pier), and alleging, in the alternative, a lost grant to the mayor, aldermen, and burgesses of S. S. for the benefit of themselves and the inhabitants of S. S., and claiming a declaration that the public and the inhabitants of S. S. were entitled to exercise such right of way and such other rights.

Held, (1) that a right of way could exist over a structure erected under statutory powers; and (2) that an owner might dedicate his land for purposes of recreation; but (3) that a licence to stray on and off a right of way required such a case to prove it that it could practically never be proved; and (4) that the plea of a lost grant could not be maintained.

Held, on the facts, that the various obstructions erected from time to time by the plaintiffs with the object of saving their rights had been a sufficient assertion of their rights.

Held also, on the facts, that the plaintiffs must be presumed to have dedicated a simple right of way within certain assigned limits.—ATTORNEY-GENERAL *v.* TYNE IMPROVEMENT COMMISSIONERS, *Q.B.D.*; 81 L. T. 174.

5. *Right of way—Undefined—No user—Method of defining.*—In 1878 the Corporation of London, with the privity of the Great Western Railway Co., leased to the Metropolitan Railway Co. the northern part of a railway station for 100 years, together with a right of way from time to time and at all times over the southern part of the station (which was demised by the corporation to the Great Western Railway Co.) through a circular road. The way was not definitely described; it was never in fact used by the Metropolitan Railway Co. In 1897 the Metropolitan Railway Co. desired to make use of their right of way, and now brought an action to enforce it. The station was substantially in the same state as it was in 1878.

Held, that the right of way was still valid and must be defined by the defendant company; failing them, by the plaintiffs. Further, that interference with the business of the Great Western Railway Co. by reason of the user of the right of way was no answer to the claim.—METROPOLITAN RAILWAY Co. *v.* GREAT WESTERN RAILWAY Co., *Ch.D. Kekewich, J.*; 82 L. T. 451.

6. *Way of necessity—Vendor and purchaser—Land sold not entirely "landlocked" by other land of vendor—Implied grant.*—Where land is sold which is surrounded, partly by other land of the vendor, but partly by the land of a stranger, a grant of a right of way, as of necessity, will not be implied over the other land of the vendor.—TITCHMARSH *v.* ROYSTON WATER Co., *Ch.D. Kekewich, J.*, 201; 81 L. T. 673.

See also Mortgage, 13.

ECCLESIASTICAL LAW:—

1. *Clergy—Discipline—Practice—Appeal—Special leave—Clergy Discipline Act*, 1892, *s.* 4 (2).—Leave to appeal will not be given under section 4, subsection 2 of the Clergy Discipline Act, 1892, in respect of the facts unless there is a *primâ facie* case; in the absence of even a suggestion to that effect, an application for leave to appeal is frivolous.—EVANS *v.* WOODS, WOODS, EX PARTE, *P.C.*; [1900] A. C. 338.

2. *Faculty—Disused burial ground, faculty for erection of churchyard wall with arcade on—Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *ss.* 4, 14—*Meaning of "building"—Refusal of faculty for pictures at east end of chancel of parish church—Discretion—Wishes of parishioners—Evidence—Memorials.*—A faculty for the erection on a disused burial ground of a churchyard wall, one side of which would be so built as to form an arcade or covered way for the protection from the weather of frescoes proposed to be painted on the panels of that side of the wall which would be inside the churchyard, was granted, the Ordinary being of opinion that the wall or structure in question was not a "building" prohibited to be erected on a disused burial ground by the Disused Burial Grounds Act, 1884, and the Open Spaces Act, 1887.

Where the vestry of a parish and the petitioners are unanimous, or substantially so, in favour of accepting a presentation picture of merit for the decoration of their parish church, the introduction of the picture into the church may be properly sanctioned by a faculty, unless the picture appears to be likely to be abused by superstitious reverence, or be otherwise inappropriate in a church, or be such as might reasonably give offence to present or future parishioners; but where it was proposed that such a picture should be introduced into the church of an admirably worked parish, and conscientious objections which might be entertained by members of the congregation, without disparagement to the views of others in favour of it, were taken to it as a church decoration by a substantial minority of resident parishioners who were members of the

Church of England, and it appeared that its introduction into the church would offend the religious feelings of that minority and introduce discord into the parish where it had never existed before, it was held to be the duty of the court to refuse to grant a faculty for its introduction.

Instance of a faculty suit in which memorials and counter-memorials signed by parishioners were admitted in evidence by consent.—VICAR OF ST. BOTOLPH, ALDERSGATE WITHOUT *v.* PARISHIONERS OF SAME, *Consistory Court of London*; [1900] P. 69.

3. *Faculty—Interest requisite for promotion of faculty suit—Parishioners having names on rate-book—Ornaments of the church—Architectural decorations—Crucifixes—Ornaments Rubric*—3 & 4 *Edw.* 6, *c.* 10—*Refusal of confirmatory faculty—Churchwardens—Undertaking to replace Tables of Commandments—Canon* 82 *of Canons of* 1603—*Tabernacle for reception of Reserved Sacrament.*—A crucifix is neither a lawful church ornament nor an architectural decoration the retention of which in a church can be authorized by faculty, and where a crucifix has been introduced into a parish church the Ordinary has jurisdiction to direct its removal by the churchwardens without proof that it is likely to have superstitious reverence paid to it.

A parishioner of a parish in the City of London whose name is on the rate-book as occupier of a room in the parish taken solely to enable him to bring a civil suit in the court, has a sufficient interest to promote a cause of faculty to obtain the removal of unlawful church ornaments out of the parish church of the parish of which he is a parishioner.—KENSIT *v.* RECTOR OF ST. ETHELBURGA, *Consistory Court of London*; [1900] P. 80.

EDUCATION.—See School, 1.

ELECTION LAW:—

1. *Registration—Parliament—Notice of objection—Division of district or borough into wards—Omission of notice to specify ward of person objected to—Registration Order*, 1895, *Schedule II., Form I.*—A notice of objection to the overseers objecting to the name of a person being retained on the occupiers' list of voters of a Parliamentary division and borough in which the lists are made out in divisions and also in wards need not specify the ward on the list of voters whereof the name of the person objected to appears, in addition to specifying the division in which such name appears.—SAGAR *v.* CLARE, *Q.B.D.*; 82 L. T. 599.

2. *Registration—Parochial electors—Separate list—Ownership parochial electors—Claims to be on parochial electors' list—Jurisdiction of revising barrister to revise separate list and claims—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 2 (1), 44.—The Local Government Act, 1894, gives the revising barrister, in the revision of the voters' list for counties, jurisdiction to revise, and imposes upon him the duty of revising, the separate list of parochial electors, being the list of persons entitled to vote as parochial electors only in respect of the ownership of property in the parish; also the parochial electors' list of claimants who claim as ownership claimants to be entered on the separate list of parochial electors in respect of the ownership of property in the parish, and the parochial electors' lists of claimants who claim to be entered on the separate list of parochial electors in respect of the occupation of property in the parish.—REG. *v.* NASH, *Q.B.D.*, 188; [1900] 1 Q. B. 103; 69 L. J. Q. B. 77; 81 L. T. 489.

See also Criminal Law, 1.

EMPLOYER and WORKMAN.—See Master and Servant, 1-28.

ESTOPPEL.—See Landlord and Tenant, 26; Metropolis, 11.

EXECUTOR.—See Inland Revenue, 21; Practice, 33; Vendor and Purchaser, 14.

FACTORY:—

*Building—Upper floors factories—Lower floors not factories—Notice to owner—Staircase for escape from fire—Trespass on lower floors—Award on arbitration—Validity of—Factory and Workshop Act*, 1878 (41 *Vict. c.* 16), *s.* 93—*Factory and Workshop Act*, 1891 (54 & 55 *Vict. c.* 75), *s.* 7.—A building was let by the owners before 1892 to different tenants. Upon the second, third, and fourth floors businesses were carried on which were "non-textile factories" within the Factories and Workshop Acts, but the tenants of the basement, ground, and first floors did not carry on businesses within those Acts.

In an arbitration under section 7 of the Factory and Workshop Act, 1891, the owners were ordered by the award to provide a staircase and approaches thereto from the top of the building to the bottom, which would necessitate an encroachment upon the lower floors of the building.

Held, that there was no jurisdiction under the Acts to require that such alterations should be done as would necessitate such encroachment upon those floors of the building which were not factories, as only the second, third, and fourth floors were factories within the Factories and Workshops Act.—LONDON COUNTY COUNCIL *v.* LEWIS, *Q.B.D.*; 69 L. J. Q. B. 277; 82 L. T. 195.

See also Master and Servant 9, 13-17.

FALSE REPRESENTATION:—

*Raid on friendly State—Illegality of common venture—Criminal offence—Claim for damages—Joint delinquents—Demurrer—Foreign Enlistment Act*, 1870 (33 & 34 *Vict. c.* 90), *s.* 11 (i.).—Where the plaintiff was induced by the fraudulent misrepresentations of the defendant to join with him and others in doing an act which in consequence of such misrepresentation he believed to be legal, but which in fact was criminal, and the plaintiff thereby suffered injury and loss,

Held, that the defendant could not set up the plea that there was no right of indemnity between joint delinquents as an answer to an action for damages by the plaintiff.—BURROWS *v.* RHODES, *Q.B.D.*, 13; [1899] 1 Q. B. 816; 68 L. J. Q. B. 545; 80 L. T. 591.

See also Injunction, 2.

FINANCE ACTS.—See Administration, 1, 2; Inland Revenue, 2-9; Will, 2.

FISHERY:—

1. *Salmon fishery—Illegal methods—Fixed net or engines—Hang net—Toot and haul net.*—It is illegal to take salmon with any net which is at all fixed or permanent, even for a time, in the water.—ATHOLL (DUKE) *v.* GLOVER INCORPORATION OF PERTH. WEDDERBURN *v.* ATHOLL (DUKE), *H.L.* (*Sc.*); [1900] A. C. 403.

2. *Salmon Fishery Acts—Unlawful taking—Trout, apparently poisoned, but still alive, taken from river by the hand—Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 22—*Freshwater Fisheries Act*, 1878 (41 & 42 *Vict. c.* 39), *s.* 7.—Taking dying salmon, trout, or char from a river or stream by hand, or otherwise than by a properly-licensed instrument is an offence within section 22 of the Salmon Fishery

Act, 1873.—STEAD *v.* TILLOTSON, *Q.B.D.*, 431; 69 L. J. Q. B. 240.

FOOD and DRUGS.—See Adulteration, 1-7.

FOREIGN ENLISTMENT.—See False Representation.

FORESHORE:—

*Lessee from the Crown—Rights of the public—Religious meetings—Urban district council—Injunction—Trespass.*—The public have no right without the consent of the Crown or its lessees to enter upon the foreshore of the sea, when dry, except for the purposes of navigation and fishing; and therefore no one is entitled to hold meetings or deliver addresses on any part of the foreshore without such consent. An injunction is a formidable legal weapon which the court will refuse to grant where the injury or inconvenience caused by the trespass is trivial.—LLANDUDNO DISTRICT COUNCIL *v.* WOOD, *Ch.D. Cozens-Hardy, J.*, 43; [1899] 2 Ch. 705; 81 L. T. 170.

FRAUDS, STATUTE of:—

1. *Contract—Memorandum in writing—Sufficient description.*—The Statute of Frauds is satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed. Thus a letter stating: "In consideration of your having this day paid me the sum of £50, I hereby agree and undertake to grant you or your assigns a further lease of twenty-four years . . . of the . . . Warden Arms . . . immediately after the expiration of the term granted by the now existing lease, . . . such new lease to be at the same rental . . . and to contain similar covenants and conditions as are contained in the existing lease," but not containing the name of the person to whom it was addressed, was held to sufficiently identify the existing tenant of the premises (who had that day paid £50 to his landlord) to satisfy the statute.—CARR *v.* LYNCH, *Ch.D. Farwell, J.*, 616; [1900] 1 Ch. 613; 69 L. J. Ch. 345; 82 L. T. 381.

2. *Principal and agent—Contract—Memorandum in writing—Signature by agent "thereunto lawfully authorized"—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—A letter written by an agent within the scope of his authority, which refers to and recognizes an unsigned document as containing the terms of a contract made by his principal, is a sufficient memorandum of the contract within the fourth section of the Statute of Frauds, and it is not necessary, in order to satisfy the statute, that the principal should have authorized the agent to sign the letter as a record of the contract.

*Smith* v. *Webster*, 3 Ch. D. 49, discussed.—GRIFFITHS (JOHN) CYCLE CO. *v.* HUMBER & CO., *C.A.*; [1899] 2 Q. B. 414; 81 L. T. 310.

3. *Vendor and purchaser—Sale of land—Agreement signed by purchaser on paper containing printed name and address of vendor—No signature by vendor—Specific performance—Action by purchaser—Statute of Frauds* (29 *Car.* 2, *c.* 3).—An offer to purchase land written on paper containing the printed name and address of the vendor, but not signed by him, is not a sufficient memorandum of the contract to satisfy the Statute of Frauds, unless it be written at his dictation.

*Schneider* v. *Norris*, 2 M. & S. 286, and *Evans* v. *Hoare*, [1892] 1 Q. B. 593, distinguished.—HUCKLESBY *v.* HOOK, *Ch.D. Buckley, J.*; 82 L. T. 117.

See also Landlord and Tenant, 26.

GAMING:—

1. *Stakeholder—Liability—Agreement by stakeholder for consideration to pay the winner the amount of the stakes—Action on the agreement—Interpleader—Construction of agreement.*—In pursuance of a written agreement the two competitors in a trotting match deposited money with a stakeholder who, by a clause in the agreement, agreed with each of them that, in consideration of a commission on the total amount deposited, he would pay over to the winner a sum of money equal to the amount of the stakes actually deposited with him, after deducting commission.

Held, that under this clause, whether taken by itself or in conjunction with the other clauses of the agreement, no personal liability to pay was undertaken by the stakeholder beyond the liability ordinarily undertaken by a stakeholder.

Held, therefore, that an interpleader issue was rightly ordered in an action by one of the competitors who claimed payment from the stakeholder as winner of the match, when the other competitor also claimed to be winner.—DOWSON *v.* MACFARLANE, *C.A.*; 81 L. T. 67.

2. *Wagering—Money deposited with stakeholder—Right to recover—Money paid under contract rendered void by* 8 & 9 *Vict. c.* 109, *s.* 18—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.—Money deposited with a stakeholder to abide the event of a boxing match is not "money paid under or in respect of a contract made void by 8 & 9 Vict. c. 109, s. 18," and may be recovered by the depositor from the stakeholder if he has given the latter notice not to part with it.

*O'Sullivan* v. *Thomas*, 43 W. R. 269, [1895] 1 Q. B. 698, approved.—BURGE *v.* ASHLEY, *C.A.*, 438; [1900] 1 Q. B. 744; 69 L. J. Q. B. 538; 82 L. T. 518.

See also Bankruptcy, 23.

GAS:—

*Gas lamp—Knocking down—Proceedings in a police court—Proceedings in county court for negligence—Summary remedy not exclusive—Gas Works Clauses Act*, 1847 (10 *Vict. c.* 15), *ss.* 6, 20.—By the Gas Works Clauses Act, 1847 (10 Vict. c. 15), s. 20: "Every person who shall carelessly or accidentally break, throw down, or damage any pipe, pillar, or lamp belonging to the undertakers or under their control shall pay such sum of money by way of satisfaction to the undertakers for the damage done, not exceeding £5, as any two justices or the sheriff shall think reasonable.

Held, where a lamp-post had been knocked down by the negligent driving of the defendants' servant, that the plaintiffs could maintain an action for negligence in the county court against the masters, as the section was not exclusive.—CRYSTAL PALACE GAS CO. *v.* IDRIS, *Q.B.D.*; 82 L. T. 200.

See also Canada, Law of, 4; Metropolis, 3; Nuisance, 1.

GLEBE.—See Vendor and Purchaser, 15.

GOODWILL.—See Inland Revenue, 25; Partnership, 1, 2.

HACKNEY CARRIAGE:—

*Definition of—Driver—Standing or plying for hire—Street—Towns Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *ss.* 3, 38, 45.—The respondent stood for hire with an unlicensed carriage upon a cab-rank situated in a road adjoining a railway station. The road was the property of the railway company, subject to a public right of footway over and

along it. An information against the respondent for standing for hire with an unlicensed carriage having been dismissed by the justices,

Held (affirming the decision of the justices), that the road was not a street within section 3 of the Towns Police Clauses Act, 1847.

Held, also, that, in order to constitute an offence under section 45 of the same Act against the driver of a carriage, it must be proved that such carriage was a hackney carriage within the definition of hackney carriage in section 38.

*Curtis* v. *Embery*, 21 W. R. 143, L. R. 7 Exch. 69, followed.—JONES *v.* SHORT, *Q.B.D.*, 251; 69 L. J. Q. B. 473; 82 L. T. 197.

HAWKER.—See Market, 3.

HIGHWAY:—

1. *Nuisance—Obstruction—Loading and unloading of vans—Injunction.*—The private reasonable right to use a public highway in carrying on a business must, in a case of difficulty, give way to the public right of using the highway. What is a reasonable user of the highway depends on the facts of each particular case. It is not enough that the user consists in an aggregate of lawful acts.—ATTORNEY-GENERAL *v.* BRIGHTON SUPPLY ASSOCIATION, *C.A.*, 314; [1900] 1 Ch. 276; 69 L. J. Ch. 204; 81 L. T. 762.

2. *Rating—Exemption—Liability to repair* ratione tenuræ—*Sum paid in discharge of liability—Highway made parish highway — Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 33—*Highway Act*, 1862 (25 & 26 *Vict. c.* 61), *s.* 35.—In a certain hamlet all the highways were, previously to 1881, repairable by the occupiers of lands *ratione tenuræ*, and highway rates were not leviable by reason of the exemption in section 33 of the Highway Act, 1835. In 1881 an order was made by the justices under section 35 of the Highway Act, 1862, declaring that all highways in the hamlet should be parish highways, and the order fixed the sums to be paid by the respective occupiers of lands previously liable to repair *ratione tenuræ*, "in full discharge of all claims thereafter in respect of the repair and maintenance of the highways" as provided by the Act. These sums were nominal in amount, and were duly paid by the respective occupiers, including a railway company. In 1897 the railway company were rated in respect of their lands in the hamlet for expenses incurred in the repair of highways including those in the hamlet.

Held, that the order of the justices made in pursuance of section 35 of the Highway Act, 1862, did not deprive the railway company of their previously existing exemption from highway rates under section 33 of the Highway Act, 1835, and that the company were exempt from payment of so much of the rate as was levied in respect of the repair of highways within the hamlet.

Decision of the Court of Appeal in *North-Eastern Railway Co.* v. *Dalton Overseers*, 47 W. R. 582, [1899] 1 Q. B. 1026, affirmed.—DALTON OVERSEERS *v.* NORTH-EASTERN RAILWAY CO., *H.L.*; [1900] A. C. 345; 69 L. J. Q. B. 650; 82 L. T. 693.

3. *Right of passage—Roadside strip—Waste of manor—Land between fences—Presumption—Rebutting evidence.*—On one side of a metalled road, which was a public highway, was an irregular shaped piece of land, formerly part of the waste of the manor, beyond was an ancient hedge inclosing private property. On the other side of the road was another ancient hedge. In 1864, by the licence of the lord of the manor, one of the copyholders dug up and carried away several cartloads of soil from the surface of this piece of land. In 1872, in accordance with the customs of the manor, the lord granted a licence to inclose the land, and admitted the licensee as copyholder thereof. In 1874 the copyholder inclosed the land by erecting a fence by the side of the metalled road at a distance of 15ft. from the centre of the road, the surveyor of the highway board assisting in setting out the line. In 1884 the fence, being decayed, was restored. In 1880 the lord of the manor enfranchised the land. No objection was made by anyone to any of these acts until in 1897 the defendants threw down the fence, alleging that it was an obstruction to the highway.

Held, that, assuming that there was a *primâ facie* presumption that the whole space of land between the two ancient hedges was part of the highway, such presumption was rebutted by the evidence before the court, and that therefore the land inclosed in 1874 was not part of the highway.—NEELD *v.* HENDON COUNCIL, *C.A.*; 81 L. T. 405.

4. *Trespass—User of highway.*—The plaintiff was the owner and occupier of land crossed by a public highway, the soil of which was vested in him. The plaintiff had granted to a trainer of racehorses a licence for valuable consideration to exercise and train his horses upon the land. The defendant, who was the owner of a sporting newspaper, went upon the highway each morning for a considerable time and walked up and down it between two points about fifteen yards apart, not for the purpose of using it as a highway, but for the purpose of watching the performances and trial gallops of the racehorses on the adjoining land and taking notes thereof. The information thus obtained he published in his newspaper. The plaintiff brought an action of trespass, alleging that the acts of the defendant caused annoyance and detriment to himself and to his licensee.

Held, that, as the defendant was not using the highway for the purposes for which it was dedicated as a highway, but for the purpose of carrying on his business there, he was a trespasser.—HICKMAN *v.* MAISEY, *C.A.*, 385; [1900] 1 Q. B. 752; 69 L. J. Q. B. 511; 82 L. T. 321.

See also Charity, 2; Local Government, 6; Telegraph, 1.

INFANT.—See Married Woman, 1; Partition, 2; Settlement, 2, 3.

INJUNCTION:—

1. *Secret process—Co-owners—Right to use invention.*—Each co-owner of a secret process or invention may, in the absence of contract, use the knowledge which he possesses without the consent of the other co-owners.—HEYL-DIA *v.* EDMUNDS, *Ch.D. Kekewich, J.*, 167; 81 L. T. 579.

2. *Trade competition — Rival manufacturers of medical apparatus—Appropriation of medical testimonials — Fraudulent representations — Damage to manufacturer—Injunction refused.*—A manufacturer of patented medical apparatus had received favourable notices and comments in the medical and other press, which a rival manufacturer of later and similar apparatus had copied, in modified forms, into several pamphlets by which he advertised his goods.

Held, that there was no evidence that the defendant's goods were passed off for the plaintiff's, and that the application for an interlocutory injunction to restrain the issue of such pamphlets containing the testimonials must be refused.

*Franks* v. *Weaver*, 8 L. T. O. S. 510, 10 Beav. 297, distinguished.

*Batty* v. *Hill*, 11 W. R. 745, 1 H. & M. 264, approved. — TALLERMAN *v.* DOWSING RADIANT HEAT CO., *Ch.D. Stirling, J.*, 146; [1900] 1 Ch. 1; 68 L. J. Ch. 618.

See also Patent, 3; Peer; Railway, 2; Trade Name, 2, 3; Trade Union, 1; Water, 1.

INLAND REVENUE:—

1. *Auctioneer's licence—"Same town or place"—City of London and Sydenham.*—The respondent, an auctioneer, as agent for T., sold certain wine at Sydenham, in the county of London. T. was duly licensed to sell intoxicating liquors in the City of London, in the same county.

Held, that Sydenham and the City of London are not "in the same town or place" within 27 & 28 Vict. c. 56, s. 1.—CASEY *v.* ROSE, *Q.B.D.*; 82 L. T. 616.

2. *Estate duty—Annuity—"Full consideration in money or money's worth"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 3, *sub-section* 1.—In 1862 the defendant inherited under a settlement a life interest in estates in Lincolnshire, subject to a jointure rent-charge of £400; he also inherited a life interest in estates in Dorsetshire. In 1870 he sold the Lincolnshire estates subject to the jointure rent-charge, investing part of the purchase-money in the name of trustees on trusts to indemnify the purchasers against the rent-charge. In 1883 an arrangement was made by which the rent-charge owner released the Lincolnshire estates from the payment of the rent-charge, in consideration of which and in consideration of the money invested in the name of trustees being released from the trusts for indemnity, the defendant charged his life interest in the Dorsetshire estate and certain policies on his life with the payment of an annuity of £400.

Upon the death of the annuitant the Commissioners of Inland Revenue claimed estate duty from the defendant in respect of the benefit which accrued or arose to him as the tenant for life of the Dorsetshire estates upon the cesser of the annuity.

Held, that the annuity was not granted by the defendant for "full consideration in money or money's worth" paid to him "for his own use or benefit" so as to be exempt from the payment of duty by virtue of section 3, sub-section 1, of the Finance Act, 1894.—ATTORNEY-GENERAL *v.* SMITH-MARRIOTT, *Q.B.D.*, 12; [1899] 2 Q. B. 595; 68 L. J. Q. B. 59; 81 L. T. 359.

3. *Estate duty—Life policy—Policy brought into settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2 (1) (d).—By the Finance Act it is enacted that estate duty shall be payable upon property passing on the death of any person dying after the commencement of the Act, and by section 2 (1) (*d*) it is provided that property passing on the death of the deceased shall be deemed to include "any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

A. effected a policy of assurance on his own life, payable on his death to his wife, and in pursuance of an agreement on his marriage assigned the policy to the trustees of his marriage settlement upon trust to hold the proceeds thereof for the benefit of his wife for life, he, A., covenanting to keep up the policy and pay the premiums during his life.

Held, that on A.'s death estate duty was payable under section 2 (1) (*d*) on the proceeds of the policy. —ATTORNEY-GENERAL *v.* DOBREE, *Q.B.D.*, 413; [1900] 1 Q. B. 442; 69 L. J. Q. B. 223; 81 L. T. 607.

4. *Estate duty—Property passing on death—Settlement—Surrender of life estate to remainderman—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2 (1) (c).—Where a tenant for life of settled property surrenders the life estate to the remainderman and dies within twelve months of the surrender, estate duty is not payable under the Finance Act, 1894, on the death of the tenant for life.

Decision of the Divisional Court (Day and Lawrance, JJ.), [1899] 2 Q. B. 238, reversed.—ATTORNEY-GENERAL *v.* DE PREVILLE, *C.A.*, 193; [1900] 1 Q. B. 223; 69 L. J. Q. B. 283; 81 L. T. 690.

5. *Estate duty—Settlement—Reservation of interest—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c).—Any gift *inter vivos* of property not involving the entire cessation of any interest therein by the grantor, and excluding his possession and enjoyment thereof, is insufficient to avoid the payment of estate duty under the Finance Act, 1894. The property so granted or assigned and existing at the death of the grantor will be deemed to have passed on his death, and therefore liable to estate duty.

A transfer of property reserving a rent-charge to the grantor and providing for the payment of grantor's debts by the grantee, to the full exhaustion of the grantor's estate, is, therefore, ineffectual for the purpose of avoiding the said duty under section 2, sub-section 1 (*c*), of the Finance Act, 1894.

Decision of the Court of Appeal (47 W. R. 37, [1898] 2 Q. B. 534) affirmed.—GREY *v.* ATTORNEY-GENERAL, *H.L.*, 383; [1900] A. C. 124; 69 L. J. Q. B. 308; 82 L. T. 62.

6. *Estate duty—Settlement estate duty—Contingent settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5 (1) (a)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2 (1)—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 14.—The construction put on section 5 (1) of the Finance Act, 1894, in *Attorney-General* v. *Fairley*, 45 W. R. 589, [1897] 1 Q. B. 698—viz., that a contingent settlement of property is a settlement within the meaning of the section—has been adopted by the Legislature in section 14 of the Finance Act, 1898, and will not now be questioned by the courts.—ATTORNEY-GENERAL *v.* CLARKSON, *C.A.*, 216; [1900] 1 Q. B. 156; 69 L. J. Q. B. 81; 81 L. T. 617.

7. *Estate duty—Settlement estate duty—Legacy by testator in satisfaction of previous covenant—Settlement of legacy by instrument outside will—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 5, 6 (2), 8 (4)—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19—*Effect of covenant to pay "without any deduction."*—Settlement estate duty arising under section 5 of the Finance Act, 1894, is in all cases primarily payable, in the absence of indications of a contrary intention, out of the settled property.

*In re Webber, Gribble* v. *Webber*, 44 W. R. 489, [1896] 1 Ch. 914, overruled.

This primary incidence may, however, be shifted on to the residuary estate by the presence of clear indications of intention—*e.g.*, by a direction to pay "without any deduction."

Decision of Kekewich, J. (47 W. R. 635, [1899] 2 Ch. 489), affirmed on the point of law, but reversed on the point of construction.—MARYON-WILSON,

RE, WILSON *v.* MARYON-WILSON, *C.A.*, 338; [1900] 1 Ch. 565; 69 L. J. Ch. 310; 82 L. T. 171.

8. *Estate duty—Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict.* c. 26), *s.* 33—"*Property passing on death*," *Finance Act*, 1894 (57 & 58 *Vict.* c. 30), *s.* 1—"*Property of which the deceased was at his death competent to dispose*," *Finance Act*, 1894, *s.* 2 (1)—*Settled property.*—A. died in 1899, having by his will left property valued at £16,000 to trustees for his widow and daughter, and after the death of the widow to the daughter absolutely. Six months after A.'s death his father died, having by his will left property to A. valued at £80,000. Estate duty was paid on this amount in respect of A.'s father's death. By section 33 of the Wills Act the devise to A. did not lapse, but took effect as if he had survived his father. On a claim by the Commissioners of Inland Revenue for further estate duty on the £80,000 as property passing on A.'s death, or of which he was competent to dispose at the time of his death under the Finance Act, 1894,

Held, that this was not property passing on A.'s death within section 1 of the Finance Act, 1894, but that it was property of which he was at the time of his death competent to dispose under section 2 (1) of the Act, and that it was disposed of by his will. By virtue of the Finance Act, ss. 5 and 22 (1) (*i.*), and of the Settled Land Act, 1882, s. 2, it was settled property, and only liable to such duty as could be charged having regard to those provisions.

*Per* Channell, J.—The Wills Act, s. 33. gives the Crown the same duties as if the son had survived the father, and the devisees of the son take subject to the payment of the same duties as if the son had survived. The rate of duty payable is to be arrived at by taking the rate applicable to the property when aggregated with A.'s other property, but the Crown is not entitled to an increased rate on the £16,000 by reason of such aggregation.—SCOTT (JOHN), RE, *Q.B.D.*, 205; [1900] 1 Q. B. 372; 69 L. J. Q. B. 121; 81 L. T. 610.

9. *Estate duty—Succession duty—Company registered in England—Donor of property to company reserving life interest—Donor a foreigner domiciled abroad—Property situate abroad—Beneficiaries abroad—Succession on death of donor—Succession Duty Act*, 1853 (16 & 17 *Vict.* c. 51)—*Finance Act*, 1894 (57 & 58 *Vict.* c. 30), *s.* 2 (1) (b) (c).—An association was in 1891 formed into a company and was registered in England under the Companies Acts with the object of benefiting Russian Jews and of assisting the emigration of Jews from Europe or Asia to other countries. The affairs of the company were to be administered by a council, and the registered office of the company was to be in England. At a meeting of the council in 1892 Baron H. (chairman of the council) proposed to hand over to the company, and the council agreed to accept, various securities on condition that he was allowed to receive the income therefrom during his life, and a deed was executed in which Baron H. (the donor) gave to the company certain stocks, shares, and securities, mostly situate abroad, on condition that the company would permit the donor to receive the whole income from the property during his life, and would after his death apply such stocks, shares, and securities for the objects of the company. The registered office of the company was in London, where the general meetings were held and where the register of members was kept. The council met in Paris in offices there, where the company had its headquarters, its officers, clerks, and staff, and where most of its business was transacted, the business transacted in London being generally formal. Baron H. was an Austrian subject, domiciled in Austria and died so domiciled, and the property represented investments for the most part situate in foreign countries. On the death of Baron H. in 1896 the Crown claimed succession duty and estate duty upon the principal value of the property of the company.

Held, that, although the donor was a foreigner domiciled abroad and the property of the company was locally situate abroad and the beneficiaries were abroad, the company itself was an English company and was domiciled in England, and the property was owned in England by this English company, and that upon the death of Baron H. and the cesser of his life interest in the property the succession devolved upon this English company, and that therefore upon such succession the Crown became entitled to succession duty under the Succession Duty Act, 1853, and to estate duty under section 2 (1) (*b*) of the Finance Act, 1894, as upon property passing on the death of the donor in which the donor had an interest ceasing on his death.—ATTORNEY-GENERAL *v.* JEWISH COLONIZATION ASSOCIATION, *Q.B.D.*; 69 L. J. Q. B. 692; 82 L. T. 679.

10. *Income tax—Assignment for benefit of creditors—Trustee carrying on debtor's business—Income Tax Acts, Schedule D.*—The appellant was trustee under a deed of assignment for the benefit of creditors made by a firm. The firm were lessees for a term of years of certain mills, and prior to the execution of the deed of assignment they had sub-let part of the mills, and from the portion which they still retained they supplied steam power to their sub-tenants at agreed rents. The appellant entered into occupation of that portion of the premises for the purpose of winding up the firm's business, and he continued to supply steam power to the sub-tenants for the purpose of increasing the dividends for the benefit of the firm's creditors. As trustee under the deed he had realized the firm's assets except the lease to them of the mills, and had paid dividends to creditors amounting in all to 8s. 6d. in the pound on admitted claims. The amount received by the appellant from the sub-tenants considerably exceeded the cost of supplying the power, and the general commissioners assessed him at the sum of £800 under Schedule D. in respect of "profits of power."

Held, that the appellant was liable to income tax under Schedule D. in respect of the profit derived by him from carrying on the trade or business of supplying the steam power.—ARMITAGE *v.* MOOR, *Q.B.D.*; [1900] 2 Q. B. 363; 69 L. J. Q. B. 614; 82 L. T. 618.

11. *Income tax—Branches abroad—Dividends from securities out of United Kingdom—Constructive receipt in United Kingdom of dividends received outside—Income Tax Act*, 1842 (5 & 6 *Vict.* c. 35), *s.* 100, *Schedule D., 4th case.*—A life assurance company, having its head office and directors in the United Kingdom, carried on business in the East Indies by means of branches with agents and committees of management.

Accounts were made up yearly, and from the aggregate results of the entire business both at home and abroad, it was determined what amount of profits should be divided between the shareholders and policy-holders.

The moneys received at the branches in India included interest and dividends arising from securities in Her Majesty's dominions out of the United Kingdom, and were used as far as required in

liquidating payments at those branches. Any balances were retained for use as required, or were dealt with as required by the directors in London.

An equivalent for the amount of such interest and dividends, if not retained abroad, would have to be sent out from the United Kingdom to India for the general conduct and due discharge of the obligations of the society's business in India.

Held that the interest and dividends were constructively received by the society in the United Kingdom, and as such, were assessable under Schedule D., 4th case, to income tax.—UNIVERSAL LIFE ASSURANCE SOCIETY *v.* BISHOP, *Q.B.D.*; 81 L. T. 422.

12. *Income tax—Business carried on in foreign branches—Investments in foreign countries—Constructive receipt in United Kingdom—Income Tax Act,* 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D., 4th case.*—The plaintiff society carries on the business of life assurance, with head offices and directors in London.

The society has funds invested in securities in foreign countries, and the interest is reinvested in those countries or remitted direct to other foreign countries for investment.

In addition to this the society carries on its business in other foreign countries by means of local agents or managers, and has funds invested in securities in those countries.

The interest on such securities is either reinvested in those countries, applied in establishment and other expenses in the country where such interest is earned, or remitted to other foreign countries.

If such interest had not been retained abroad or remitted from one foreign country to another the society would have been obliged to send out money from the United Kingdom to their agencies to meet their obligations.

Held, that these amounts were constructively received in the United Kingdom, and were liable to be assessed to income tax.—GRESHAM LIFE ASSURANCE SOCIETY *v.* BISHOP, *Q.B.D.*; 81 L. T. 442.

13. *Income tax—Deduction—Poor law officer—Contribution to superannuation fund—Income Tax Act,* 1842 (5 & 6 *Vict. c.* 35), *s.* 146—*Poor Law Officers' Superannuation Act,* 1896 (59 & 60 *Vict. c.* 50), *s.* 12.—An officer or servant in the employ of poor law guardians is entitled, by section 146 of the Income Tax Act, 1842, to deduct from the amount of his salary on which income tax is payable the amount deducted from his salary for the purpose of the superannuation fund under the powers conferred by the Poor Law Officers' Superannuation Act, 1896.—BEAUMONT *v.* BOWERS, *Q.B.D.*, 557; [1900] 2 Q. B. 204; 69 L. J. Q. B. 600.

14. *Income tax—Deduction of tax from interest or annuities—Customs and Inland Revenue Act,* 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-section* 3.—The London County Council, when they paid the dividends due on Metropolitan Consolidated Stock, deducted a sum therefrom at the rate of 8d. in the pound in respect of income tax, in accordance with section 24, sub-section 3, of the Customs and Inland Revenue Act, 1888. The dividends were paid out of the Consolidated Loans Fund. The Consolidated Loans Fund was made up (*inter alia*) of rents received by the county council from their tenants, interest received by the county council from local authorities in respect of loans made by the county council, and money raised by rates. The Consolidated Loans Fund was applicable, first, to the payment of the said dividends, and then to the redemption of Consolidated Stock and the payment of various debts and liabilities. The county council claimed to be entitled to retain, as against the Crown, the amount deducted as income tax in respect of so much of the dividends as they stated to have been paid out of rents from tenants and interest from local authorities.

Held, first, that the county council were not entitled to retain any income tax in respect of so much of the dividends as they stated to have been paid out of rents; secondly, that they were entitled to retain the tax on so much only of the dividends as was equal to that rateable proportion of the interest received from local authorities which was applicable to the payment of the dividends.—ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL, *C.A.*, 294; [1900] 1 Q. B. 192; 69 L. J. Q. B. 241; 81 L. T. 698.

15. *Income tax — Life insurance company — "Annual profits and gains"—Participating policyholders—Return of surplus by way of bonus—Income Tax Act,* 1853 (16 & 17 *Vict. c.* 34), *Schedule D.*—By the articles of the charter of a life insurance company which had a capital divided into shares, it was provided that the company could issue participating policies, that the insurance business should be conducted on the mutual plan, and that, after the owners of the capital stock had received dividends to the amount of 7 per cent., the other earnings of the company should be allowed to accumulate, and that every five years a balance should be struck and the surplus (after deducting a sufficient sum to cover risks and obligations) be divided among the policyholders.

Held, that such surplus was an annual profit or gain of the company liable to be assessed to income tax under Schedule D of the Income Tax Act of 1853.

*Last* v. *London Assurance Corporation*, 34 W. R. 233, 10 App. Cas. 438, and *New York Life Insurance Co.* v. *Styles*, 14 App. Cas. 381, 38 W. R. Dig. 89, considered.

Decision of the Divisional Court (Darling and Channell, JJ.), 47 W. R. 556, [1899] 2 Q. B. 439, affirmed.—EQUITABLE LIFE ASSURANCE CO. OF UNITED STATES *v.* BISHOP, *C.A.*, 341; [1900] 1 Q. B. 177; 69 L. J. Q. B. 252; 81 L. T. 693.

16. *Income tax — Non-payment — Distress — Authority of collector—Taxes Management Act,* 1880 (43 & 44 *Vict. c.* 19), *ss.* 73, 86.—The power to distrain in the event of non-payment of taxes, conferred upon a tax collector by section 86 of the Taxes Management Act, 1880, may be lawfully exercised after the expiration of the year in respect of which the tax is payable, provided that, at the time of the distress, the collector has not been required to pay over the sums collected by him, and to deliver a schedule of arrears, as provided by section 103 of the Act.—ELLIOTT *v.* YATES, *C.A.*, 610; [1900] 2 Q. B. 370; 82 L. T. 812.

17. *Income tax—Profits or gains of trade—Deductions—Wear and tear of plant—Ships—Income Tax Act,* 1843 (5 & 6 *Vict. c.* 35), *s.* 100, 1*st case, r.* 3—*Customs and Inland Revenue Act,* 1878 (41 *Vict. c.* 15), *s.* 12.—The Customs and Inland Revenue Act, 1878, by section 12, provides that "the commissioners . . . shall, in assessing the profits or gains of any trade . . . chargeable under Schedule D . . . allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used in the concern. . . ."

The commissioners allowed to the appellant company, in respect of the diminished value of their fleet of ships by reason of wear and tear, a deduc-

tion which was less than that to which the company claimed to be entitled. Upon a case stated the Queen's Bench Division dismissed the appeal of the company.

Upon a further statement made by the commissioners, pursuant to a direction of the Court of Appeal, the appeal was dismissed upon the ground that no question of law arose.—PENINSULAR AND ORIENTAL CO. *v.* LESLIE, *C.A.*; 82 L. T. 137.

18. *Inhabited house duty — Exemption — Public-house*—48 Geo. 3, *c.* 55, *Schedule B., r.* 3—57 *Geo.* 3, *c.* 25, *s.* 1—5 *Geo.* 4, *c.* 44, *s.* 4—*Inland Revenue Act*, 1878, *s.* 13, *sub-section* 2. — By section 13, sub-section 2, of the Inland Revenue Act, 1878, "every house or tenement which is occupied solely for the purposes of any trade or business or of any profession shall be exempted from the duties (on inhabited houses) by the said commissioners upon proof of the facts to their satisfaction.

Appellant was owner of a building of two storeys. The ground-floor was occupied by appellant to carry on the trade of a licensed retailer of spirits. The upper storey was occupied as his dwelling-house. Access to the dwelling-house was by a door opening from the public street and by a staircase from that door which led to the upper storey. Access to the public-house was by a different door, also opening from the public street. There was no internal communication between the dwelling-house on the upper storey and the public-house on the lower storey.

Held, that the public-house was not liable to inhabited house duty, and that the duty ought to be confined to the value of that portion of the building used as a dwelling-house.—GRANT *v.* LANGSTON, *H.L.* (*Sc.*); [1900] A. C. 383; 69 L. J. P. C. 66; 82 L. T. 629.

19. *Inhabited house duty — Hall — Library — Liability to be assessed*—48 *Geo.* 3, *c.* 55, *Schedule B, r.* 5—*House Tax Act*, 1851 (14 & 15 *Vict. c.* 36), *s.* 1.—The dining-hall and offices of the Middle Temple, which are used and occupied during the daytime only, in which no one sleeps or resides, and which have no communication with any premises in which anyone sleeps or resides, are liable to inhabited house duty, as coming within the words "hall or office" in rule 5 of Schedule B of 48 Geo. 3, c. 55; but the library is not a "hall" within the meaning of that rule, and is not liable to inhabited house duty.

Judgment of Wills and Bruce, JJ. (47 W. R. 383), affirmed. — STYLES *v.* MIDDLE TEMPLE SOCIETY, *C.A.*, 164; 81 L. T. 426.

20. *Licence for male servant — "Gardener"— "Under gardener"—Employed "in any capacity involving the duties" of gardener or under-gardener— Spade work in garden*—32 & 33 *Vict. c.* 14, *ss.* 18, 19 (3).—Whether a workman employed all his time in working in a garden is or is not a gardener or under-gardener or a person employed in any capacity involving the duties of a gardener or under-gardener within 32 & 33 Vict. c. 14, ss. 18, 19 (3), is a question of fact to be decided by the justices on the evidence submitted to them.

The mere employment in a garden of a man doing work which a single-handed gardener would have to do does not necessarily make the man a gardener, and justices, in deciding the point, are entitled to consider whether or not the work done by him is work for the proper execution of which skill in gardening is required.—DILLON *v.* BATH (MARQUIS), *Q.B.D.*; 81 L. T. 186.

21. *Probate duty—Testator resident and domiciled abroad—Taking possession and administering the estate—Executor* de son tort—55 *Geo.* 3. *c.* 184, *s.* 37 —*Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 40.—The foreign executors of a testator who died domiciled abroad, and was the registered owner of shares and debentures in an English company, requested the company to transfer these shares and debentures into their names. The company were aware that the executors did not intend to take out probate in this country, but the transfer was made.

Held, that the company had taken possession and administered the estate of the deceased in this country, and constituted itself an executor *de son tort*, and become liable to probate duty and the statutory penalties.

Decision of the Court of Appeal (46 W. R. 193, [1898] 1 Q B. 205) affirmed.—NEW YORK BREWERIES CO. *v.* ATTORNEY-GENERAL, *H.L.*, 32; [1899] A. C. 62; 68 L. J. Q. B. 135; 79 L. T. 568.

22. *Stamp duty—Agreement — Promissory note— Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 33 (1).—The defendant gave the plaintiff the following document: "April 4, 1899.—*Re* The Mitre Hotel, Tooting Graveney, S.W.—On the day of the transfer of the licence I agree to pay you the sum of twenty-five pounds.—W. J. Dean.—To Mr. G. W. Smith.—Witness, T. M. Wales, 174, Victoria-street, S.W."

Held, that this document ought to be stamped as a promissory note within section 33 (1) of the Stamp Act, 1891.—SMITH *v.* DEAN, *Q.B.D.*; 69 L. J. Q. B. 331; 81 L. T. 755.

23. *Stamp duty—Agreement in consideration of fixed annual payments—"Bond, covenant, or instrument of any kind whatsoever"—"Only or principal or primary security for an annuity" for indefinite period—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Schedule I.*—By an agreement in writing not under seal, R. agreed to pay a telephone company the sum of £12 per annum for the use of a telephone wire and apparatus which the company was to affix to his house. The rent was to be payable every year in advance, and either party might put an end to the agreement by giving the other three months' notice.

Held, that this instrument was within the words "Bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity" for an "indefinite period" in Schedule I. of the Stamp Act, 1891, and chargeable with the *ad valorem* duty therein stated.

Decision of the Court of Appeal (47 W. R. 247, [1899] 1 Q. B. 250) affirmed.—NATIONAL TELEPHONE CO. *v.* INLAND REVENUE COMMISSIONERS, *H.L.*, 210; [1900] A. C. 1; 69 L. J. Q. B. 43; 81 L. T. 546.

24. *Stamp duty—Agreement to sell book debts— Guaranty of payment before completion—Consideration—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59 (1). —A. Co. (Limited) agreed to sell their entire undertaking together with the book debts owing to them to B. Co. (Limited). By the agreement the book debts were to be taken as they were at the making up of the books of the A. Co. at the end of the preceding year, and the A. Co. gave a guaranty that they would be paid in full before the date fixed for completion of the conveyance; and the A. Co. were to be taken as conducting the business as agents for the B. Co. since the end of the preceding year till completion.

At the date of the agreement only a small part of the debts due at the end of the preceding year was still owing, and they were all in fact paid before completion of the conveyance.

Held, that the sale of book debts was a sale of property within section 59 (1) of the Stamp Act, 1891, and that consequently the B. Co. were liable to pay stamp duty on that part of the consideration appropriated as representing the consideration given for those debts.—MEASURE *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*; 82 L. T. 689.

25. *Stamp duty—Conveyance on sale—Goodwill—Contract "made" in the United Kingdom—"Equitable interest in property"—"Property locally situate out of the United Kingdom"—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-section* 1.—By section 59, sub-section 1, of the Stamp Act, 1891, "Any contract or agreement made in England or Ireland under seal or under hand only . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except . . . (*inter alia*) property locally situate out of the United Kingdom" is chargeable with the same *ad valorem* duty as if it were a conveyance on sale.

A contract is "made," within the meaning of that section, in that country in which the signature of the last necessary party to it is affixed.

A contract for the sale of an option to purchase property at a particular price is not a contract for the sale of an "equitable estate or interest in any property" within the section.

Where the goodwill of a business is sold together with the premises where the business is carried on for a lump sum the goodwill is *primâ facie* annexed to the premises, and, therefore, if the business premises so sold are situate abroad, and there are no circumstances to rebut the presumption of annexation, the goodwill also will be treated as "property locally situate out of the United Kingdom" within the meaning of that section.

*West London Syndicate* v. *Inland Revenue Commissioners*, [1898] 2 Q. B. 507, distinguished.—MULLER & CO.'S MARGARINE *v.* INLAND REVENUE COMMISSIONERS, *C.A.*; [1900] 1 Q. B. 310; 69 L. J. Q. B. 291; 81 L. T. 667.

26. *Stamp duty—Conveyance on sale—Leaseholds—Assignment—Consideration—Rent—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 57.—The lessee of land with three houses thereon, conveyed in consideration of a sum of money two of the houses for the residue of the term, subject to a duly apportioned part of the rent reserved by the original lease. The assignee covenanted to pay the rent and to observe and perform the covenants contained in the original lease.

Held, that the rent payable by the assignee was not part of the consideration in respect whereof the conveyance was chargeable with *ad valorem* duty under section 57 of the Stamp Act, 1891.

Judgment of the Divisional Court (47 W. R. 300, [1899] 1 Q. B. 335) affirmed.—SWAYNE *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 197; [1900] 1 Q. B. 172; 69 L. J. Q. B. 63; 81 L. T. 623.

27. *Stamp duty—Debenture—Option to redeem on paying premium—Sum secured—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 86; *Schedule I.*, "*Marketable security.*"—A limited company issued a series of debentures of £100 each, each debenture stating that the company would, as and when the principal moneys thereby secured become payable, pay to the registered holder the sum of £100. By one of the conditions indorsed thereon, a certain number of debentures were to be redeemed by annual drawings on the 1st of July, 1902, and on the 1st of July in each succeeding year up to the 1st of July, 1917, when the balance outstanding was to be redeemed. By another condition the company might at any time after the 1st of July, 1900, redeem the debentures at £103 on giving six months' previous notice in writing, and upon the expiration of such notice the sum of £103 was to become payable as if the same was the amount of the principal moneys secured. The debentures were "marketable securities," not transferable by delivery within the meaning of Schedule I. to the Stamp Act, 1891.

Held, that each debenture was a security for £100 only, and was, therefore, liable to *ad valorem* duty upon that amount, and not upon £103.

Judgment of the Divisional Court (47 W. R. 415, [1899] 1 Q. B. 345) reversed.—KNIGHTS DEEP *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 198; [1900] 1 Q. B. 217; 69 L. J. Q. B. 66; 81 L. T. 625.

28. *Stamp duty—Mortgage to secure debentures—Substituted security—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 86 (11), *Schedule I.*—By a trust deed made between a joint-stock company and trustees for the debenture-holders, the former stipulating that they might redeem the debenture stock after giving certain notice, covenanted that after giving such notice they would redeem at nominal value, plus 10 per cent. By further clauses of the deed certain freeholds and leaseholds were assured to the trustees to secure payment of all principal moneys, bonuses, and interest which might become payable in respect of the debenture stock, and a floating charge on all the company's property was created for the same purpose. There was a clause giving the company power to withdraw any of the freeholds or leaseholds assured to the trustees and substitute other property of equal value.

By a subsequent indenture a small part of the leaseholds so assured was withdrawn and other leaseholds belonging to the company assured to the trustees to be held on the trusts of the earlier indenture. This second indenture contained no covenant for payment of the debenture principal money or interest, and no express declaration of the trusts on which the property assured was to be held.

Held, that the second indenture was a "mortgage" within section 86 (1) of the Stamp Act, 1891, and a "substituted security" within Schedule I. and heading "Mortgage, Bond, Debenture, Covenant" of that Act, and that therefore the Commissioners of Inland Revenue were right in holding that the stamp duty was to be calculated at the rate of 6d. per £100 on the whole principal money of the debenture stock.—GARTSIDES *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*; 82 L. T. 686.

29. *Stamp duty—Partnership dissolution—Record of transfer of property—"Conveyance on sale"—"Release or renunciation"—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *Schedule I.*—J. F. and his brother J. W. carried on business in partnership. J. F. in pursuance of the power for that purpose contained in the articles of partnership, gave J. W. notice to determine it, and J. W. gave J. F. notice of taking over his share in the partnership upon the terms prescribed by the articles. Two instruments were executed to give effect to the dissolution of the partnership—the first a conveyance, whereby the share and interest of J. F. in the real estate of the partnership was released and transferred to J. W. This deed was duly stamped with an *ad valorem*

duty. The other instrument, of even date—after reciting that accounts of the partnership had been made up, and that the amount standing to the credit of J. F. was £41,752 4s. 7d., and that, by the above-mentioned deed of even date, the real estate had been conveyed to J. W., and that the chattel property of the partnership was then in the exclusive possession of J. W., and that the said J. W. had given his promissory note bearing even date therewith for the above said sum—witnessed that J. F. and J. W. declared that the partnership between them should be considered as determined, and J. F. declared that he accepted the said promissory note in full satisfaction of all claims against J. W. in respect of his share and interest in the said partnership and the assets and properties thereof.

The commissioners claimed that this last-mentioned instrument was chargeable with an *ad valorem* conveyance duty.

Held, that the instrument was chargeable in accordance with the assessment of the commissioners.—GARNETT *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*, 303; 81 L. T. 633.

30. *Stamp duty—Railway company—Increase of nominal amount of capital—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 113.—A railway company being authorized by a special Act to re-arrange and consolidate the several classes of the shares and stocks in the capital of the company, made changes whereby the nominal amount of the share capital of the company was increased, but no real increase was thereby made in the actual capital of the company by the creation of new share capital.

Section 113 of the Stamp Act, 1891, enacts that in the case of any increase of the "amount of nominal share capital" of any company being authorized by any Act, the company shall deliver "a statement of the amount of such increase," and shall pay *ad valorem* duty on the amount of such increase.

Held, that the expression "amount of nominal share capital" in section 113 meant "nominal amount of share capital," and was not equivalent to "actual capital" or "assets," and that the company was liable to the payment of stamp duty in respect of the increase in the nominal amount of the share capital.—ATTORNEY-GENERAL *v.* MIDLAND RAILWAY CO., *Q.B.D.*; [1900] 2 Q. B. 353; 69 L. J. Q. B. 669; 82 L. T. 716.

31. *Stamp duty—Receipt—Scrip certificate of stock—"Consideration money therein expressed"—Instalments—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 3, *sub-section* 2; *Schedule I.*, "*Receipt,*" *exemption* 11.—A duly stamped scrip certificate for £100 stock was issued upon payment of the allotment money, the balance being payable by two instalments of £40 each at fixed future dates. Payment in full might be made at any time subject to discount, and upon default in payment of the amounts at their due dates the previous payments were liable to forfeiture. At the foot of the certificate two blank forms of receipt for payment of the two instalments respectively were printed. The instalments were duly paid and the receipts filled in.

Held, that the receipts were exempt from stamp duty with exemption 11 under the heading "Receipt" in Schedule I. to the Stamp Act, 1891, as they were written upon the duly stamped certificate, and acknowledged the receipt of the consideration money therein expressed.—LONDON AND WESTMINSTER BANK *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 195; [1900] 1 Q. B. 166; 69 L. J. Q. B. 102; 81 L. T. 630.

32. *Stamp duty—Release or renunciation on sale—Compensation by railway company to mine owner—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *Schedule I.—Railways Clauses Consolidation Act,* 1845 (8 & 9 *Vict. c.* 20), *s.* 78.—Mine owners, having received from a railway company compensation under section 78 of the Railways Clauses Consolidation Act, 1845, in respect of coal which they were required to leave unworked, executed an instrument whereby, in addition to acknowledging the receipt of the compensation money, they agreed to leave the coal unworked, covenanted to do all things necessary to vest the coal in the railway company, and declared that the sum paid to them included satisfaction and compensation for all claims which, but for those presents, they might have had against the railway company in respect of the coal.

Held, that the instrument was a release of an interest in property within the meaning of Schedule I. of the Stamp Act, 1891, and chargeable with a 10s. stamp, but that it was not a release or renunciation upon a sale, and therefore not chargeable with *ad valorem* duty.—GREAT NORTHERN RAILWAY CO. *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*, 170; [1899] 2 Q. B. 652; 81 L. T. 385.

See also Banker, 2.

INSURANCE:—

1. *Bullion—Seizure by Government of assured's country—Subsequent declaration of war—Insurance of property of enemy.*—Gold bullion, the property of a company registered and carrying on business in the Transvaal, was insured at Lloyd's during transit from the mine to the United Kingdom by a policy which covered the usual risks of capture and detention. The gold, while in transit, was seized on the 2nd of October by the orders of the Transvaal Government. At that date it appeared probable that hostilities might shortly break out between this country and the Transvaal, but hope of a peaceful settlement had not been entirely abandoned. On the 11th of October hostilities commenced. In an action on the policy, it having been agreed that the case was to be dealt with as if the war was over,

Held, that, as at the date of the seizure a state of war did not exist, the plaintiffs were not, as alien enemies, disentitled to recover.—DRIEFONTEIN CONSOLIDATED GOLD MINES *v.* JANSON; WEST RAND GOLD MINES *v.* DE ROUGEMONT, *Q.B.D.*, 619; [1900] 2 Q. B. 339; 69 L. J. Q. B. 771.

2. *Guarantee policy—Concealment of material facts*—Uberrima fides.—On the application of the appellant the respondent, an underwriter at Lloyd's, underwrote an instrument in the form of a policy whereby he guaranteed the solvency of a person who was surety for the repayment by the borrower of money lent by the appellant. The respondent made no inquiry as to the rate of interest payable by the borrower or as to the circumstances of the loan, and no information was given to him on those points. In fact the interest was over 30 per cent. and the borrower was unable to repay the loan. In an action on the policy the jury found that the transaction was not one of exceptional risk.

Held, that the non-disclosure of the rate of interest and the circumstances of the loan did not constitute a defence, there being no evidence that those facts were material to the only risk undertaken by the respondent—namely, the solvency of the surety.

Decision of the Court of Appeal (47 W. R. 487, [1899] 1 Q. B. 782), granting a new trial, reversed.—SEATON *v.* BURNAND, BURNAND *v.* SEATON, *H.L.*; [1900] A. C. 135; 69 L. J. Q. B. 409; 82 L. T. 205.

3. *Life policy—Practice—Declaration as to future interests—Refusal to accept premiums—Repudiation of policy—Action by holder.*—The court will refuse to make a declaration as to the validity of a policy of life assurance during the life of the assured, even when the society issuing the policy has refused to accept from the holder premiums due upon it upon the ground that the policy is void.—HONOUR *v.* EQUITABLE LIFE ASSURANCE CO. OF UNITED STATES, *Ch.D. Buckley, J.*, 347; [1900] 1 Ch. 852; 69 L. J. Ch. 420; 82 L. T. 144.

4. *Marine—Collision clause—"Injury to the other ship or vessel itself"—Wreck—Cost of removal.*—A policy of marine insurance on hull and machinery contained a collision clause which covered sums paid by the assured in the event of a collision with another vessel "in respect of injury to the other ship or vessel itself." The insured ship came into collision with a tug in a river and sank it. The wreck of the tug was removed by a conservancy board under their statutory powers, and the cost of doing so was paid to the board by the owners of the tug and recovered by them from the assured in a collision action.

Held, that the cost of removing the wreck was not recoverable by the assured under the policy.—BURGER *v.* INDEMNITY MUTUAL MARINE ASSURANCE CO., *C.A.*, 643; [1900] 2 Q. B. 348; 82 L. T. 831.

5. *Marine — Deviation — Delay —Clause allowing deviation at premium to be arranged.*—The plaintiffs insured with the defendants by a Lloyd's policy a box containing bullion "at and from Boodinni to London," in a P. & O. steamer, "including all risks of every description from the mines by escort to railway station at Raichur (forty miles) thence by rail (400 miles) to Bombay, thence to London." The policy contained a clause covering the assured "in the event of deviation or change of voyage at a premium to be hereafter arranged." At Raichur the station-master improperly refused to receive the box at other than owner's risk rate, and the official in charge of it took it for safety to the plaintiffs' head office at Secunderabad, 170 miles from Raichur, and off the route from that place to Bombay; the box was kept there for a month in the plaintiffs' safe while arrangements were being made with the railway company. The box was then taken to Raichur and forwarded by the prescribed route to London, where upon arrival a bar of gold was found to be missing; it had in fact been stolen while the box was in the plaintiffs' office at Secunderabad.

Held, that the taking of the box to Secunderabad was a necessary act done in the prosecution of the insured journey, and was within the scope of the adventure; that the risk was always a transit risk; that the delay at Secunderabad was unreasonably long, and that there was at that place an unjustifiable deviation not covered by the premium paid, but that, being a deviation in the course of the voyage, it was covered by the deviation clause in the policy, and the defendants were therefore liable.—HYDERABAD (DECCAN) CO. *v.* WILLOUGHBY, *Q.B.D.*; [1899] 2 Q. B. 530.

6. *Marine—Loss of freight—Exception—"Claim consequent on loss of time."*—A policy of insurance was effected on the outward voyage of a steamer from London to the Australian ports for freight expected to be earned on the homeward voyage, the subject-matter being described as "upon freight of frozen meat chartered or as if chartered"; the policy was warranted "free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." The ship was a general ship, but had three of her five holds fitted with refrigerating machinery for frozen meat. While discharging her outward cargo on her arrival at Sydney, a fire broke out on board, which destroyed the refrigerating apparatus, and in consequence it became impossible to carry frozen meat upon the homeward voyage.

In an action on the policy for total loss of freight on frozen meat,

Held, that the warranty applied not only to chartered freight but to all freights; that if the damage to the refrigerating apparatus could have been repaired promptly there would have been no loss of freight; that the claim therefore was "consequent on loss of time" within the meaning of the exception; and that the underwriters were not liable.

*Bensaude* v. *Thames and Mersey Marine Insurance Co.*, [1897] A. C. 609, followed.—TURNBULL *v.* HULL UNDERWRITERS ASSOCIATION, *Q.B.D.*; [1900] 2 Q. B. 402; 69 L. J. Q. B. 588; 82 L. T. 518.

7. *Marine—Mutual insurance society—Action for contributions—Insurance by agent, member of association—Shipowner not member—Liability.*—The plaintiffs, a mutual insurance association, sued the defendants for contributions or premiums payable in respect of an insurance of the defendants' ship in the plaintiffs' club.

By the policy, which was in the form of a Lloyd's policy, and subject to the plaintiffs' memorandum and articles of association and rules, the defendants' manager insured the ship in his own name, and for, and in the names of, all persons to whom the same might appertain. By the memorandum one of the objects of the association was the mutual insurance "of ships which the members may be authorized to insure in their own names." The articles defined a member as any person who, on behalf of himself, or of any other person, insures any ship in the association, and empowered a committee of the association to assess the members rateably in order to provide a fund to meet losses, and stipulated that the association should not be liable for losses, except to the extent of the fund which it could recover from members or persons liable. The rules provided for payment of premiums, for which the ships were to be assessed.

The defendants authorized the manager of their ship to enter her in the club, which he did, and he so became a member of the club, within the meaning of the plaintiffs' memorandum and articles of association, and personally liable to pay the contributions or premiums, which, under the articles of association and the rules, might be levied by the committee of the club. He became insolvent, and unable to pay, and the plaintiffs sued the defendants, as being the persons on whose behalf, and for whose benefit, the insurance was effected.

Held, that the defendants, being owners of an insurable interest, were the persons for whom the insurance was effected, that there was nothing in the memorandum and articles of association, or the rules, to exclude their liability to pay the premiums, and the plaintiffs were entitled to recover.

*United Kingdom Mutual Steamship Assurance Association* v. *Nevill*, 19 Q. B. D. 110, distinguished.—BRITISH MARINE MUTUAL INSURANCE CO. *v.* JENKINS, *Q.B.D.*; [1900] 1 Q. B. 299; 69 L. J. Q. B. 177; 82 L. T. 297.

8. *Marine—Policy on ship—Furniture—Grain cargo—Dunnage mats and separating cloths.*—Dunnage mats and separating cloths, which are used on

board a ship in connection with the carriage of a grain cargo, are covered by a time policy on ship in the ordinary Lloyd's form, although they are not being used on the voyage in the course of which the loss occurred.

Judgment of Bigham, J. (*ante*, p. 47, [1899] 2 Q. B. 401), affirmed.—HOGARTH *v.* WALKER, *C.A.*, 545; [1900] 2 Q. B. 283; 69 L. J. Q. B. 634; 82 L. T. 744.

9. *Marine—Ship—Seaworthiness—Warranty implied.*—A policy of marine insurance on cattle provided that the fittings of the ship were to be approved by Lloyd's surveyor. The fittings were so approved. During the voyage a number of cattle died owing partly to insufficiency of ventilation appliances and partly to insufficiency in the number of cattlemen appointed to attend to them.

Held, that the ship was unseaworthy in both respects; that the implied warranty of seaworthiness was not excluded by the provision as to the approval of the fittings, and consequently that the underwriters were not liable.—SLEIGH *v.* TYSER, *Q.B.D.*; [1900] 2 Q. B. 333; 69 L. J. Q. B. 626; 82 L. T. 804.

10. *Marine—Time policy—Ship pledged for cost of repairs—Subsequent loss of ship—Particular average.*—Where under a time policy a ship has sustained damage by perils insured against, and has been repaired abroad under an arrangement whereby the ship was pledged for the cost of the repairs, but the shipowners were not personally liable for them, and the ship was subsequently totally lost on the voyage home,

Held, that the underwriters were not liable to pay the cost of repairs in particular average, in addition to the total loss.—"DORA FORSTER," THE, *P.D. & Ad.D.*; 69 L. J. P. 85.

11. *Marine—Underwriters' liability—Repair to ship—Owners taking advantage of ship being dry-docked—Apportionment of expenses.*—A ship was dry-docked solely to enable the underwriters to effect the repairs for which they were liable. The owners took advantage of the ship being in dry dock to have her surveyed for the purpose of reclassification at Lloyd's, but no extra expense was occasioned to the underwriters thereby.

Held, that the underwriters were alone liable for the whole dock dues and the cost of getting in and out of dock, the owners being under no liability for them whatsoever.

*Marine Insurance Co.* v. *China Transpacific Co.* (*Limited*) (*Vancouver case*), 35 W. R. 169, 11 App. Cas. 573, commented on and explained.

Decision of the Court of Appeal (46 W. R. 417, [1898] 1 Q. B. 722) reversed.—RUABON STEAMSHIP CO. *v.* LONDON ASSURANCE, *H.L.*, 225; [1900] A. C. 8; 69 L. J. Q. B. 86.

12. *Marine—Wagering policy—Insurable interest—"P.p.i. clause"—"Ship"—Marine Insurance Act*, 1745 (19 *Geo.* 2, *c.* 37), *s.* 1.—A policy of marine insurance whereby the assured is entitled to be indemnified against loss in respect of the non-arrival of a ship at a certain port by a certain date is a policy of insurance on the ship within the meaning of 19 Geo. 2, c. 37, s. 1.

Where, on the trial of an action, the plaintiff's case discloses that the transaction which is the basis of his claim is illegal, the court cannot properly ignore the illegality or give effect to the claim, even if the illegality be not pleaded or relied on by the defendants. The court will, therefore, not enforce a policy of marine insurance which is illegal under 19 Geo. 2, c. 37, s. 1, by reason of its containing a clause that the policy itself is to be deemed a full and sufficient proof of interest, although that defence is not set up by the underwriters.—GEDGE *v.* ROYAL EXCHANGE ASSURANCE CORPORATION, *Q.B.D.*; [1900] 2 Q. B. 214; 69 L. J. Q. B. 606; 82 L. T. 463.

See also Inland Revenue, 3, 15.

INTEREST.—See Bill of Sale, 3; Bond; Trustee, 4.

JAMAICA, LAW of:—

*Fact not submitted to jury—New trial—Jamaica Code of Civil Procedure, s.* 438.—The appellants had a prescriptive right to load and store coals on their wharf in such a manner as to spread their coal-dust over the respondents' wharf. The respondents, however, alleged that the appellants had within twenty years so extended the site of their operations and altered the structure of their works as to produce injurious effects, not caused by any prescriptive right, to the respondents' wharf. In an action by the respondents against the appellants for damages in respect of the alleged nuisance, the question submitted to the jury was whether the appellants' works, taken as a whole, had by their extension been rendered more injurious than before to the respondents' works taken as a whole. The jury found that there had been no increase in inconvenience and discomfort to the respondents, and a verdict was entered for the appellants; but on appeal to the full court judgment was entered for the respondents on the ground that the change in the incidence of the dust produced by the extension and alteration of the site and works so altered the nature of the easement as to constitute a new wrong.

Held, that the question whether by their extension and alteration there had been a variation in the servitude imposed on the respondents of a kind substantial enough to cause an appreciable new wrong was a question of fact which had not been left to the jury, and that there must be a new trial.

Under section 438 of the Jamaica Code of Civil Procedure, the court cannot decide a question of fact never left to the jury, though it may draw inferences of fact not inconsistent with the findings.—ROYAL MAIL STEAM PACKET CO. *v.* GEORGE, *P.C.*; [1900] A. C. 480; 82 L. T. 539.

JUSTICES:—

1. *Appeal—Order for maintenance of pauper—* 43 *Eliz. c.* 2, *ss.* 6, 7—*Poor Relief Act*, 1819 (59 *Geo.* 3, *c.* 12), *s.* 26—*Poor Law Amendment Act*, 1868 (31 & 32 *Vict. c.* 122), *s.* 36—*Police* (*Metropolis*) *Act*, 1839 (2 & 3 *Vict. c.* 71), s. 50.—There is no appeal to quarter sessions from an order of justices against relatives for the maintenance of a pauper.

An order by a metropolitan police magistrate against the relative of a pauper that he should pay 2s. 6d. a week towards the maintenance of such pauper is not an order "in which the sum or penalty adjudged to be paid" is "more than three pounds" within section 50 of the Police (Metropolis) Act, 1839.—REG. *v.* LONDON JUSTICES, *Q.B.D.*, 319; [1900] 1 Q. B. 438; 69 L. J. Q. B. 364; 82 L. T. 296.

2. Certiorari—*Proceedings against officers of a trade union—Magisterial orders for payment of sums due — Civil debt — Criminal proceedings — Orders regular on the face—Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31), *s.* 12—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 6.—Summonses were issued against two officers of local branches of a certain trade union under the Trade Union Act, 1871,

s. 12, charging them with wilfully withholding certain sums of money belonging to the union. Both defendants admitted the charges against them, and orders, headed "Civil debt," were made upon them for payment of the amounts due, or in default distress and sale. Both defendants defaulted, and application was then made for their committal to prison under the section. The magistrate refused the application on the ground that the section was modified by the Summary Jurisdiction Act, 1879, s. 6, and that, the proceedings being civil and not criminal, in order to obtain committal a judgment summons must be issued, and the prosecution must prove possession of means by the defendants. An order *nisi* was then obtained, addressed to the magistrate and the two defendants, calling on them to show cause why the orders should not be removed and quashed on the ground that the moneys ordered to be paid were not civil debts.

Held, that, as the orders were regular on the face, the rule must be discharged.—REG. *v.* TRUSCOTT, *Q.B.D.*; 81 L. T. 188.

3. *Costs of appeal to quarter sessions—Payment by treasurer of county or borough—"Place"—Vagrant Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 9.—By section 9 of the Vagrant Act, 1824, upon an appeal to quarter sessions against a conviction under the Act, the justices in quarter sessions are empowered to order the treasurer of "the county, riding, division, or place in which the offence shall have been committed," to pay the prosecutor's costs.

A county borough had a separate commission of the peace, but not a separate court of quarter sessions. An appeal from a conviction under the Act by the borough justices having been successfully brought to the quarter sessions for the county, an order was made by quarter sessions upon the borough treasurer for payment of the prosecutor's costs.

Held, that the word "place" in the section must be construed as *ejusdem generis* with "county, riding, division," and meant a place having a separate court of quarter sessions; and that the order of quarter sessions was therefore wrongly made upon the borough treasurer, and should have been made upon the treasurer of the county.—REG. *v.* WEST RIDING JUSTICES, *Q.B.D.*; [1900] 1 Q. B. 291; 69 L. J. Q. B. 13.

4. *Public health—Nuisance—Order to abate—Prohibition against continuance and recurrence—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 96, 105.—Where justices make an order for the abatement of a nuisance upon a complaint made by a private individual under section 105 of the Public Health Act, 1875, such order must specify the works required as may be necessary for that purpose.

Further, where such order prohibits the doing of any acts as may lead to the recurrence of such nuisance, no works need be specified.—REG. *v.* HORROCKS, BOWSTEAD, EX PARTE, *Q.B.D.*; 69 L. J. Q. B. 688; 82 L. T. 767.

5. *Quarter sessions—Appeal—Notice of appeal—Service—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31 (2) (7).—Personal service on the other party of notice of appeal to the quarter sessions is not required by section 31 of the Summary Jurisdiction Act, 1879.—REG. *v.* SOMERSET JUSTICES, *Q.B.D.*; 69 L. J. Q. B. 311.

See also Adulteration, 4, 5; Divorce, 8-12; Licensing Law, 1-3, 6, 8, 9; Local Government, 21; Lunacy, 4, 6; Master and Servant, 29; Metropolis, 7; Poor Law, 3; Practice, 37; Vaccination, 1, 2.

LANDLORD and TENANT:—

1. *Dwelling-house—Covenant for quiet enjoyment—Adjoining house of greater height—Injury to demised house—Smoking chimneys.*—The erection by a lessor, of a building of such a height and so near the demised dwelling-house as to alter the ordinary currents of air and cause the wind to blow down the chimneys and make them smoke, and thus cause grievous annoyance to the lessee, is a physical interference with the house, and a breach of a covenant by the lessor that the lessee should enjoy the premises without any interference or disturbance by the lessor.—TEBB *v.* CAVE, *Ch.D. Buckley, J.*, 318; [1900] 1 Ch. 642; 69 L. J. Ch. 282; 82 L. T. 115.

2. *Distress—Exemptions from—Bedding—Bedstead—Law of Distress Amendment Act*, 1888 (51 & 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 147.—By section 147 of the County Courts Act, 1888, which is incorporated in section 4 of the Law of Distress Amendment Act, 1888, wearing apparel and bedding to the value of £5 are exempt from distress.

Held, that the word "bedding" includes "bedstead."—DAVIS *v.* HARRIS, *Q.B.D.*, 445; [1900] 1 Q. B. 729; 69 L. J. Q. B. 232; 81 L. T. 780.

3. *Distress—Goods impounded on premises—Possession—Pound breach—Abandonment—Distress for Rent Act*, 1737 (11 *Geo.* 2, *c.* 19), *s.* 10—*Practice—Leave to appeal to Court of Appeal on one point—Argument limited.*—Where a landlord, in distraining for rent, has, under section 10 of the Distress for Rent Act, 1737, impounded goods on the premises, it is not necessary that anyone on his behalf should remain in possession of the goods.

Where leave to appeal on one point has been given by the Divisional Court, the Court of Appeal will not allow appellant to argue other points which had been raised in the county court and in the Divisional Court.

Decision of the Divisional Court (Lawrance and Channell, JJ.), 47 W. R. 239, affirmed.—JONES *v.* BIERNSTEIN, *C.A.*, 232; [1900] 1 Q. B. 100; 69 L. J. Q. B. 1; 81 L. T. 553.

4. *Distress—Mortgage by sub-demise—Liability for rent*—Elegit—*Sheriff*—1 & 2 *Vict. c.* 110, *s.* 11.—The lessee for years mortgaged property by sub-demise and covenanted to pay the rent and perform the covenants in the lease. The defendant, the owner in fee simple, recovered judgment for rent due by the lessee, and issued a writ of *elegit*, under which the lands were delivered to the defendant. The mortgagee, the plaintiff, appointed a receiver, who entered into receipt of the rents and profits. The defendant levied a distress for rent subsequently accrued. The plaintiff brought an action to restrain the defendant from distraining on the premises.

Held, that the whole interest of the lessee was not taken by the judgment creditor, and that he was not a surety for the lessee (*Moule* v. *Garrett*, 18 W. R. 697, L. R. 5 Ex. 132, distinguished); that the land must be taken to have been delivered to the defendant under the *elegit* to the extent of the mortgagor's interest as mortgagor in possession, and not in respect of the mere dry reversion expectant on the determination of the sub-demise (*In re South*, 22 W. R. 460, L. R. 9 Ch. App. 369, applied); and that the defendant was entitled to distrain.—JOHNS *v.* PINK, *Ch.D.*

*Stirling, J.*, 247; [1900] 1 Ch. 296; 69 L. J. Ch. 98; 81 L. T. 712.

5. *Ground game—Agreement divesting the right of the occupier to kill—Validity—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *s.* 3.—An agreement by the owner of a farm, whereby he undertakes, in the event of his tenant forbearing to kill the ground game, to compensate him for loss or damage done to his crops by the ground game, is void by section 3 of the Ground Game Act, 1880.—SHERRARD *v.* GASCOIGNE, *Q.B.D.*, 557; [1900] 2 Q. B. 279; 69 L. J. Q. B. 720; 82 L. T. 850.

6. *Ground game—Occupying landlord—Alienation of right of shooting—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47).—The benefit of the Ground Act, 1880, is not confined to tenants, but extends to occupying landlords in cases where there has been an alienation of the right of shooting.

The owner of a farm granted a lease of the exclusive right of shooting to the plaintiff, and afterwards, during the currency of the lease, conveyed the freehold of the farm to the defendant, who entered into occupation. Finding that the rabbits on the farm were doing damage to his crops, the defendant caused them to be trapped. In an action for trespass to the plaintiff's exclusive right of shooting,

Held, by Vaughan Williams and Romer, L.JJ. (A. L. Smith, L.J., dissenting), that the defendant, being the occupier of the land, was entitled under the Ground Game Act to kill and take the ground game, notwithstanding that he was also the landlord.

Decision of the Queen's Bench Division ([1899] 2 Q. B. 436) affirmed.—ANDERSON *v.* VICARY, *C.A.*, 593; [1900] 2 Q. B. 287; 69 L. J. Q. B. 713.

7. *Lease—Company—Debenture—Receiver—Leaseholds covered by trust debenture deed and sub-demised to trustees—Liability of receiver appointed on behalf of debenture-holders to pay rent and perform covenants of head lease.*—A company's debentures were secured by a trust deed which dealt with the property of the company and included leaseholds. The deed purported to sub-demise the same to the trustees, but such trustees were not assigns of the lease. The receiver appointed on behalf of the debenture-holders entered into possession of the leaseholds, and subsequently removed the company's goods from the premises, but did not give up possession to the landlord, and certain rent remained in arrear. Subsequently an order was made permitting the landlord to re-enter and determine the lease. On a summons asking for an order that the receiver pay the rent due up to such period of re-entry,

Held, that the liability of the receiver was no greater than that of the trustees, who were not liable either at law or in equity for the head-rent, That if the court had been tenant it would have done what a just tenant would; but that the honour of the court could not be satisfied at the expense of somebody else not liable at law or in equity to satisfy it, and that therefore the summons must be dismissed.—HAND *v.* BLOW, *Ch.D. Stirling, J.*; 82 L. T. 750.

8. *Lease—Covenant—Breach by lessee of covenant with lessor—Right of adjoining lessee to enforce the covenant.*—A. let one of a row of houses to B., covenanting not to let any other house in the row for the trade of a greengrocer. A. subsequently let another house in the row to C., taking a covenant from him to use it for an Italian warehouse only. Action by B.'s assignee to restrain A. from letting, and C. from using, his premises for the trade of a greengrocer.

Held, that C. had broken his covenant with A.; that A. had observed his covenant with B.; that the plaintiff could neither sue C. directly for breach of his covenant with A. nor compel A. to sue him; and that the action must be dismissed.

*Kemp* v. *Bird*, 25 W. R. 838, 5 Ch. D. 974, followed.

*Fitz* v. *Iles*, [1893] 1 Ch. 77, discussed.—ASHBY *v.* WILSON, *Ch.D. Kekewich, J.* 105; [1900] 1 Ch. 66; 69 L. J. Ch. 47; 81 L. T. 480.

9. *Lease—Covenant—Building covenant—Repairing covenant—Continuing breaches of covenants—Waiver by acceptance of rent—Recovery of possession—Sufficiency of notice under Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.—A piece of land, with four houses, was demised on lease to the defendants by the predecessor in title of the plaintiffs on the 4th of June, 1894. The lease contained a licence to the defendants to pull down the houses within twelve months, and covenants by the defendants (*a*) within the same period to erect new premises in their place, and (*b*) to "at all times during the said term keep the said messuages and premises so to be erected as aforesaid in good and substantial repair." There was also a proviso for re-entry on "any breach or non-observance of any of the lessees' covenants." The new houses were never built. On the 27th of August, 1895, rent was paid by the defendants and accepted on behalf of the original lessor. In August, 1898, the plaintiffs served on the defendants a notice under section 14 of the Conveyancing Act, 1881, which set out the building covenant and the breach thereof, but did not refer to the repairing covenant.

Held, (1) that, by the acceptance of rent, the breach of the building covenant, which had been made once for all, had been waived; (2) that there was no continuing breach of the building covenant; (3) that there was a continuing breach of the repairing covenant; and (4) that the notice served under section 14 of the Conveyancing Act, 1881, was insufficient.—JACOB *v.* DOWN, *Ch.D. Stirling, J.*, 441; [1900] 2 Ch. 156; 69 L. J. Ch. 493.

10. *Lease—Covenant—Public-house licence—"Discontinuance" of—"Assigns"—Underlessee.*—The lessee of a public-house covenanted to conduct the business so as to afford no ground for "discontinuing the licence."

Held, that, read with the context, "discontinuing" meant not refusing to renew but forfeiting the licence.

The decision of the Court of Appeal (46 W. R. 386, [1898] 1 Q. B. 716) affirmed.—BRYANT *v.* HANCOCK & Co., *H.L.*; [1899] A. C. 442; 81 L. T. 96.

11. *Lease—Covenant—Repairs—Res judicata—Measure of damages.*—Certain premises were demised to the predecessors in title of the plaintiffs for sixty-one years from Michaelmas, 1837, subject to covenants to repair and deliver up in repair. The premises were sub-demised to the predecessors in title of the defendant subject to the same covenants.

On the 4th of April, 1894, an action was commenced by the plaintiffs against the defendant for damages for the breaches of the covenants, and £1,305 was recovered, no part of which was expended in repairing the premises.

On the 19th of September, 1898, the term of the underlease expired, and the plaintiffs claimed the sum that it would cost to put the premises into such state of repair as the defendant would be bound to leave them at the end of the term, making due allowance for the sum of £1,305 they had received.

Held, that the previous action was no estoppel, and that the true measure of damages of the breaches of covenants was the cost of putting the premises into the state of repair in which the tenant was bound to leave them at the expiration of the said term, less the sum of £1,305 and interest. —REBETTS *v.* CONQUEST, *Q.B.D.*; 82 L. T. 560.

12. *Lease—Covenant—Repairs—Trustee—Lease to—Covenant by lessee to repair—Occupation by* cestui que trust—*Liability of* cestui que trust *for breach of trustee's covenant.*—A lease of a house contained a covenant by the lessee for himself and his assigns to repair, and also a declaration that the lessee held the premises in trust for the defendant. The defendant occupied the premises during the whole of the term, as it was intended by the parties that she should do, and she paid the rent. Upon the expiry of the term the premises were out of repair.

Held, that the fact of the defendant having the beneficial interest in the lease did not, either by itself or coupled with the fact of occupation by her, create any equitable liability in her for the breach of the lessee's covenant.—RAMAGE *v.* WOMACK, *Q.B.D.*; [1900] 1 Q. B. 116; 69 L. J. Q. B. 40; 81 L. T. 526.

13. *Lease—Covenant not to assign—Forfeiture—Equitable assignment—Declaration of trust—Condition against assignment for benefit of creditors—"Disposing of the land leased"—Notice before action—Service on "lessee"—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-section* 4—*Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-sections* 1, 6 (*i.*); *s.* 67, *sub-section* 2.—By a lease the lessee covenanted not to assign or underlet the demised premises without the consent of the lessor, and there was a proviso for re-entry on breach of any of the covenants, or if the lessee should (*inter alia*) execute an assignment for the benefit of his creditors. The lessee executed an assignment of all his real and personal property, except that of a leasehold tenure, to a trustee for the benefit of his creditors, and he declared that he would stand possessed of all his leasehold property upon trust for the trustee and to assign and dispose of the same in such manner as the trustee should direct for the purposes of the deed. The trustee entered into possession of the demised premises, but no legal assignment of them was executed. The lessor served upon the trustee a notice alleging as ground of forfeiture the execution by the lessee of the assignment. In an action against the lessee to recover possession of the premises,

Held, that, as there had been no legal assignment of the premises, there had been no breach of the covenant against assignment.

Held, also, that the condition against assignment for the benefit of creditors was not a condition against disposing of the land leased within the meaning of section 14, sub-section 6 (*i.*), of the Conveyancing Act, 1881, and therefore service of notice on the lessee under section 14, sub-section 1, was necessary before the lessor could enforce his right of re-entry; and that service of the notice on the trustee under the deed was not a sufficient compliance with the provisions of section 14, sub-section 1, and section 67, sub-section 2, of the Act.

A condition against the disposing of the land leased within the meaning of section 14, sub-section 6 (*i.*), of the Conveyancing Act, 1881, means a condition which on its face is against the disposing of the land leased.—GENTLE *v.* FAULKNER, *C.A.*; [1900] 2 Q. B. 267; 69 L. J. Q. B. 777; 82 L. T. 708.

14. *Lease—Covenant by tenant to pay and discharge "all taxes, rates, duties, and assessments whatsoever"—Liability to pay for drainage works required by the vestry—Metropolis Management Act,* 1855 (18 & 19 *Vict. c.* 120), *ss.* 85, 217; *Metropolis Management Amendment Act,* 1862 (25 & 26 *Vict. c.* 102), *ss.* 64, 96.—The defendant, who was lessee of the plaintiffs, covenanted to pay and discharge all taxes, rates, duties, and assessments whatsoever which then were or thereafter should become payable for or in respect of the said premises thereby demised or any part thereof, whether parliamentary, parochial, or otherwise, except the landlord's property tax. The vestry of the parish served notices under the Metropolis Management Act, 1855, requiring the drains to be reconstructed according to the regulations of the vestry. It was agreed between the parties that the work should be done by the plaintiffs without prejudice to their right (if any) under the covenant to throw the liability for its cost upon the defendant.

Held, that the tenant was liable to pay the cost of the drainage works.

*Brett* v. *Rogers*, 45 W. R. 334, [1897] 1 Q. B. 525, approved.—FARLOW *v.* STEVENSON, *C.A.*, 213; [1900] 1 Ch. 128; 69 L. J. Ch. 106; 81 L. T. 589.

15. *Lease—Forfeiture—Breach of covenant—Notice to remedy several breaches—Validity—Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 14 (1). —A notice to a lessee under the 14th section of the Conveyancing Act, 1881, to remedy a number of alleged breaches of covenant is not bad merely because in respect of one or more of them the breach cannot be established.

*Lock* v. *Pearce*, 41 W. R. 369, [1893] 2 Ch. 271, followed.

*Horsey Estate* v. *Steiger*, 47 W. R. 644, [1899] 2 Q. B. 79, and *In re Serle*, 46 W. R. 440, [1898] 1 Ch. 652, distinguished.—PANNELL *v.* CITY OF LONDON BREWERY CO., *Ch.D. Buckley, J.*, 264; [1900] 1 Ch. 496; 69 L. J. Ch. 244; 82 L. T. 53.

16. *Lease—Insanitary condition—Innocent misrepresentation—Rescission—Indemnity—Damages.*—The plaintiffs, who were the lessees of certain premises which they used for the purpose of breeding prize poultry, alleged that they had been induced to take the lease on the representations of the defendant's agents that the premises were in a sanitary condition and that the state of repair of the premises was good.

The defendant denied that any such representations were made.

The premises proved to be in an insanitary condition and in a bad state of repair.

Held, that, assuming innocent misrepresentations were made which entitled the plaintiffs to rescission of their contract, they could not claim to be indemnified by way of compensation for injuries sustained by the insanitary condition of the premises and occasioned by their entering into the contract. Such compensation is in reality damages pure and simple, and is not the proper consequence of rescinding the contract.—WHITTINGTON *v.* SEALE-HAYNE, *Ch.D. Farwell, J.*; 82 L. T. 49.

17. *Lease—Minerals—Specific performance—Undivided moiety—Inconvenience.*—An agreement by one of two tenants in common of land to make a lease of the minerals contained in his share can be enforced by specific performance.

Inconvenience caused by the other tenant in common having granted a lease of the minerals contained in his share to another person is not sufficient ground for the court to refuse specific performance in such a case: *Price* v. *Griffith*, 1 De G. M. & G. 80, distinguished.—HEXTER *v.* PEARCE, *Ch.D. Far-*

*well, J.*, 330; [1900] 1 Ch. 341; 69 L. J. Ch. 146; 82 L. T. 109.

18. *Lease — Mortgage — Assignee of equity of redemption—Action to recover possession for breach of covenants in lease—Right of assignee to bring action—"Assign" of lessor—Notice to execute repairs—Sufficiency of notice—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-section* 1, 3—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 5.—The assignee of the equity of redemption, being in receipt of the rents and profits of property which had been demised by the owner and afterwards mortgaged, is entitled under section 25, sub-section 5, of the Judicature Act, 1873, to maintain in his own name an action for the recovery of the property for breach of the covenant in the lease to repair, under a proviso in the lease entitling the lessor to re-enter for such breach.

Such assignee is an "assign" of the lessor within the meaning of section 14, sub-section 3, of the Conveyancing Act, 1881, and is therefore entitled to serve upon the tenants the notice specifying the breach required by section 1 of that Act; and such notice is sufficient, and "sufficiently specifies the breach and requires its remedy," although it does not specify the repairs required in each particular house—the property being house property—if it gives in detail in a schedule every repair that may be required according to the condition of each house, and leaves it to the tenant to apply it and ascertain what particular repairs are to be done in his house.—MATTHEWS *v.* USHER, *Q.B.D.*; 81 L. T. 542.

19. *Lease—Public-house—Condition for re-entry on liquidation—Forfeiture—Underlessee, relief to—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14—*Conveyancing Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 4—*Waiver.*—A voluntary winding up by a solvent company for the purpose of amalgamating with other companies works a forfeiture of a condition for re-entry on liquidation.

On forfeiture of the head lease the court has power, under section 4 of the Conveyancing Act, 1892, in granting relief to an underlessee, to vary (even by way of increase) the amount of rent reserved by the underlease.—EWART *v.* FRYER, *Ch.D. Kekewich, J.*, 443; 82 L. T. 415.

20. *Lease—Reservation of exclusive sporting rights—Severability—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *s.* 3.—A lease of a farm contained a reservation to the lessor of "the exclusive right . . . to enter upon the said farm for the purpose of sporting or otherwise."

Held, that the reservation was severable and was not wholly void as being in contravention of the Ground Game Act, 1880, and that a person who, with the permission of the tenant, was shooting partridges on the farm was liable to be convicted of trespassing in pursuit of game.—STANTON *v.* BROWN, *Q.B.D.*, 333; [1900] 1 Q. B. 671; 69 L. J. Q. B. 301.

21. *Lease—Theatre—Covenant not to assign—Grant of right to supply refreshments—Breach—Forfeiture.*—A lessee of a theatre covenanted not to assign or part with the premises, or any estate or interest therein, for all or any part of the term thereby granted. The lessee subsequently granted to a third person the free and exclusive licence and right to use the refreshment rooms and bars in the said theatre.

Held, that the lessee had not assigned or parted with the premises or any estate or interest therein, and that consequently there was no forfeiture.—DALY *v.* EDWARDES, *Ch.D. Kekewich, J.*, 360; 82 L. T. 372.

22. *Lease—Tied house—Lease executed by lessee only—Covenant running with the land—Assignment of reversion—Evidence—"Successors in business"—32 Hen.* 8, *c.* 34—*Specific performance—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 10.—In 1892 the defendant executed under seal an agreement with B. (Limited) to take a yearly tenancy of an hotel, and covenanted with B. (Limited) that he would at all times during the tenancy purchase of B. (Limited) or their successors in business all ale, beer, &c., sold or consumed either on or off the premises. The document was executed by the defendant alone.

In 1899 B. (Limited) sold all their property, including the hotel, and the goodwill of their business, to the plaintiffs.

The defendants refused to purchase beer, ale, &c., from the plaintiffs and bought from others.

On an injunction by the plaintiffs to restrain the defendants from committing a breach of the covenant, it was

Held, that the plaintiffs were "successors in business" of B. (Limited); that, although the plaintiffs could not before the Judicature Acts have sued in covenant or *in assumpsit*, yet, as the defendant would have no defence to an action by the plaintiffs for specific performance to compel the defendant to take the legal estate, the plaintiffs were entitled to an injunction: *Walsh* v. *Lonsdale*, 21 Ch. D. 9, considered.

It is doubtful whether the word "lease" in section 10 of the Conveyancing Act, 1881, includes an "agreement for a lease."

In examining the defendant with respect to the covenant alleged to have been broken the general question "Have you received complaints from customers?" was allowed.—MANCHESTER BREWERY CO. *v.* COOMBS, *Ch.D. Farwell, J.*; 82 L. T. 347.

23. *Lease—Underlease—Covenant for quiet enjoyment—"Without any interruption by the landlord or any person claiming through him"—Original lease with covenant not to assign or underlet—Grant of underlease in breach of covenant—Subsequent assignment of reversion—Action of ejectment by assignees of reversion—Consent of underlessor to judgment.*—The defendant, being the lessee of a shop which he covenanted not to assign or underlet without the approval of the landlord, let the premises to the plaintiff for the residue of the term without having obtained such approval. The sub-lease contained a covenant by the defendant that the plaintiff should hold and enjoy the premises without any interruption by the defendant or any person lawfully claiming through him. Subsequently the superior landlord assigned the reversion, and the assignees brought an action of ejectment against the defendant, on the ground that he had forfeited his lease by breach of covenant. The defendant consented to judgment being signed against him, and the plaintiff was obliged to go out of possession. In an action by the plaintiff against the defendant for breach of covenant for quiet enjoyment, Ridley, J., gave judgment for the plaintiff.

Held, on appeal, that there was evidence that the interruption of the plaintiff's tenancy was caused by the act of the defendant in consenting to a judgment being signed against him which he might have resisted; and that, therefore, the appeal must be dismissed.—COHEN *v.* TANNAR, *C.A.*, 642.

24. *Market garden holding—Improvements—Compensation—Special bargain—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 57.—A

tenant who, by agreement with his landlord, is to receive compensation for improvements, and who might, but does not, make a claim for compensation under the Agricultural Holdings (England) Act, 1883, is not debarred by section 57 of the Act from recovering compensation under his agreement.—PEARSON AND I'ANSON'S ARBITRATION, RE, *Q.B.D.*, 154; [1899] 2 Q. B. 618; 81 L. T. 289.

25. *Rent—Instalments payable in advance—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *s.* 2.—The Apportionment Act, 1870, only applies to sums accruing due, and not to sums accrued due at the time of the event which necessitates the apportionment.—ELLIS *v.* ROWBOTHAM, *C.A.*, 423; [1900] 1 Q. B. 740; 69 L. J. Q. B. 379; 82 L. T. 191.

26. *Tenancy from year to year not in writing—Parol agreement to give up possession of premises at a particular date—Surrender by operation of law—Estoppel by conduct—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 3.—Under a three years' agreement in writing the defendant B. became tenant of certain premises belonging to the plaintiff F., and after the expiration of his tenancy in March, 1898, B. remained on in possession as tenant from year to year.

In December, 1898, B. asked F. to release him from his tenancy, and it was verbally agreed that B. should go out on the 24th of June following. F. placed a notice board on the premises that the same were "to be let," and subsequently sold the premises to a third party, who bought with possession at Midsummer, 1899.

On the 24th of June, 1899, the defendant refused to give up possession.

In an action of ejectment brought by F. against B.,

Held, that the plaintiff was entitled to judgment on two grounds: (1) Because the agreement of December, although bad as an agreement to surrender by reason of it not being in writing, was nevertheless an acceptance of a new tenancy by B., which was to end at Midsummer, 1899, and that acceptance worked a surrender of the old tenancy by operation of law; and (2) because the defendant, by his conduct in standing by and permitting the plaintiff to contract an obligation with the purchaser, was estopped from denying that his tenancy was other than that upon the footing of which he allowed his landlord to sell the property to the purchaser.—FENNER *v.* BLAKE, *Q.B.D.*, 392; [1900] 1 Q. B. 426; 69 L. J. Q. B. 257; 82 L. T. 149.

27. *Waste—Long lease—Deposit of rubbish—Injury to reversion—Countervailing advantage—Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 25.—To constitute waste on the part of a tenant there must be a substantial alteration of the thing demised, resulting in an injury to the inheritance; and such an alteration is not the less waste because it may result also in some countervailing advantage greater than the injury.

Therefore, where the land demised was low-lying land, and the lessee shot rubbish containing vegetable matter upon it, and thereby raised it above high-water level, but made it more expensive to build upon, it is no answer to an action for waste to say that it is an advantage for building, for the land to be thus raised. The land demised being building land, the fact that the existence of vegetable matter upon it might, under the Public Health Acts, prevent the lessors at the end of the term from building dwelling-houses upon it, or might put them to the proof that such vegetable matter was not then existing, is an injury to the inheritance making the shooting of the rubbish waste.

The fact that the shooting of the rubbish during the term would prevent the lessors at the end of the term from deriving the special profit to be made by the use of the land in this way, is an injury to the inheritance making the shoooting of the rubbish waste.—WEST HAM CHARITY BOARD *v.* EAST LONDON WATERWORKS CO., *Ch.D. Buckley, J.*, 284; [1900] 1 Ch. 624; 69 L. J. Ch. 257; 82 L. T. 85.

28. *Yearly tenant—Notice to quit—Alternative notice—"End of current year's tenancy"—Sufficiency of notice.*—A notice given the 24th of March, 1898, to a tenant from year to year holding from the 25th of March to the 25th of March in each year, to quit "on the 24th of June, 1898, or at the end of your current year's tenancy," is a good notice to quit on the 25th of March, 1899, and determines the tenancy on that day.—WRIDE *v.* DYER, *Q.B.D.*, 73; [1900] 1 Q. B. 23; 69 L. J. Q. B. 17; 81 L. T. 453.

See also Bankruptcy, 4.

LANDS CLAUSES ACTS.—See Arbitration, 3, 4, 7; Railway, 1, 4.

LAND TRANSFER ACT.—See Administration, 4; Practice, 38; Vendor and Purchaser, 14.

LEASE. — See Foreshore; Inland Revenue, 26; Landlord and Tenant, 1, 7-23; Merger, 1, 2; Mine, 1-4; Mortgage, 3, 7, 10, 11; Practice, 35; Probate, 1; Railway, 4; Settled Land, 4-7; Vendor and Purchaser, 4, 16-18.

LIBEL:—

1. *Imputation upon a tradesman in the way of his trade—Criticism on manufacture or goods.*—If the only meaning which can be reasonably attached to a writing is that it is a criticism upon the goods or manufacture of a trader it cannot be the subject of an action for libel, but an imputation upon a man in the way of his trade is properly the subject of an action without proof of special damage.

*Harman* v. *Delany*, 2 Stra. 898, and *Evans* v. *Harlow*, 5 Q. B. 624, distinguished and approved.

Whether in any particular case the words complained of are susceptible of a defamatory meaning, or are simply a disparagement of goods, is for the jury.—LINOTYPE CO. *v.* BRITISH EMPIRE TYPE-SETTING MACHINE CO., *H.L.*; 81 L. T. 331.

2. *Publication—Circulating library—Book circulated in ignorance of libel contained in it—Negligence.*—The proprietors of a circulating library circulated copies of a book which, unknown to them, contained a libel on the plaintiff. In an action for libel brought against them by the plaintiff, they failed to show that it was not through negligence on their part that they did not know that the book contained the libel when they circulated it.

Held, that they were liable as publishers of the libel.

*Emmens* v. *Pottle*, 16 Q. B. D. 354, discussed.—VIZETELLY *v.* MUDIE'S SELECT LIBRARY (LIM.), *C.A.*; [1900] 2 Q. B. 170; 69 L. J. Q. B. 645.

See also Contempt, 2.

LICENSING LAW:—

1. *Beerhouse—Forfeiture of licence by conviction of licensee—Application by owner for temporary authority—Discretion of justices—Grounds of refusal—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 15.—Where the holder of a beerhouse licence

which has existed before and continuously since 1869 has forfeited his licence by conviction for offences under section 15 of the Licensing Act, 1874, and the owner of the premises makes an application under that section to a court of summary jurisdiction for a temporary authority to carry on the business until the next special licensing sessions, the justices in such court have not a general discretion to refuse such application, and cannot go beyond the four grounds of refusal specified in section 8 of the Wine and Beerhouse Act, 1869.—FLINN, EX PARTE, *Q.B.D.*, 29; [1899] 2 Q. B. 607; 81 L. T. 221.

2. *Beerhouse—Licence—Privileged house—No beer sold in beerhouse—Application to renew licence—Jurisdiction of justices to refuse renewal—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19.—A beerhouse was licensed prior to May, 1869, and remained continuously licensed down to 1898, but no beer had been sold in the house for many years. A new tenant, who had become the occupier of the premises and who intended to carry on the business of the beerhouse, but to whom a transfer of the licence had been refused, applied at the annual licensing meeting for a renewal of the licence.

Held, that the justices had no jurisdiction to refuse the renewal on the ground that no beer had been sold in the house or that the house was not required by the neighbourhood, but that they were limited by section 19 of the Wine and Beerhouse Act, 1869, to the four grounds specified in section 8 of that Act.—MACKRELL *v.* BRENTFORD JUSTICES, *Q.B.D.*, 648; [1900] 2 Q. B. 387; 69 L. J. Q. B. 748.

3. *Justices—Appeal to quarter sessions—Costs—Taxation out of sessions—Consent—Order on borough treasurer to pay costs of licensing justices—Right of treasurer to be present at the taxation—Jurisdiction—Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29.—Section 29 of the Licensing Act, 1828, provides that, in the case of an appeal from the judgment of a justice in or concerning the execution of the Act to the court of quarter sessions having been reversed, "it shall be lawful for the court, if it shall think fit, to adjudge and order that the treasurer of the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment shall pay to such justice, or to whomsoever he shall appoint, such sum as shall, in the opinion of such court, be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been so put."

When a court of quarter sessions under this enactment orders the expenses of licensing justices to be paid by the treasurer of the county or place for which the justices acted, the amount of such expenses ought not to be taxed out of sessions without the consent of the treasurer; and if, in the absence of such consent, the court refer the taxation to their clerk of the peace, they must adopt his decision during the sessions. The treasurer is entitled to have notice of, and to attend, the taxation of the expenses.

A court of quarter sessions ordered the treasurer of a borough to pay a sum of money to the clerk of licensing justices whose judgment, while acting for the borough, had been appealed against, for the expenses to which he (the clerk) had been put in supporting the judgment of the justices.

Held, that the order was bad.—REG. *v.* WINDER, *Q.B.D.*, 605; 69 L. J. Q. B. 729.

4. *Keeping premises open for sale of intoxicating liquor—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 9.—Eleven being the closing hour in B., after that hour five men were in the bar of an inn with glasses, some of which were not empty. No drink had been drawn, and no person had entered the house after eleven, but both doors of the inn were open.

Held, that the premises were not kept open for the sale of intoxicating liquors within section 9 of the Licensing Act, 1874.—LLOYD *v.* BARNETT, *Q.B.D.*; 82 L. T. 804.

5. *Licence—Premises pulled down for public improvement—Application for licence for other premises—Notices, sufficiency of—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *s.* 7—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 40.—The holder of a licence for the sale of intoxicating liquors on and off the premises in respect of a house which was about to be pulled down for the purpose of a public improvement, applied to the justices in special sessions, under section 14 of the Alehouse Act, 1828, for a similar licence in respect of other premises not theretofore licensed. The applicant had satisfied all the requirements of section 14 as to the giving of notices, but not the provisions of section 40 of the Licensing Act, 1872.

Held, that the notices were sufficient; that the express provisions of section 14 of the Alehouse Act, 1828, as to notices are not repealed, either expressly or impliedly, by section 40 of the Licensing Act, 1872.—REG. *v.* NICHOLSON, *C.A.*, 52; [1899] 2 Q. B. 455; 81 L. T. 257.

6. *Licence—Refusal to renew—Appeal to quarter sessions—Power of quarter sessions to refuse renewal in absence of evidence—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 27—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42.—Where the holder of a licence appeals to quarter sessions from the refusal of a general annual licensing meeting to renew his licence, the quarter sessions have no power to refuse to grant a renewal in the absence of evidence in opposition to the renewal.—EVANS *v.* CONWAY JUSTICES, *C.A.*, 577; [1900] 2 Q. B. 224; 69 L. J. Q. B. 636; 82 L. T. 704.

7. *Proprietary club—Company carrying on a club—Sale of liquors—Some shareholders of company not members of club—Necessity of licence for sale of liquors to members.*—The proprietor of an ordinary proprietary club, where the refreshments and liquors sold to the members are the property of the proprietor, and where the proprietor gets the profit from such sales, cannot sell intoxicating liquors to the members of the club without having the necessary licences.

A limited company incorporated under the Companies Acts carried on the business of a club. Most of the shareholders of the company were members of the club, but there were a few outside shareholders who were not members. The refreshments and liquors were the property of the company, and the profits (if any) from the sale of such refreshments went to the company, and not to the club.

Held, that the company, being a legal entity distinct from the club, and being composed of different members, could not sell intoxicating liquors or tobacco to members of the club without the requisite licences.—NATIONAL SPORTING CLUB *v.* COPE, *Q.B.D.*, 446; 82 L. T. 352.

8. *Renewal—General annual licensing meeting—Proceedings where no notice of opposition—Objection—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42.—At the general annual licensing meeting of a division in which a certain beerhouse was situated, a report made by the head constable of the division

was read, in which he asked that the renewal of the licence of the beerhouse should be withheld until the adjourned meeting. No notice of opposition to the licence had been served on the licence-holder prior to the mheting, nor had he had notice to attend at the meeting. The justices thereupon adjourned the granting of the licence, and gave notice to the licence-holder to attend at the adjourned meeting.

Held, that an objection was made within the meaning of section 42 (2) of the Licensing Act, 1872, and that the justices had jurisdiction to consider the objection of the head constable at the adjourned meeting. — HAWKINS *v.* BRIDGWATER JUSTICES, *Q.B.D.*, 587; [1900] 2 Q. B. 382; 69 L. J. Q. B. 663; 82 L. T. 847.

9. *Sale of beer—Sale at unlicensed place—Traveller—Order—Appropriation—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.—The respondent, a brewer, carrying on business at L., held a wholesale licence besides a retail licence in respect of those premises enabling him to sell beer for consumption off the premises.

On the 10th of July his traveller called at a house in K.-terrace, H., and obtained an order for six bottles of beer. He entered the order in a memorandum book he had with him. Nothing more was done at this house by the traveller, and the goods were delivered by the respondent's carter on the 14th of July. On delivering the bottles, which were not marked in any way indicating any appropriation, the carter took the bottles from a box which was constructed to contain twelve, but which only contained the six ordered. There was no address or label on the boxes, and the beer was paid for on delivery, and the appellant contended the sale took place at K.-terrace. It was proved that the practice was for each traveller to enter his orders in an order book at the licensed premises. The respondent himself entered all these orders in a private general order book, and contended that he accepted or rejected each order as he considered fit. He then entered them in the general delivery book. The justices considered that there was no sale of beer at K.-terrace, and that the sale and appropriation took place at the licensed premises, and dismissed the summons.

Held, allowing the appeal, that the justices were wrong.—COCKER *v.* MCMULLEN, *Q.B.D.*; 81 L. T. 784.

See also Landlord and Tenant, 10.

LIGHT.—See Easement, 1.

LIMITATION STATUTES:

1. *Adverse possession—Rent—Set-off—Will—Construction—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 34, 42—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.—The effect of the Limitation Acts of 1833 and 1874 is that, where a tenant has obtained an absolute title to property by reason of the expiration of the statutory period, all rights which the reversioner would have had in respect of the land come to an end, and rent, the non-payment of which has given the occupier his title, cannot be deemed to be owing.

Consequently, rent in respect of the period previous to the extinguishment of the landlord's estate cannot be brought into account under a hotchpot clause in his will.

Decision of North, J. ([1900] 1 Ch. 292), reversed. —JOLLY, RE, GATHERCOLE *v.* NORFOLK, *C.A.*, 657.

2. *Company — Prospectus — Untrue statements — Action by shareholder for compensation—Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3—*Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3.—An action for compensation for loss or damage sustained by a shareholder in a company by reason of untrue statements in a prospectus under section 3 of the Directors' Liability Act, 1890, is not an action "for penalties, damages, or sums of money given to the party grieved" within the meaning of section 3 of 3 & 4 Will. 4, c. 42, and consequently need not be brought within two years after the cause of action accrued.

The Directors' Liability Act, 1890, does not impose a penalty, but merely a liability to make compensation for a loss sustained.

In such an action the cause of action accrues and the time begins to run from the time when the plaintiff subscribes for shares.

*Semble*, the period of limitation would be six years under the Act 21 Jac. 1, c. 16.

Held, also, on the merits of the case, that the plaintiff was entitled to succeed.

Judgment of Kekewich, J. (*ante*, p. 39, [1899] 2 Ch. 523), affirmed.—THOMSON *v.* CLANMORRIS (LORD), *C.A.*, 488; [1900] 1 Ch. 718; 69 L. J. Ch. 337; 82 L. T. 277.

3. *Copyhold manor—Admittance—Arbitrary fine—Fine assessed and demanded more than six years after defendant's admittance—Accrual of lord's cause of action—Statutes of Limitation* (21 *Jac.* 1, *c.* 16; 3 & 4 *Will.* 4, *c.* 42, *s.* 3).—P. was admitted tenant of a copyhold manor by M. on the 5th of April, 1892. M., as lord of the manor, could by right of custom claim an arbitrary fine from any tenant so admitted by him, such fine to be assessed by the lord, and to be reasonable and to be duly demanded.

On the 2nd of September, 1898, the fine, which had not been assessed until February of that year by M., was duly demanded; and, not being paid, the writ in the present action to recover the fine was issued on the 13th of April, 1899, whereupon P. pleaded in defence the Statutes of Limitation.

Held, that, as it was the admittance by the lord that gave him the right to demand the fine, the action could not be maintained, since the lord's cause of action accrued on the 5th of April, 1892, or more than six years before the action was brought. —MONCKTON *v.* PAYNE, *Q.B.D.*, 44; [1899] 2 Q. B. 603.

4. *Dispossession of land—Interference from equivocal acts—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 3.—In order to acquire a title to land, which has a known owner, by the Statute of Limitations, that owner must have lost his right to the land by being dispossessed of it or by having discontinued his possession of it (3 & 4 Will. 4, c. 27, s. 3).

Such owner cannot be dispossessed unless the plaintiff, who claims under the statute, obtained possession, which involves an *animus possidendi*—*i.e.*, occupation with the intention of excluding the owner as well as other people.

When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important.

Many years ago the plaintiffs placed gates at the end of a strip of land belonging to the defendants, over which the plaintiffs had a right of way only, and they did various equivocal acts on the strip of land in question, which was bounded on either side by defendants' land.

Held, in the circumstances of the case and upon the evidence (Jeune, P., *dubitante*), that the plaintiffs had failed to prove the acquisition of a title to the strip of land in dispute, and that the defendants had not been dispossessed for the

statutory period.—LITTLEDALE *v.* LIVERPOOL COLLEGE, *C.A.*, 177; [1900] 1 Ch. 19; 69 L. J. Ch. 87; 81 L. T. 564.

5. *Powers of appointment under settlement—Money charged on lands—Express trust—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 8, 10—*Wills Act* (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 27—*Residuary bequest in will—Assets—Administration.*—Powers of appointment over two separate sums of £2,000 were given to A. H. and G. W. respectively, the money to be raised on the death of each by trustees on an estate which they held in trust for a term of 500 years. G. W. died in 1860 and A. H. in 1886. The money was not raised on the death of either. An action was brought within twelve years of the death of A. H. to have both sums of £2,000 raised.

Held, that though the trustees could enter to raise the £2,000 due on the death of A. H., they could not raise the £2,000 due on the death of G. W., as the right to raise that was barred by section 10 of the Real Property Limitation Act, 1874.

Held, further, that the gift of residue in the will of A. H. operated as an appointment of her £2,000, and that this sum was applicable for payment of her debts and legacies.—HARTLEY, RE, WILLIAMS *v.* WILLIAMS, *Ch.D. North, J.*, 245; [1900] 1 Ch. 152; 69 L. J. Ch. 79; 81 L. T. 804.

6. *Public authority—"Within six months of ceasing of injury or damage"—Fatal Accidents Act*, 1846 (*Lord Campbell's Act*)—*Negligence—Public Authorities Protection Act*, 1893, *s.* 1 (a).—The injury or damage in respect of which an action lies under Lord Campbell's Act is the injury or damage to the deceased by the act, neglect, or default which caused his death, and not the injury or damage resulting from his death to the plaintiff.

Held, therefore, that where the action is brought against a statutory body the period of six months within which section 1 (*a*) of the Public Authorities Protection Act, 1893, requires it to be commenced must be calculated from such act, neglect, or default, or in case of continuance of injury or damage to the deceased, from the ceasing thereof.—MARKEY *v.* TOLWORTH JOINT HOSPITAL DISTRICT BOARD, *Q.B.D.*; 69 L. J. Q. B. 738.

See also Bond; Company, 6; Mortgage, 8.

LOCAL GOVERNMENT:—

1. *Bye-law—Betting—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 16—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Metropolitan Streets Act*, 1867 (30 & 31 *Vict. c.* 134), *s.* 23.—A bye-law that "No person shall frequent or use any street or other public place, on behalf either of himself or any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager with any person, or paying, or receiving, or settling bets," is a bye-law for the good government of the district, and is valid under a statutory power for the local authority to make bye-laws for the good government of the district. Nor is such a bye-law repugnant to section 23 of the Metropolitan Streets Act, 1867, which prohibits three or more persons assembling together in a street for the purpose of betting.

*White* v. *Morley*, 47 W. R. 583, [1899] 2 Q. B. 34, approved.—THOMAS *v.* SUTTERS, *C.A.*, 133; [1900] 1 Ch. 10; 69 L. J. Ch. 27; 81 L. T. 469.

2. *Corporation—Municipal corporation—Accounts—Elective auditor—Municipal accounts—Accounts of urban sanitary authority—Remuneration of auditor—Duty of auditor—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 25, 27 (1)—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 246.—A elective auditor of a borough is not entitled, under the Municipal Corporations Act, 1882, to any remuneration for his services.

The duty of an auditor of the accounts of a corporation as urban sanitary authority, under section 246 of the Public Health Act, 1875, is not confined to a mere examination of vouchers, but extends to the consideration whether any of the payments which have been made are illegal or improper.—THOMAS *v.* DEVONPORT CORPORATION, *C.A.*, 89; [1900] 1 Q. B. 16; 69 L. J. Q. B. 51; 81 L. T. 427.

3. *Costs as between solicitor and client—Public right of way—Action of trespass—Person acting under direction of local authority—Public Authorities Protection Act*, 1893, *s.* 1 (*b*)—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26.—A public right of way having been obstructed by the owner of the land through which it ran, the county council passed a resolution, under section 26 of the Local Government Act, 1894, that the powers and duties of the district council, who had failed to take proceedings to protect the right of way, should be transferred to them. The county council then, under an arrangement with the owner of the land, directed the defendants, two of their officials, to drive along the way so as to enable the question of the public right to be raised. The landowner brought an action of trespass against the defendants, in which the latter obtained judgment.

Held, that the defendants, in committing the alleged trespass by the direction of the county council, were acting in pursuance of the public duty of protecting public rights of way imposed upon the local authority by section 26 of the Local Government Act, 1894, and were therefore entitled to their costs as between solicitor and client under section 1 of the Public Authorities Protection Act, 1893.—GREENWELL *v.* HOWELL, *C.A.*, 307; [1900] 1 Q. B. 535; 69 L. J. Q. B. 461; 82 L. T. 183.

4. *County fund—County rate—Military aid for suppression of riots—Maintenance of troops*—Mandamus.—The justices of a county, having applied to the military authorities to send soldiers into the county for the purpose of suppressing riots, made arrangements with tradesmen for the housing and lodging of the soldiers at certain agreed rates of payment, and pledged the credit of the county for such payment.

Held, that the tradesmen were not entitled to a writ of *mandamus* to the county council to make such payment out of the county fund.—REG. *v.* GLAMORGAN COUNTY COUNCIL, *C.A.*, 112; [1899] 2 Q. B. 536; 81 L. T. 372.

5. *Expenses—Rates—Asylums board—Contributions from county and county boroughs—Apportionment—Rateable values—Assessable values—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 33, *sub-section* 2—*Agricultural Rates Act*, 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 2, 3, 5, 9.—By a local Act passed in 1891 it was enacted that the Lancashire Asylums Board, which was thereby constituted, should, for the purpose of raising the annual sum required for payment of the expenses incurred by them, obtain contributions from the county and the county boroughs in proportion to the respective rateable values, as ascertained under section 33 of the Local Government Act, 1888, of the county and county boroughs.

Held, that, on the passing of the Agricultural Rates Act, 1896, the provisions of that Act did not make it the duty of the asylums board to divide the sum required by them in proportion to the assessable values of the county and the county boroughs as ascertained under that Act, but that it was still their duty to divide it in proportion to the rateable values as ascertained under section 33 of the Local Government Act.

Judgment of Bruce and Ridley, JJ. (47 W. R. 361, [1899] 1 Q. B. 759), reversed. — LANCASHIRE ASYLUMS BOARD *v.* MANCHESTER (MAYOR), *C.A.*, 356; [1900] 1 Q. B. 458; 69 L. J. Q. B. 234; 82 L. T. 1.

6. *Highway—Liability to repair* ratione tenuræ—*Recovery of expenses incurred by district council in effecting repairs—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25, *sub-section* 2.—Proceedings under section 25, sub-section 2, of the Local Government Act, 1894, to enforce liability to repair a highway *ratione tenuræ* must be taken against the occupier of the land charged with the repair, and not against the owner.

*Cuckfield Rural District Council* v. *Goring*, 46 W. R. 541, [1898] 1 Q. B. 865, affirmed.—DAVENTRY DISTRICT COUNCIL *v.* PARKER, *C.A.*, 68; [1900] 1 Q. B. 1; 69 L. J. Q. B. 105; 81 L. T. 403.

7. *Parish council*—Mandamus—*Costs of action—Sanction of action by parish meeting—Consent to incur expenses over 3d. in the pound.*—By section 11 of the Local Government Act, 1894, a parish council cannot, without the consent of the parish meeting, incur expenses or liabilities which will involve a rate above 3d. in the pound for any year, and the sum raised by the council in any year is not to exceed 6d.

An action was brought by the parish council in which they were unsuccessful, and they incurred costs to the successful defendant amounting to £92 14s. 10d. A rate of 3d. would realise £54 12s., and since March, 1899, when the financial year began, precepts had been issued for £52, £25 of which went to defray the council's costs, and the balance in parish expenses.

After a rule *nisi* for a *mandamus* to the council to issue their precept to the overseers to pay the sum due to the defendant for costs, two parish meetings were called, but the necessary resolutions were not passed to raise the extra 3d., owing to the small attendance.

Held, that as no information was forthcoming as to the proceedings before the action was commenced, it must be assumed consent was given, and the rule must be made absolute.—REG. *v.* STOKE PARISH COUNCIL, *Q.B.D.*; 82 L. T. 198.

8. *Public health—Arbitration—"Full compensation"—Practice—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 308.—The "full compensation," to which, by section 308 of the Public Health Act, 1875, any person who sustains damage by reason of the exercise of the powers of the Act, in relation to any matter as to which he is not himself in default, is entitled, is confined to costs as taxed between party and party, and does not include other expenses reasonably and properly incurred.

The appellant was owner of premises in a borough of which the respondents were the local authority. The respondents served a notice requiring him to abate a nuisance on his premises, and made a complaint to justices, who ordered him to comply with the notice. He appealed to quarter sessions, and the appeal was dismissed, subject to a case for the opinion of the High Court. The High Court ordered that the order of quarter sessions dismissing the appeal be quashed with costs, and that the respondents pay to the appellant his costs of the appeal to the High Court, to be taxed. The costs of the two appeals were taxed, and paid to the appellant. In prosecuting his appeals the appellant reasonably incurred greater expenses than those he received from the respondents. The appellant claimed the difference between the taxed costs of the two appeals and the amount so expended, and he also claimed the costs of defending himself before the justices.

On a special case stated by an arbitrator acting under section 308,

Held, that the words "full compensation" were confined to costs which had been taxed and were recoverable as between the parties, and the appellant was not entitled so recover.

Decision of the Divisional Court ([1900] 2 Q. B. 104) affirmed.—BARNETT *v.* ECCLES CORPORATION, *C.A.*; [1900] 2 Q. B. 423; 69 L. J. Q. B. 556.

9. *Public health—Compulsory purchase of land—User for different purpose—Order of Local Government Board — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 175.—A direction by the Local Government Board under section 175 of the Public Health Act, 1875, that land which has been acquired by a local authority for specific purposes, but is not required for those purposes, shall not be sold, cannot authorize a permanent user of the land for purposes other than those for which it was originally acquired.

Decision of Kekewich, J. (reported *ante*, p. 69, [1900] 1 Ch. 51), affirmed.—ATTORNEY-GENERAL *v.* HANWELL URBAN DISTRICT COUNCIL, *C.A.*, 690; 82 L. T. 778.

10. *Public health—Continuing offence — Work executed in contravention of bye-law—Continuance in same state—Builder without power to remedy breach—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 158.—By the Public Health Act, 1875, s. 158, where the execution of any work is an offence, in respect whereof the offender is liable in respect of any bye-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the bye-law shall be deemed to be a continuing offence.

A builder was convicted for building a house without sufficient air space, contrary to a bye-law. The builder was not the owner, and had not been in possession, nor had any right to go on the premises after the conviction. Afterwards the builder was prosecuted for a continuing offence in respect of the continuance of the work in the same state, in contravention of the bye-law, and convicted.

On a case stated,

Held, that the builder, having no power to remedy the breach complained of, was not guilty of a continuing offence, and the conviction was wrong.—WELSH & SON *v.* WEST HAM CORPORATION, *Q.B.D.*; [1900] 1 Q. B. 324; 69 L. J. Q. B. 114; 82 L. T. 262.

11. *Public health—Sanitary expenses—Capital or income—Leasehold houses—Equitable tenant for life—Repairs—Ground-rent—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76)—*Dangerous structures notice—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*).—There is no distinction in the position of an equitable tenant for life of leaseholds where the property is sub-let at a rack-rent, and where it is sublet at an improved ground-rent; as between tenant for life and remainderman the cost of complying with a sanitary notice under the Public Health (London) Act, 1891, and a dangerous

structures notice under the London Building Act, 1894, is chargeable against income.—COPLAND'S SETTLEMENT, RE, JONES *v.* CARDEN, *Ch.D. Byrne, J.*; [1900] 1 Ch. 326; 69 L. J. Ch. 240; 82 L. T. 194.

12. *Public health—Sewer—Alteration of premises by owner—Owner required by local authority to do work which they are liable to do—Work done as a volunteer—Right of owner to recover cost.*—The owner of a house who was enlarging his premises was required by the local authority's surveyor (amongst other things) to take up and relay the back drain of the house (which was in fact a sewer) and to construct an interception chamber or manhole, and these works the owner, upon being told that they must be done, though no actual steps were taken to enforce their execution, agreed to do under protest and did do under the direction and by order of the surveyor of the local authority, but without any legal proceedings being taken against him and without serious threat of such proceedings. The liability in law for carrying out these works rested on the local authority. In an action by the owner to recover the cost of the works from the local authority on the ground that he was compelled by them to do works which the local authority were compellable by law to do,

Held, that the owner, in the execution of these works, was acting as a volunteer and not under compulsion, and was therefore not entitled to recover, although without legal proceedings or the threat of such there may be sufficient compulsion to prevent a person being regarded as a volunteer.—ELLIS *v.* BROMLEY DISTRICT COUNCIL, *Q.B.D.*; 81 L. T. 224.

13. *Public health—Sewer—Drainage—Right to pollute watercourse*—40 & 41 *Vict. c. xxxvi., s.* 134.—A private Act of Parliament enacted that "no person shall without the consent of the commissioners . . . open any new drain or other work into any of the drainage works of the commissioners . . . and no person shall cause any filthy or unwholesome water, or washings of manufactories or mines, or other foul or poisonous liquid to flow into any watercourse within the jurisdiction of the commissioners," and imposed penalties for the violation of the prohibitions. The section contained a proviso that "this section shall not apply to any person having a legal right to cause such water, washing, or liquid as aforesaid to flow into any existing river, stream, or watercourse."

Before and at the time of the passing of the Act the sewage of a town flowed into a tidal river within the jurisdiction of the commissioners. The urban sanitary authority proposed to remodel their system of drainage, and to make a new outfall into the river, in place of those previously existing.

Held, that, assuming the tidal river to be a watercourse within the meaning of the Act, the case fell within the above-mentioned proviso, and that the commissioners had no power to prevent the carrying out of the new drainage works. The exemption in the proviso is not to be restricted to the precise amount or manner of pollution going on at the time of the passing of the Act.—SOMERSET DRAINAGE COMMISSIONERS *v.* BRIDGWATER CORPORATION, *H.L.*; 81 L. T. 729.

14. *Public health—Sewer—Neglect to cleanse sewers—Nuisance—Action against local authority—Public Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 19, 299.—Where a local authority has neglected to perform the duty imposed upon them by section 19 of the Public Health Act, 1875, of properly cleansing the sewers vested in them, and damage is thereby caused to an individual, an action will lie against the local authority at the suit of the person injured.

Decision of Mathew, J. (*ante*, p. 191), affirmed.—BARON *v.* PORTSLADE DISTRICT COUNCIL, *C.A.*, 641.

15. *Public health—Sewer—Sewage matter—Pollution—Trade effluent—Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75)—*West Riding of Yorkshire Rivers Act*, 1894 (57 & 58 *Vict. c. clxvi.*), *ss.* 9, 10—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 17, 21—*Public Health Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 17.—Where a prescriptive right exists to discharge drainage into a sewer, trade effluent may also be discharged, and a local authority has no right to cut off the connection of the drain and the sewer, although as a matter of fact the discharge may prejudicially affect the discharge of the sewage matter.—EASTWOOD *v.* HONLEY COUNCIL, *Ch.D. Byrne, J.*, 614; [1900] 1 Ch. 781; 69 L. J. Ch. 470.

16. *Public health—Sewer—Vesting in local authority—"Sewers made by any person for his own profit"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 13, *sub-section* 1.—A drain was made by the owner of a quarry for the purpose of collecting and carrying off surface water coming on to his land and preventing it from running over the quarry. By means of the drain the quarry could be more economically and conveniently worked than if the water were allowed to spread over it.

Held, that the drain was a sewer made by a person for his own profit within the meaning of section 13, sub-section 1, of the Public Health Act, 1875, and did not vest in the local authority of the district.

Decision of the Divisional Court ([1899] 1 Q. B. 979) reversed.

*Croysdale* v. *Sunbury-on-Thames Urban Council*, [1898] 2 Ch. 515, approved.—SYKES *v.* SOWERBY URBAN DISTRICT COUNCIL, *C.A.*; [1900] 1 Q. B. 584; 69 L. J. Q. B. 464; 82 L. T. 177.

17. *Public health—Street—Paving expenses—Alteration of width of carriage-way and footway—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.—An urban authority has no power under section 150 of the Public Health Act, 1875, when paving and making good a street, to alter the width of the carriage-way and footway.—ROBERTSON *v.* BRISTOL (MAYOR), *C.A.*, 498; [1900] 2 Q. B. 198; 69 L. J. Q. B. 590; 82 L. T. 516.

18. *Public health—Street—Private street work—Charge of expenses on frontager's premises—Date from which charge takes effect—"Completion of works" or "final apportionment"—Vendor and purchaser—"Outgoings"—Implied covenant against incumbrances—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 1, 12, 13.—The apportioned expenses of private street works executed under the Private Street Works Act, 1892, become a charge on the premises affected thereby as from the date of the completion of the works, and not merely as from the date of the final apportionment.

If, therefore, the premises are sold free from incumbrances after the completion of the works, but before the date of the final apportionment, the sum finally apportioned thereon is payable by the vendor.

Decision of Kekewich, J. (*ante*, p. 6), affirmed.—STOCK *v.* MEAKIN, *C.A.*, 420; [1900] 1 Ch. 683; 69 L. J. Ch. 401; 82 L. T. 248.

19. *Public health—Water supply—District council—Riparian owner—River—Water rights—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 332.—A local authority has no power either as a riparian

owner or under the Public Health Act, 1875, to affect the flow of a stream for the purpose of supplying its district with water if the rights of a lower riparian owner are thereby infringed, even though such riparian owner sustained no actual damage.

Decision of Kekewich, J. (47 W. R. 376, [1879] 1 Ch. 583), affirmed. — ROBERTS *v.* GWYRFAI DISTRICT COUNCIL, *C.A.*, 51; [1899] 2 Ch. 608; 81 L. T. 465.

20. *Public health—Water-tower erected by company under special Act—Non-compliance of undertakers with bye-laws under Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157—*Jurisdiction of council to enforce bye-law.*—The Uckfield District Council laid two informations against the respondent water company for having begun to build a water-tower without giving any of the notices prescribed by, or in any otherwise complying with, the provisions of certain bye-laws made by the council under powers conferred on them by the Public Health Act, 1875.

The justices dismissed the informations on the ground that, as the erection of the water-tower was expressly authorized by the company's private Act of 1897 the bye-laws did not apply.

Held, that the justices were wrong. The special Act was merely to enable the respondent company to build the water-tower on land belonging to someone else, but being so empowered they were then in the same position as a private person intending to erect a building on his own land, and under a similar obligation to comply with bye-laws duly made under the Public Health Act, 1875, which Act, although not expressly incorporated in the respondent company's private Act of 1897, must, in the absence of any expression to the contrary, be held to apply.

Held, also, that there was no such inconsistency between the powers conferred by the special Act of 1897 upon the respondents to erect their tower and the provisions of the Public Health Act, 1875, empowering the appellants to make bye-laws, as would support an inference that the latter had been repealed. — UCKFIELD DISTRICT COUNCIL *v.* CROWBOROUGH WATER CO., *Q.B.D.*, 63; [1899] 2 Q. B. 664; 81 L. T. 539.

21. *Rating—Drill hall—Not used exclusively as such—Justices—Summons to enforce rate—Volunteer Act*, 1863 (26 & 27 *Vict. c.* 65), *s.* 26.—A volunteer drill hall, besides being used for the purposes of the battalion, was let for concerts and other entertainments. It was assessed in the valuation list, and district rates were levied in respect of it. There had been no appeal against such assessment.

On a complaint to recover the amount of the district rates,

Held, that the justices were bound to issue process for the recovery of such rates, as the premises were not exempt as being solely used by the Crown for the purposes of the Crown, nor were they exempt under section 26 of the Volunteer Act, 1863, for they were not solely used as a storehouse.

Held, further, that the justices could not go into the question of the amount of the assessment.—RAYNER *v.* DREWITT, *Q.B.D.*; 82 L. T. 718.

22. *Rating—General district rate—Reservoir—"Land covered with water"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-section* 1 (b).—A reservoir of a water company held to be "land covered with water" within the meaning of these words in section 211, sub-section 1 (*b*), of the Public Health Act, 1875, and therefore assessable to general district rates at one-fourth of its annual value.

Decision of the Court of Appeal, 47 W. R. 177, [1899] 1 Q. B. 273, affirmed.—HAMPTON URBAN COUNCIL *v.* SOUTHWARK AND VAUXHALL WATER CO., *H.L.*, 209; [1900] A. C. 3; 69 L. J. Q. B. 72; 81 L. T. 547.

23. *Rating—Railway—Exemptions—Land used as railway for public conveyance—Liverpool Corporation Act*, 1893 (56 & 57 *Vict. c. clxxxi.*), *s.* 36 (*ii.*).—The Liverpool Corporation Act, 1893, *s.* 36, provides that no person occupying "land used as a railway made under the powers of any Act of Parliament for public conveyance" shall be rated in respect of the same to the general rate leviable by the corporation in any greater proportion than one-fourth part of the net annual value. A railway company occupied land in Liverpool for a goods station. The premises consisted of a large covered shed, open on one side; and, on the other, with openings in the walls to admit trucks. Inside the shed were a number of railway lines, comprising sidings, and running alongside platforms, for the purpose of loading and unloading railway trucks with goods. All these lines were used for the conveyance of any goods sent by the public to or from the premises. The premises were some distance from the company's main line, and were connected therewith by a dock line belonging to the Mersey Docks and Harbour Board, who under statutory powers permitted the company to use such line, and by a tramway laid across a street by the company under a licence granted by the corporation under statutory powers. The company's premises were acquired and laid out under powers conferred upon them by a private Act.

Held, that the land used for the lines, sidings, and platforms inside the company's premises was not land "used as a railway made under the powers of an Act of Parliament for public conveyance" within the meaning of section 36 of the Liverpool Corporation Act, 1893, and that the company were not entitled, with regard to those premises, to the partial exemption in respect of rating contained in that section.

Judgment of Divisional Court ([1899] 2 Q. B. 197) reversed.—WILLIAMS *v.* LONDON AND NORTH-WESTERN RAILWAY CO., *C.A.*; [1900] 1 Q. B. 760; 69 L J. Q. B. 531; 82 L. T. 287.

24. *Street—Telephone company—Illegal stretching of wires across public street — Removal by local authority—Guernsey, law of.*—In a suit by a telephone company against the local authority to recover damages for cutting down and removing telephone wires stretched across a public street, it appeared that the company was not authorized by statute so to place their wires.

Held, that the action failed; the removal was within the legal powers of the defendants, and there was no allegation of any unnecessary damage having been caused by the cutting.—NATIONAL TELEPHONE CO. *v.* CONSTABLES OF ST. PETER PORT, *P.C.*; [1900] A. C. 317; 82 L. T. 398.

See also Arbitration, 3; Charity, 3; Election Law, 2; Poor Law, 12; Scotland, Law of, 1; Tramway, 2, 3.

LONDON BUILDING ACTS.—See Local Government, 11; Metropolis, 1-3, 13.

LORD CAMPBELL'S ACT.—See Admiralty, 6, 7; Limitation Statutes, 6.

LUNACY:—

1. *Lunatic—Charging order—Fund in court.*—Where a charging order has been obtained against the interest of a lunatic in a fund in the Court of Chancery, the charge will be satisfied before the fund is ordered to be transferred to Lunacy.—BROWN, RE, *Ch.D. Cozens-Hardy, J.*, 461; [1900] 1 Ch. 489; 69 L. J. Ch. 234; 82 L. T. 83.

2. *Lunatic—Contract to purchase real estate—Contract carried out by committee under direction of court—Voidable contract—Conversion of lunatic's estate.*—A direction by the Master in Lunacy to the committee of a lunatic to carry out a contract by such lunatic for the purchase of real estate, and to provide the purchase-money out of such lunatic's personal estate, amounts to an election on the part of the lunacy authorities to confirm the voidable contract of such lunatic, and the result will be to effect a conversion of the estate so contracted to be purchased as between the lunatic's heir-at-law and next-of-kin, and such estate will accordingly descend to the heir.—BALDWYN *v.* SMITH, *Ch.D. Buckley, J.*, 346; [1900] 1 Ch. 588; 69 L. J. Ch. 336; 82 L. T. 616.

3. *Lunatic not so found—Foreign lunatic—Status of lunacy declared by competent foreign court—Guardian appointed by competent foreign court—"Tuteur"—Vesting of property in guardian—Power of guardian to give receipts and discharges—Payment and transfer to guardian.*—Where application is made to the court to direct an English firm holding moneys and securities of a foreign lunatic for payment and transfer thereof to the applicant, if there has been a judicial declaration of the status of lunacy by a competent court of the country to which the lunatic belongs, and if the applicant on the lunatic's behalf has, according to the laws of the lunatic's country, the latter's property vested in him in the sense that he has the right to retain and deal with it without becoming the actual owner, the application may properly be, and generally should be, granted.

*Semble*, a French "tuteur" is such an applicant.—THIERY *v.* CHALMERS, *Ch.D. Kekewich, J.*, 148; [1900] 1 Ch. 80; 69 L. J. Ch. 122; 81 L. T. 511.

4. *Pauper lunatic—Reception order—Justices—Workhouse outside union—Poor Law Amendment Act*, 1844 (7 & 8 *Vict. c.* 101), *s.* 56—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 14, 24.—Section 14 of the Lunacy Act, 1890, provides that paupers who are lunatics and ought to be sent to an asylum shall be brought before "a justice having jurisdiction in the place where the pauper resides."

A pauper who was chargeable to a union became lunatic while residing in the workhouse infirmary, which was situate outside the union.

Held, that a justice having jurisdiction in the union to which the workhouse belonged had power to deal with the case, since section 56 of the Poor Law Amendment Act, 1844, applied, and the workhouse must therefore be considered as situated in the parish to which the lunatic was chargeable.—REG. *v.* BELL, *Q.B.D.*; [1900] 2 Q. B. 391; 69 L. J. Q. B. 622; 82 L. T. 711.

5. *Person of unsound mind—Foreign domicil—English property of foreign lunatic—Foreign receiver—Next friend, action by—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 134.—An action can be brought in the name of a lunatic not so found by inquisition without the sanction of the Crown.

The *administrateur provisoire*, with power to collect the personal estate of a lunatic domiciled abroad, can bring an action in England in his own name and in the name of the lunatic, and as her next friend, for the delivery to him of her property in England.—DIDISHEIM *v.* LONDON AND WESTMINSTER BANK, *C.A.*, 501; [1900] 2 Ch. 15; 69 L. J. Ch. 443; 82 L. T. 738.

6. *Person of unsound mind not so found by inquisition—Pauper lunatic—Application of property—Jurisdiction—Discretion—Lunacy Act*, 1890 (53 *Vict. c.* 5), *ss.* 116 (4), 117, 299, 300.—A wandering lunatic not so found by inquisition was detained in a county asylum, and maintained there at the expense of a union. By an order of the Master in Lunacy, a sum exceeding £300, which had been found upon the lunatic's person, and represented his entire savings, had been lodged in court, with directions to raise by periodical sales thereout the sum of £35 a year for the maintenance of his destitute wife and daughter. The guardians of the union applied for a small sum in respect of the lunatic's past maintenance and for an allowance of £26 a year for his future maintenance, over and above some provision for the wife.

Held, that, as section 299 of the Lunacy Act, 1890, only gave a power to justices to act summarily in certain cases, and did not interfere with the discretionary power of the Lords Justices to direct the property of the lunatic to be applied for his maintenance, the reasonable application of the guardians should be complied with.—TYE, RE, *Lunacy*, 276; [1900] 1 Ch. 249; 69 L. J. Ch. 153; 81 L. T. 743.

MALICIOUS PROSECUTION:—

*Corporation—Liability in action for.*—An action for malicious prosecution will lie against a corporation.

Decision of Darling, J. ([1899] 1 Q. B. 392, 47 W R. Dig. 44), affirmed.—CORNFORD *v.* CARLTON BANK (LIMITED), *C.A.*; [1900] 1 Q. B. 22; 81 L. T. 415.

*MANDAMUS.*—See Local Government, 4, 7; Metropolis, 12; Practice, 13, 14.

MARGARINE.—See Adulteration, 3.

MARKET:—

1. *Bye-laws*—Ultra vires—*Markets and Fairs Clauses Act*, 1847 (10 & 11 *Vict. c.* 14), *s.* 42—*Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57), *s.* 32, *sub-section* 2.—The Diseases of Animals Act, 1894, s. 32, sub-section 2, incorporated with the said Act the Markets and Fairs Clauses Act, 1847, and section 42 of the latter Act provides that the undertakers (authorized by the special Act to regulate a market or fair) may, from time to time, make such bye-laws as they think fit (*inter alia*) "For regulating the use of the market-place and fair, and the buildings, stalls, pens, and standings therein; and for preventing nuisances or obstructions therein, or in the immediate approaches thereto."

A local authority purporting to act in the exercise of the powers of the above Acts made a bye-law to the effect that sale-rings at a public market belonging to it should not "be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying."

Held, affirming the decision of the First Division of the Court of Session ([1899] 1 F. 665, 458) (Lord Shand dissenting), that the bye-law was not *ultra vires*.—SCOTT *v.* GLASGOW CORPORATION, *H.L.* (*Sc.*); [1899] A. C. 470; 81 L. T. 302.

2. *Toll—Exposure for sale—Newton District Im-*

*provement Act*, 1855 (18 & 19 *Vict. c. c.*), *s.* 59, *Schedule B.*—The plaintiffs were authorized by section 59 and Schedule B of the Newton District Improvement Act, 1855, to collect a toll "for every cart used by any person for exposing or in which shall be exposed for sale any article," &c.

An aerated water dealer was in the habit of sending round a cart loaded with aerated waters to the houses of his customers. The man in charge of the cart entered the house of the customer, took his order, and there and then delivered from the cart the goods ordered.

Held, that the goods were not exposed for sale within the meaning of the schedule, and that no toll was therefore chargeable in respect of the cart.—NEWTON-IN-MAKERFIELD COUNCIL *v.* LYNN, *Q.B.D.*, 222; 69 L. J. Q. B. 230; 81 L. T. 756.

3. *Tolls—Selling potatoes in the street—Penalty—Licensed Hawker—Exemption—Hawkers Act*, 1888 (51 & 52 *Vict.* c. 33) *s.* 3 (3)—*Markets and Fairs Clauses Act*, 1847 (10 *Vict.* c. 14), *s.* 13.—By section 3, sub-section 3, of the Hawkers Act, 1888, a person is not required to take a hawker's licence to sell in the street fish, fruit, victuals, or coals.

By section 13 of the Markets and Fairs Clauses Act, 1847, a penalty is imposed on "every person other than a licensed hawker" who exposes for sale in the street any produce in respect of which a toll is leviable by the market authority of that district.

Held, that if such a vendor has taken out a hawker's licence, he is to be deemed a licensed hawker and comes within the benefit given to that class by section 13 of the Markets and Fairs Clauses Act, 1847.—LLANDUDNO DISTRICT COUNCIL *v.* HUGHES, *Q.B.D.*, 366; [1900] 1 Q. B. 472; 69 L. J. Q. B. 303; 82 L. T. 147.

MARRIED WOMAN:—

1. *Infant — Marriage settlement — Covenant by husband implied—Married Woman's Property Act*, 1882, *s* 19.—An ante-nuptial settlement entered into in 1891 by the intending wife (an infant), the intending husband, and trustees, recited that it was agreed that a legacy to which the lady was entitled, but not for her separate use, should be settled, and it was thereby witnessed that the lady with the privity and approbation of the intending husband declared that the legacy should be held upon certain trusts. There was no express covenant by the husband. The lady repudiated the settlement when she came of age.

Held, that having regard to the recital, a covenant must be implied on the part of the husband to give effect to the settlement, inasmuch as the settlement would otherwise be wholly inoperative as the declaration in the operative part by the lady being an infant had no effect at all; that by virtue of section 19 of the Married Women's Property Act, Act, 1882, the settlement was excluded from the operation of that Act, and that the marital right of the husband to the legacy was barred by his implied covenant.—BUCKLAND *v.* BUCKLAND, *Ch.D. Buckley, J.*, 637; 82 L. T. 759.

2. *Marriage—Capacity—Uncle and niece—Celebration abroad—Domicil—Jews—Marriage Act*, 1836 (6 & 7 *Will.* 4, *c.* 85). *s.* 2—*Marriage Act*, 1840 (3 & 4 *Vict. c.* 72), *s.* 5—*Marriage Act*, 1835 (5 & 6 *Will.* 4, *c.* 54).—A marriage between a niece and an uncle, who are members of the Jewish faith and domiciled British subjects, is invalid, although celebrated abroad where such a marriage would be legal.—DE WILTON, RE, DE WILTON *v.* MONTEFIORE, *Ch.D. Stirling, J.*, 645.

3. *Separate use—Restraint on anticipation—Bankruptcy — Subsequent discoverture — Life interest, residue of—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 5; *s.* 19.—Where a married woman entitled to property for life for her separate use without power of anticipation becomes bankrupt, her entire life interest vests in her trustee in bankruptcy under section 1, sub-section 5 of the Married Women's Property Act, 1882, subject, however, to the restraint upon anticipation under section 19; but the restraint upon anticipation saved by section 19 only attaches to her life interest during the joint lives of herself and her husband, and not to the residue of her life interest after her husband's death.

Consequently, the trustee in bankruptcy of a married woman, who at the date of the bankruptcy is entitled to real property for her life for her separate use without power of anticipation, becomes entitled upon the death of the husband of the bankrupt to the future rents and profits during the remainder of her lifetime.—WHEELER'S SETTLEMENT, RE, BRIGGS *v.* RYAN, *Ch.D. Cozens-Hardy, J.*, 10; [1899] 2 Ch. 717; 81 L. T. 172.

4. *Wife's tort—Contract—Liability of husband.*—In July, 1898, the defendant G. K., the wife of the defendant H. K., requested the plaintiff to join her in the purchase of some shares, and asked her to raise a sum of £2,000 to be invested in the purchase of the shares, holding out as an inducement to the plaintiff that she would by means of the investment be able in three months to repay the plaintiff the sum of £5,300 which she then owed her. The plaintiff agreed to raise the £2,000 when the shares had been purchased. Shortly afterwards the plaintiff, relying on the representation of the defendant G. K. that she had bought the shares, signed two promissory notes for £1,000 each, and, her solicitor having discounted them, paid the proceeds to the said defendant, and the plaintiff paid the notes on maturity.

The defendant G. K. never in fact purchased the shares.

In an action for damages by the plaintiff against the defendant G. K. and her husband,

Held, that the contract was effected prior to and independently of the fraud complained of, and that the fraud was not the means of effecting the contract in the sense in which that expression is used in *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Ex. 422, and that on the authority of that case and of the case of *Wright* v. *Leonard*, 11 C. B. N. S. 258, the husband was liable in damages for his wife's deceit.—EARLE *v.* KINGSCOTE, *Ch.D. Byrne, J.*; [1900] 1 Ch. 203; 69 L. J. Ch. 202; 81 L. T. 775.

See also Administration, 3; Bond; Conflict of Laws, 2; Criminal Law, 6; Divorce, 7-14; Domicil, 1, 2; Peer; Practice, 10, 14; Solicitor, 11.

MASTER and SERVANT:—

1. *Apprentice—Infant—Stipulation in apprenticeship deed not for benefit of infant—Validity—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 6.—An apprenticeship deed contained a stipulation that the master should not be liable to instruct the apprentice or to pay her wages at times when the business of the master should be at a standstill through accident beyond the control of the master.

Held, that this stipulation did not render the contract as a whole unfair as against the infant, and that the apprenticeship deed was not invalid.—GREEN *v.* THOMPSON, *Q.B.D.*, 31.

2. *Employers' liability—Accident—Compensation—*

*Building "being constructed"—Building complete and in use—Removal of scaffolding—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.—A building constructed by means of a scaffolding is "being constructed" within the meaning of section 7 of the Workmen's Compensation Act, 1897, until the scaffolding has been taken down.

A builder erected a scaffolding for the purpose of raising building materials from a lower level to the higher level on which stood the building which he was constructing.

After the building was complete and while it was in actual use a workman was injured as he was removing gear from this scaffolding.

Held, that the workman was employed on a building which was "being constructed" by means of a scaffolding, and was entitled to compensation under the Workmen's Compensation Act, 1897.—FRID *v.* FENTON, *C.A.*; 69 L. J. Q. B. 436; 82 L. T. 193.

3. *Employers' liability—Accident—Compensation—Building being constructed by means of a scaffolding—Painting ceiling of theatre—Undertakers—Persons undertaking construction of part of building—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-sections* 1, 2.—In an arbitration under the Workmen's Compensation Act it appeared that a firm of builders had undertaken to build a theatre, and that the building owners, under powers reserved to them in the contract, had placed a substantial portion of the work, including the fixing of a ceiling and the erection of a proscenium, in the hands of a firm of decorators. A workman in the employment of the decorators, while working on a scaffolding erected by the builders, and while engaged in painting the ceiling of the theatre (the building being over thirty feet in height), accidentally fell to the floor and was killed. In proceedings against the decorators,

Held, that the employment of the deceased was an employment to which the Act applied, and that the respondents were undertakers within the Act.

*Wood* v. *Walsh & Sons*, 47 W. R. 504, [1899] 1 Q. B. 1009, considered.—MASON *v.* DEAN, *C.A.*, 353; [1900] 1 Q. B. 770; 69 L. J. Q. B. 358; 82 L. T. 139.

4. *Employers' Liability—Accident — Compensation —Building being "constructed" by means of a "scaffolding"—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—The building of a house exceeding thirty feet in height was so far completed that the roof was on and the outside scaffolding was taken down, but the inside plastering work was not completed. To enable the plasterers, who were in the employment of the builder, to reach the ceilings and upper parts of the walls of the rooms, movable trestles, with boards placed across the top, were used for the plasterers to stand upon. While some of the plasterers were working on the trestles and boards another plasterer was plastering the walls of the top landing, not standing upon trestles and boards, and, while so working, he fell over the stairs and was killed.

The county court judge found that the arrangement of trestles and boards was a "scaffolding" within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act, 1897, and that, therefore, the building was, at the time of the accident, being constructed by means of a scaffolding.

Held, by A. L. Smith and Rigby, L.JJ. (Collins, L.J., dissenting), that there was evidence upon which the county court judge was entitled to find that the arrangement of trestles and boards was a "scaffolding" within the meaning of the section. —MAUDE *v.* BROOK, *C.A.*, 290; [1900] 1 Q. B. 575; 69 L. J. Q. B. 322; 82 L. T. 39.

5. *Employers' liability—Accident—Compensation—Building exceeding thirty feet in height—Employment —Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.—Internal communication between a building over thirty feet high and an adjoining building less than that height, coupled with the fact that the same business is carried on in both buildings, is not evidence to justify a finding that the lower building is a part of the higher and that a workman injured while engaged in demolishing the lower building is employed on the demolition of a building exceeding thirty feet in height within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act, 1897.—RIXSOM *v.* PRITCHARD & RENWICK, *C.A.*; [1900] 1 Q. B. 800; 69 L. J. Q. B. 494; 82 L. T. 186.

6. *Employers' liability — Accident—Compensation —"Claim for compensation"—Initiation of proceedings—Time within which they must be made—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 2 (1).—By section 2, sub-section 1, of the Workmen's Compensation Act, 1897, it is provided that "proceedings for recovery . . . of compensation shall not be maintainable unless . . . the claim for compensation has been made within six months from the occurrence of the accident."

The expression "the claim for compensation" means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation sent to the workman's employer. A workman who had been injured in the course of his employment sent to his employers, within six months, a notice of the accident and also a notice stating that he claimed a certain amount as compensation for the injury. More than six months after the accident he filed a request for arbitration in the county court.

Held, that the proceedings were in time.

Decision of the Court of Appeal (*ante*, p. 534, [1900] 2 Q. B. 145) reversed.—POWELL *v.* MAIN COLLIERY CO., *H.L.*; [1900] A. C. 366; 69 L. J. Q. B. 758.

7. *Employers' liability—Accident—Compensation—Claim not made within six months—Waiver—Agreement to pay compensation—Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-section* 1.—A workman was injured by an accident arising out of and in the course of his employment, which totally incapacitated him from work. His employer paid him half the amount of his average weekly wages from the second week after the accident, and negotiations took place between them as to paying the workman a lump sum in lieu of the weekly payment. The parties were unable to agree upon the amount, and after the expiration of six months from the accident the negotiations ceased and the weekly payment was stopped. The workman thereupon took proceedings to have the compensation assessed under the Workmen's Compensation Act, 1897, when the employer took the objection that the claim for compensation was not made within the six months.

Held, that, in the circumstances, there was evidence of an agreement by the employer to pay compensation under the Act, the only question left open being the amount of compensation, and that, in such a case, the employer was precluded from taking the objection that the claim for compensation was not made in time.—WRIGHT *v.* BAGNALL

(JOHN), *C.A.*, 533; [1900] 2 Q. B. 240; 69 L. J. Q. B. 551; 82 L. T. 346.

8. *Employers' liability—Accident—Compensation—Claim to be made within six months—Waiver of claim by employers — Estoppel—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-section* 1.—In an arbitration under the Workmen's Compensation Act it appeared that, shortly after the accident, the insurance company with whom the employers had insured their liability under the Act began to make weekly payments to the injured workman of half the sum which he had been earning as weekly wages, and continued to do so for ten months, taking receipts from him for the payments on account of compensation which might be or become due to him under the Workmen's Compensation Act. The payments having ceased, the workman filed a request for arbitration.

Held, that the employers were not precluded from taking the objection that the claim for compensation was not made within six months from the occurrence of the accident, as required by section 2, sub-section 1, of the Act.

*Wright* v. *John Bagnall & Sons* (*Limited*), *ante*, p. 533, distinguished.—RENDALL *v.* HILL'S DRY DOCK Co. *C.A.*, 530; [1900] 2 Q. B. 245; 69 L. J. Q. B. 554; 82 L. T. 521.

9. *Employers' Liability—Accident—Compensation Course of employment—"On or in or about" a factory Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.—A workman was employed to fetch water in a water-cart from a brook to a steam-engine in a shed connected with a mortar mill for mixing mortar for use in the construction of a building. While he was conducting the horse and cart along a public road from the brook to the engine, the horse ran away and the cart went over him. The place where the accident happened was was at least 110 yards distant from the engine.

Held, that, though the engine was a "factory" within section 7 of the Workmen's Compensation Act, 1897, there was no evidence that the workman was, at the time of the accident, employed "about" a factory within the meaning of sub-section 1 of that section, and that, therefore, compensation was not payable.—FENN *v.* MILLER, *C.A.*, 369; [1900] 1 Q. B. 788; 69 L. J. Q. B. 439; 82 L. T. 284.

10. *Employers' liability—Accident—Compensation—Course of employment—Workman injured on his way to his work—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the deceased workman, who was in the employment of a railway company and lived near K. Station, being under orders to work in an engine-shed at H. Station, went by train from K. to H. free of charge, arriving at H. a quarter of an hour before the time for beginning work. Instead of making use, as he might have done, of either a bridge or a subway for the purpose of reaching the engine-shed, he proceeded to cross the line on the level, and while doing so was knocked down by a train and killed.

Held, that the accident arose out of and in the course of the employment of the deceased.—HOLMES *v.* GREAT NORTHERN RAILWAY Co., *C.A.*, 681; [1900] 2 Q. B. 409.

11. *Employers' liability—Accident—Compensation—Dependants—Dependency on child's earnings—Standard of living—Workmen's Compensation Act*, 1897, *s.* 7, *sub-section* 2.—A father earning wages may be in part dependent upon the earnings of his child within the meaning of the Workmen's Compensation Act, 1897. Whether there is dependency is entirely a question of fact in each case, irrespective of the standard of living in the neighbourhood or the class to which the family belong.

Where it was proved that the child contributed to the family wages fund and that the father received the contribution and spent it in maintaining himself and his family,

Held, to be sufficient evidence for a finding in fact that the father was dependent upon the earnings of the child within the meaning of the Act, and was consequently entitled to compensation for the death of the child who was killed by an accident in the course of his employment.—MAIN COLLIERY Co. *v.* DAVIES, *H.L.*; [1900] A. C. 358; 69 L. J. Q. B. 755.

12. *Employers' liability—Accident—Compensation—Employment on, in, or about a mine—"Mine"—Sidings belonging to a mine—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—The Workmen's Compensation Act, 1897, s. 7 (2), provides that "in this Act 'mine' means a mine to which the Coal Mines Regulation Act, 1887, applies"; and the latter Act, section 75, provides that "in this Act, unless the context otherwise requires, 'mine' includes . . . all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine."

The defendants owned a number of collieries, and also a private railway about twelve miles long, not being a "railway" within the meaning of the Workmen's Compensation Act, 1897. This railway connected all the collieries, and was used for conveying coal from all the collieries, and was the sole means by which coal was conveyed away from them; and there was on this railway a depôt, with sidings, where coal was stored and distributed to purchasers.

An engine driver employed by the defendants was killed by accident when he was driving the engine of a train carrying coal from one of the collieries to the depôt; the accident occurred about three quarters of a mile from the pit mouth of this colliery and close to the sidings of the depôt.

Held, that the workman was not employed "on or in or about a mine," within the meaning of the Act, when the accident happened.—TURNBULL *v.* LAMBTON COLLIERIES Co., *C.A.*; 82 L. T. 589.

13. *Employers' liability—Accident—Compensation—Factory—Factory of third person—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—Section 7, sub-section 1, of the Workmen's Compensation Act, 1897, which provides that the Act shall apply only to employment by the undertakers "on or in or about a . . . . factory," applies only to a factory occupied by the employer where he carries on his business, and does not include a factory belonging to a third person to which the workman is sent on his employer's business.—FRANCIS *v.* TURNER, *C.A.*, 228; [1900] 1 Q. B. 478; 69 L. J. Q. B. 182; 81 L. T. 770.

14. *Employers' liability—Accident—Compensation—Factory—Machinery—Loading from a dock—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-section* 1.—A stevedore's labourer was injured by an accident in the course of his employment. At the time of the accident he was on board a ship lying in a dock, and was engaged in loading the ship from a lighter by means of a steam winch which was attached to the ship. No shore machinery was being used.

Held, that the steam winch was not constituted a

factory within the meaning of the Workmen's Compensation Act, 1897, by virtue of section 23 of the Factory and Workshop Act, 1895; for it was not being used in the process of loading from a dock.—HENNESSEY *v.* MCCABE, *C.A.*, 231; [1900] 1 Q. B. 491; 69 L. J. Q. B. 173; 81 L. T. 575.

15. *Employers' liability—Accident—Compensation—"Factory"—Machinery used for unloading from ship to quay—Workman on ship—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7 (2).—A workman was employed in unloading bags from a ship in dock to the quay; his work was, with another man, to make up sets of bags in the hold which were laid across a rope strop. When a set was made up the strop was fastened to the hook of the runner of a crane which stood upon the quay and was hoisted from the hold to the quay. While he was making up a set a bag fell upon him from behind and he was killed. The runner of the crane was not at that time on the ship at all, but was ashore.

Held, that the workman was employed on, in, or about machinery which was being used in the process of unloading to a quay, and therefore on, in, or about a "factory" within the meaning of section 7 of the Workmen's Compensation Act, 1897.——LAWSON *v.* ATLANTIC TRANSPORT CO., *C.A.*; 82 L. T. 77.

16. *Employers' liability—Accident—Compensation—"Factory"—"Shipbuilding yard"—Ship in dock being repaired—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 93; *Sched. IV., Part II., cl.* 24—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—By section 7, sub-section 2, of the Workmen's Compensation Act, 1897, a "factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891.

By section 93 of the Factory and Workshop Act, 1878, non-textile factory means any premises named in Part II. of Schedule IV., which, by clause 24, includes "shipbuilding yards"—that is to say, premises in which any ships are made, finished, or repaired.

Held, that an ordinary dock in which a ship is repaired is not a "shipbuilding yard," and therefore not a "factory" within the Act of 1897.—SPENCER *v.* LIVETT, *C.A.*, 323; [1900] 1 Q. B. 498; 69 L. J. Q. B. 338; 82 L. T. 75.

17. *Employers' liability—Accident—Compensation—Factory—Wharf—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23.—A workman was killed by an accident while he was engaged in removing some timber from a place where it was stored on the premises of the Mersey Docks and Harbour Board. By the side of the Canada Dock there was a large open space stretching back from the water for a distance of 150 yards, and on the further side of this space there was a road running parallel with the water. Beyond the road there was a row of offices, to which were attached timber yards. The offices and yards were leased to timber merchants. The timber in question was stored in one of these yards.

Held (Rigby, L.J., dissenting), that the place where the timber was stored was not a wharf so as to come, by virtue of section 23 of the Factory and Workshop Act, 1895, within the definition of "factory" contained in section 7 of the Workmen's Compensation Act, 1897.—HADDOCK *v.* HUMPHREYS, *C.A.*, 292; [1900] 1 Q. B. 609; 69 L. J. Q. B. 327; 82 L. T. 72.

18. *Employers' liability—Accident—Compensation—Medical examination—Notice of accident not given—Right of employer to—Examination of workman by medical practitioner—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 2; *First Schedule, s.* 3.—Where a workman who took proceedings under the Workmen's Compensation Act, 1897, had not given notice of the accident as required by section 2 of the Act, but the employers raised no objection to his claim on that ground,

Held, that, although the workman had not given notice of the accident, the employers were entitled to require him to submit himself for medical examination in pursuance of section 3 of the First Schedule of the Act; and that the county court judge had no jurisdiction to impose any term upon them as a condition of the workman's being bound to do so.—OSBORN *v.* VICKERS, SONS, & MAXIM, *C.A.*; [1900] 2 Q. B. 91; 69 L. J. Q. B. 606; 82 L. T. 491.

19. *Employers' liability—Accident—Compensation—Payment in case of death—Right of legal personal representative to receive whole of compensation money—Investment for benefit of dependant—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.*, 4, 5, 6, 7.—In an arbitration under the Workmen's Compensation Act, the applicant was the widow of the deceased workman, and she had taken out letters of administration. The county court judge by his award ordered the respondents to pay a lump sum to and for the benefit of the dependants of the deceased, whom he declared to be the widow and the two infant sons of the deceased, and he apportioned the said sum between the widow and the sons, and he ordered the sum apportioned to the widow to be paid to her, and the sum apportioned to the sons to be paid to the registrar and to be invested by him for their benefit.

Held, that, on the construction of paragraphs 4, 5, 6, and 7 of the First Schedule to the Act, the county court judge had power to make such order, and that the applicant, although she was the legal personal representative of the deceased, had no absolute right to receive the whole of the compensation money.—DANIEL *v.* OCEAN COAL CO., *C.A.*, 467; [1900] 2 Q. B. 250; 69 L. J. Q. B. 567; 82 L. T. 523.

20. *Employers' liability—Accident—Compensation—Railway—Barmaid in refreshment room—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 3.—A barmaid in the employment of a railway company, while attending to her duties in a refreshment room at one of their stations, sustained accidental injury in consequence of a framed advertisement falling from the wall.

Held, that she was not employed on or in or about a railway within the meaning of section 7 of the Workmen's Compensation Act, 1897, and that, therefore, her employment was not an employment to which the Act applied.—MILNER *v.* GREAT NORTHERN RAILWAY CO., *C.A.*, 387; [1900] 1 Q. B. 795; 69 L. J. Q. B. 427; 82 L. T. 187.

21. *Employers' liability—Accident—Compensation Sub-contractor—Work ancillary to business of undertakers—Erection of railway station—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.—A workman employed by a contractor, who in turn was employed by a railway company to erect a railway station for them, cannot recover compensation from the railway company for injuries sustained in such employment, since the work undertaken by the contractor is merely ancillary or incidental to, and is no part of, the trade or business of the railway company within the

meaning of section 4 of the Workmen's Compensation Act, 1897.—PEARCE *v.* LONDON AND SOUTH-WESTERN RAILWAY CO., *C.A.*, 599; [1900] 2 Q. B. 100; 69 L. J. Q. B. 683; 82 L. T. 487.

22. *Employers' liability—Accident—Compensation—Undertaker—Building—Contractor for supply of labour—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7 (2).—An employer who supplied and paid workmen for the brickwork of a building which was being erected by the building owners upon their own premises, the workmen so supplied being under the supervision and control of the foreman of the building owners, is not an "undertaker" within the meaning of the Workmen's Compensation Act, 1897.—PERCIVAL *v.* GARNER, *C.A.*; [1900] 2 Q. B. 406.

23. *Employer's liability—Accident—Compensation—"Undertakers"—Sub-contractor—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.—A sub-contractor is not an "undertaker" within the meaning of section 7 of the Workmen's Compensation Act, 1897.—CASS *v.* BUTLER, *C.A.*, 309; [1900] 1 Q. B. 777; 69 L. J. Q. B. 362; 82 L. T. 182.

24. *Employer's liability—Accident—Compensation—Weekly earnings—Accident causing injury—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I., clauses* 1 (*b*), 2.—Schedule I., clause 2, of the Workmen's Compensation Act, 1897, which provides that in fixing the amount of a weekly payment regard is to be had to the difference between the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, does not operate so as necessarily to cut down the maximum rate of compensation allowed by clause 1 (*b*) of the schedule.—ILLINGWORTH *v.* WALMSLEY, *C.A.*; [1900] 2 Q. B. 142; 69 L. J. Q. B. 519; 82 L. T. 647.

25. *Employers' liability—Accident—Compensation—Weekly earnings—Application for review of weekly payment—Change in circumstances—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (12).—An application under paragraph 12 of Schedule I. of the Workmen's Compensation Act, 1897, for a review of a weekly payment can only be made where some change in the circumstances of the case has taken place since the making of the award.

So held, Vaughan Williams, L.J., doubting.—CROSSFIELD *v.* TANIAN, *C.A.*, 609; 82 L. T. 813.

26. *Employers' liability—Accident—Compensation—Weekly earnings—Duration of employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37).—For the dependants of a workman who has met his death by an accident arising out of and in the course of his employment to be entitled to compensation under the Workmen's Compensation Act, 1897, it is necessary that the workman, at the time of the accident, should have been in the employment of the employer for at least two weeks.—STUART *v.* NIXON, *C.A.*, 598; [1900] 2 Q. B. 95; 69 L. J. Q. B. 598; 82 L. T. 489.

27. *Employers' liability—Accident—Compensation—Weekly earnings—Workmen in employment for less than two weeks—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (1).—No workman is entitled to the benefit of the Workmen's Compensation Act, 1897, who has not, at the time of the accident, been for at least two weeks in the service of his employer.—LYSONS *v.* KNOWLES, *C.A.*, 408; [1900] 1 Q. B. 780; 69 L. J. Q. B. 449; 82 L. T. 189.

28. *Employers' liability—"Accident"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-section* 1.—"Accident" in section 1, sub-section 1, of the Workmen's Compensation Act, 1897, implies something fortuitous and unexpected.

The definition of "accident" by Lord Halsbury in *Hamilton* v. *Pandorf*, 36 W. R. 369, at p. 370, 12 App. Cas. 518, at p. 524, adopted.—HENSEY *v.* WHITE, LLOYD *v.* SUGG, WALKER *v.* LILLESHALL, *C.A.*, 257; [1900] 1 Q. B. 481; 69 L. J. Q. B. 188; 81 L. T. 767.

29. *Employers' liability—Dispute—Summons to recover fine—Employers and Workmen Act*, 1875—*Truck Act*, 1896, *s.* 1, *sub-section* 2 (b).—By a contract of service in writing the appellants were to be entitled to deduct 2s. 6d. from the wages of the workman for each day he was absent without leave.

The respondent having so absented himself for two days,

Held, that, whether the contract was good or bad under the Truck Act, 1896, the justices should have proceeded to hear and determine on its merits a summons taken out by the appellants under the Employers and Workmen Act, 1875, to recover from the respondent 5s. as "a fine or penalty, or alternatively, by way of damages for such abstention," and that the justices were in error in holding that the appellants had lost their right to sue under the Act of 1875 by reason of the fact that the Truck Act of 1896 ousted the jurisdiction of the justices to determine disputes under the Act of 1875 in all cases where the contract in question fell within its provisions.—BUXTON LIME FIRMS CO. *v.* HOWE, *Q.B.D.*, 472; [1900] 2 Q. B. 232; 69 L. J. Q. B. 498; 82 L. T. 422.

30. *Negligence of servant—Liability of master—Scope of authority—Omnibus driven by conductor.*—On the trial of an action for negligence against an omnibus company, it was proved by the plaintiff's witnesses that the omnibus by which the plaintiff was run down and injured had just finished one of its journeys and was coming down an incline at the rate of eight miles an hour while making a slight *détour* for the purpose of coming to the starting-place facing the right way for commencing a fresh journey, and that it was being driven by the conductor, who was not the regular driver.

Held, that the judge was right in withdrawing the case from the jury at the close of the plaintiff's case, on the ground that there was no evidence that the person who was driving the omnibus was acting within the scope of his authority.—BEARD *v.* LONDON GENERAL OMNIBUS CO., *C.A.*, 658.

**MERCHANDIZE MARKS ACT.**—See Trade-Mark, 2, 3.

**MERGER:**—

1. *Lease—Lessee tenant for life—Intention—Benefit of tenant for life.*—Where a person entitled to the benefit of a contract enforceable in equity, and who is one of the original parties to it, ultimately becomes both the proper person to grant and to receive such benefit, merger does not necessarily take place; but the court will look to see what is to the benefit of the person in whom the various interests coalesce. The doctrine of equitable merger is applicable as much to leases as to charges.—INGLE *v.* VAUGHAN JENKINS, *Ch.D. Farwell, J.*, 684; [1900] 2 Ch. 368; 69 L. J. Ch. 618.

2. *Lease—Mortgage by sub-demise—Sale by mortgagee to mortgagor in fee—Sale by him to A. in fee—Mortgage by mortgagee to B. in fee—Judicature Act,*

1873 (36 & 37 *Vict. c.* 66), *s.* 25 (4)—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 63.—In 1891 the sites of certain houses in P.-road and W.-road were conveyed to H. in fee. He subsequently leased them, with the houses erected thereon, to W. for ninety-nine years in the usual form.

W. then mortgaged the leases of P.-road back to H. for the whole term less one day by sub-demise.

In 1893 the houses were sold by H. to W. with the benefit of the covenants in and subject to the leases, and in the same year W. sold the same to the plaintiffs on the same terms. At the same time W. mortgaged the leases of W.-road back to H. for the whole term less one day by sub-demise. Later on W. assigned to H. his equity of redemption in these houses, and H. covenanted with him to pay the rent and perform the covenants of the leases, and to keep W. indemnified from any claims thereunder.

Subsequently H. conveyed the premises to W. in fee subject to the leases, and W. then conveyed the same to the plaintiffs.

The title of the defendant rested on an indenture of the 20th of December, 1894, whereby H. purported to convey the premises to her in fee by way of mortgage.

On a summons to ascertain the rights of the parties,

Held, that the defendant could not claim a title in fee, but that she took, by virtue of section 63 of the Conveyancing Act, 1881, whatever interest H. had in the premises at the date of her conveyance; that that interest consisted of the leases which, having regard to the evidence and to *Snow* v. *Boycott* (66 L. T. Rep. 762), had not merged in the fee; and accordingly that she, offering to accept a lease of the houses, was, as mortgagee under the indenture of the 20th of December, 1894, entitled in equity to the same for the respective residues of the terms, subject to the payment of rent and performance of the covenants therein contained.—THELLUSSON *v.* LIDDARD, *Ch.D. Stirling, J.*; 82 L. T. 753.

METROPOLIS:—

1. *Buildings — Erection beyond general line of buildings—"Land lawfully occupied by building—London Building Act*, 1894 (57 & 58 *Vict. c. cxxiii.*), *s.* 22.—The London Building Act, 1894, s. 22, provides that no building shall, without the written consent of the county council, be erected beyond the general line of buildings in any street, but that "this section shall not apply to any building or structure erected after the commencement of this Act, which, either at the commencement of this Act upon land, or at any time within seven years previously, has or shall have been lawfully occupied by a building or structure."

Two adjoining houses abutting on, and standing more than fifty feet back from a street in the metropolis, had each a one-storey building upon the forecourt which extended to the side of the road. One of these buildings was erected in 1858, contrary to the provisions of section 140 of 7 Geo. 4, c. cxlii., which provided that no building should be erected in this street within fifty feet of the side of the road. That section was repealed by section 75 of the Metropolis Management Act, 1862, which provided, by section 108, that nothing therein contained should "in any way prejudice or affect any act, matter, or thing, done or commenced prior to the passing of this Act." The other building was erected in 1876, under a licence from the Metropolitan Board of Works, which, under section 76 of the Act of 1862, was given subject to the condition that the erection should not be at any time in any way altered or raised without the consent of the board.

The owner proposed to pull down and rebuild the whole premises and to erect, without the consent of the county council, three-storey buildings upon the forecourts which would be beyond the general line of buildings in the street.

Held, that the owner was not entitled to erect the proposed buildings upon the forecourts beyond the general line of buildings in the street without the consent of the county council.—SCOTT *v.* CARRITT, *C.A.*; 82 L. T. 67.

2. *Building—Portico or shelter—Supported entirely from porch—Projection over pavement beyond building line—London Building Act*, 1894 (57 & 58 *Vict. c. cxxiii.*), *ss.* 22, 200 (3).—A glass and iron portico or shelter which projects beyond the general building line of the street, and which is dovetailed into the main structure of a building, if not erected by the consent of the London County Council, is within section 22 of the London Building Act, 1894.—COBURG HOTEL *v.* LONDON COUNTY COUNCIL, *Q.B.D.*; 81 L. T. 450.

3. *Building in street—London Building Act*, 1894 *—Application to private gas company.*—Where a gas company erect a building upon lands specified in the schedule to their private Act, they are subject to the sections of the London Building Acts, 1894 and 1898, relating to the position of new buildings with reference to streets. — LONDON COUNTY COUNCIL *v.* WANDSWORTH GAS CO., *Q.B.D.*; 82 L. T. 562.

4. *Public health—General regulations by vestry as to drainage—Size of inspection chambers—Validity of regulations.* — The appellant having given notice under section 76 of the Metropolis Management Act, 1855, of his intention to make new drains, on a form supplied by the vestry upon which was indorsed "notes from the regulations as to the drainage of new houses," the proposed drains and plans were approved by the respondents, who sent to the appellant a printed copy of their general regulations.

Held, that the respondents had exercised their discretion in this particular case, and that it was not necessary on each occasion to make fresh regulations, but that, having considered the drain proposed, there was nothing to prevent their general regulations being applied. — FROST *v.* FULHAM VESTRY, *Q.B.D.*; 82 L. T. 720.

5. *Public health—Offensive business—Where gut is cleansed, scraped, or dealt with—Scraped gut sorted—Business within prohibition—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 19 (1) (*b*), 142 (2) (*b*)—*Order Metropolitan Board of Works, the 19th of November*, 1880.—By an order made in pursuance of section 3 of the Slaughterhouses, &c., Act, 1874, "the business of a gut scraper—that is to say, any business in which gut is cleansed, scraped, or dealt with otherwise than for the manufacture of catgut," was declared an offensive business, and was not to be carried on anew without the sanction of the local authority.

Section 3 of the above Act was repealed by the Public Health (London) Act, 1891, but was re-enacted by the same statute, making the county council the authority to give the sanction for carrying on offensive businesses, and the force of all orders previously issued was preserved.

The respondents purchased from gut scrapers the intestines of sheep which have been previously cleansed and scraped by such gut scrapers, as

sausage casings, and their business consisted of sorting these cases into different sizes and lengths. They then repack them, and supply them to sausage makers.

Held, that this was not a business within the order.—LONDON COUNTY COUNCIL *v.* HIRSCH, *Q.B.D.*; 81 L. T. 447.

6. *Public health—Sanitary conveniences—Stable-yard—"Workplace"—Persons "in attendance"—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 38.—Section 38 of the Public Health (London) Act, 1891, provides that every factory, workshop, and workplace shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, regard being had to the number of persons employed or in attendance at such building.

Held, that the stable-yard and stables of a cab proprietor, where a number of men were employed as horse-keepers and cab-cleaners, and where cab-drivers were daily in attendance for the hiring of cabs and horses, constituted a "workplace" within the meaning of the section, and that the cabdrivers were "in attendance" at the premises, and that sanitary conveniences must be provided for the persons employed in the premises and for the cab-drivers who came there to hire cabs.—BENNETT *v.* HARDING, *Q.B.D.*, 647; [1900] 2 Q. B. 397; 69 L. J. Q. B. 701.

7.—*Public health—Unsound food—Seizure of by officer of health—Condemnation—Functions of magistrate—Jurisdiction of magistrate to consider whether article was intended for food of man—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 47 (1), (2).—When under section 47 of the Public Health (London) Act, 1891, a medical officer of health has examined any article intended for the food of man and sold or exposed or deposited in any place for sale, and is satisfied that the article is unsound, unwholesome, or unfit for the food of man, and brings the same before a justice to be dealt with, the justice has no jurisdiction under sub-section 2 of that section to consider the question whether the article was intended for the food of man, or was sold, or exposed or deposited for sale, but upon being satisfied on the evidence that the article is unsound, unwholesome, or unfit for the food of man, he is bound to condemn the same and make an order for its destruction, his duty in that respect being then merely ministerial.—THOMAS *v.* VAN OSS, *Q.B.D.*; 69 L. J. Q. B. 665; 82 L. T. 845.

8. *Rating—Exemption—River Thames—Foreshore reclaimed.*—The exemption from taxes conferred by section 51 of 7 Geo. 3, c. 37 upon the foreshore of the River Thames reclaimed under that Act, has been taken away by section 169 of the City of London Sewers Act, 1848.—SION COLLEGE *v.* LONDON CORPORATION, *Q.B.D.*; 69 L. J. Q. B. 766.

9. *Rating—Quinquennial valuation—Alteration in value—Provisional and supplemental valuation—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 43, 46, 47.—Section 43 of the Metropolis (Valuation) Act, 1869, enacts that the valuation list as approved by the assessment committee shall last for five years subject to any supplemental or provisional list as provided by sections 46 and 47.

Held, that to justify the insertion of hereditaments in the supplemental and provisional lists on the ground of an alteration in value, the alteration must be such that if the fact relied on as constituting the valuation had been present at the time of the original valuation, it could properly have been taken into consideration in arriving at the assessment; that the fact constituting the alteration in value should affect the hereditament in question in particular; that a general rise in values would not be a fact constituting such an alteration; and that the onus of proving that the cause of the alteration in value is one which does not affect all classes is on those who make the supplemental or provisional list.—ELLIS *v.* CAMBERWELL UNION, *C.A.*, 162; [1900] 1 Q. B. 68; 69 L. J. Q. B. 202; 81 L. T. 661.

10. *Rating—Small tenements—Gross value—Sum paid for cleaning, &c., of common staircase—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 4.—The owner of a building in the metropolis containing a large number of tenements, separately occupied as artizan's dwellings, and having staircases common to several tenements, employed P. as his agent to collect the rents. Each tenant, in addition to the rent, paid to P. a weekly sum for the cleaning, lighting, and watching of the common staircase, and for removing the dust.

Held, that the weekly sum so paid was properly taken into account in arriving at the gross value of the tenements under section 4 of the Valuation (Metropolis) Act, 1869, for the purpose of rating the owner in respect thereof.—PULLEN *v.* ST. SAVIOUR'S UNION, *Q.B.D.*, 186; [1900] 1 Q. B. 138; 69 L. J. Q. B. 139; 81 L. T. 583.

11. *Sewer—Agreement to receive sewage of outside district*—Ultra vires—*Estoppel—Jurisdiction of court to grant injunction which will result in public nuisance—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 138, 140, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 61—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55).—There is no provision in the Metropolis Management Act, 1855, the Metropolis Management Amendment Act, 1862, or the Public Health Act, 1875, which authorizes a parish outside the metropolitan area to send its sewage into any sewer of any parish within that area, without the consent of such latter parish.

The vestry of a parish inside the metropolitan area has no higher power to grant its consent to a district outside the metropolitan area to send its sewage into the drains of such vestry than the Metropolitan Board of Works had to grant a similar consent under the provision of section 61 of the Metropolis Management Amendment Act, 1862, as read in connection with sections 135, 138, 140, and 250 of the Metropolis Management Act, 1855. The Metropolitan Board of Works had power under the above sections to grant such consent as above mentioned only in the form of a revocable leave and licence, but no power to grant an irrevocable licence of the kind in perpetuity, or even for a definite period.

A public body with limited powers, which has purported to permit the doing of a certain act, the permission of which is *ultra vires* its powers, is not subsequently estopped by such permission from asserting its right to prevent what it has hitherto purported to permit, and even encouraged and agreed to allow.

The fact that, if an injunction be granted, a public nuisance will be a necessary consequence unless the persons against whom the injunction is granted take steps to prevent it, affords the latter no defence to an action for such an injunction, even if it be true that they cannot take steps to prevent the nuisance without obtaining statutory powers.

At the same time, the difficulty in which such an injunction would place the defendants will in many cases induce the court to use its discretion,

and not to exert its jurisdiction to the utmost when it is not absolutely essential to do so.

Decision of Kekewich, J. (80 L. T. Rep. 746, 47 W. R. Dig. 128), reversed.—ST. MARY, ISLINGTON, VESTRY *v.* HORNSEY DISTRICT COUNCIL, *C.A.*, 401; [1900] 1 Ch. 695; 69 L. J. Ch. 324; 82 L. T. 580.

12. *Sewer — Main drainage — London County Council—Duty to provide sewers and works—Duty to keep sewers so as not to be a nuisance —Neglect of duty*—Mandamus—*Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 135. —The Metropolis Management Act, 1855, by section 135, provides that the London County Council shall "make all such sewers and works and such diversions and alterations of any existing sewers or works as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis," and shall "cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health"

Under this section, if works are in fact necessary for the effectual sewerage and drainage of any part of the metropolis, the council is bound to execute works for that purpose, having a discretion only as to the kind of works which are to be executed, and that duty will be enforced by *mandamus*.

If the sewage from any sewer vested in the council escapes into any district so as to be a nuisance, a *mandamus* will be granted to compel the council to keep that sewer so as not to be a nuisance.—LEE DISTRICT BOARD *v.* LONDON COUNTY COUNCIL, *C.A.*; 82 L. T. 306.

13. *Street—Laying out new street—Carriage-drive for blocks of flats forming a quadrangle with garden in centre*—Cul de sac *for carriage traffic—Requisite sanction of county council—London Building Act*, 1894 (57 & 58 *Vict. c. cxviii.*), *s.* 7.—The appellant was summoned upon an information charging him with having commenced to form and lay out a street for carriage traffic or foot traffic without having first obtained the sanction of the local authority pursuant to the 7th section of the London Building Act, 1894.

The appellant began to form the road in part straight, intending to build blocks of residential flats on each side of that straight part and facing into it, and the other part of the road ran into and formed the boundary of a square, round which again it was intended to build a continuous line of houses facing into the square. The length of the entire road would be 600ft., and about 40ft. in width. The road was to be formed and sewered as an ordinary street, although gullies used for draining a courtyard would also be required. The road was to be entered by gates, and no part of it was to be dedicated to the public, but was intended to be used only as a private road.

Held, that the road in question was a "street" within the meaning of section 7 of the London Building Act, 1894, and that the justices were right in convicting the appellant.

Held, also, that the question whether a place was a "street" within the meaning of the section was one largely of fact, and the decision in each case must depend on its particular circumstances.

*Wood (Appellant)* v. *The London County Council (Respondents)*, 44 W. R. 144, 64 L. J. M. C. 276, *overruled.*—ARMSTRONG *v.* LONDON COUNTY COUNCIL, *Q.B.D.*, 367; [1900] 1 Q. B. 416; 69 L. J. Q. B. 267; 81 L. T. 638.

14. *Street—New street—Buildings on one side only —Vacant land opposite—Repairs to road—Right of authority to claim apportionment—Lapse of reasonable time—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.—The appellants were the owners of certain houses in the Fulham Palace-road, which, on the expiration of a Turnpike Act, became a highway repairable by the inhabitants at large, and was repaired from time to time by the respondent's predecessors. In 1864 it was not a street, but by 1883 it was built with houses along one side, the other side remaining vacant building land. Between 1879 and 1898 it was altered and repaired at various times by the respondents and others. In 1897 the respondents resolved that the road was not paved to their satisfaction, and that it should be accordingly paved, and the expenses apportioned upon the owners.

Held, that the magistrate was justified in holding that the Fulham Palace-road became a new street in 1883.

Held, further, that where, in the metropolis, a highway repairable by the inhabitants at large becomes a new street by reason of the erection of houses along it, a vestry is not precluded from causing it to be paved at the cost of the frontagers by lapse of time, however long, after it became a new street, even though it was in fact already paved at the time it became a new street.—SIMMONDS *v.* FULHAM VESTRY, *Q.B.D.*, 574; [1900] 2 Q. B. 188; 69 L. J. Q. B. 560; 82 L. T 497.

15. *Street—Paving new streets—Apportionment and demand — Rescission — Subsequent apportionment — Validity of — Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 57, 105.—A vestry or local board have power, under section 57 of the Metropolis Management Act, 1855, to rescind a resolution and apportionment on the paving of a new street in pursuance of section 105, even where a summons has been issued and withdrawn, for the payment of the sum apportioned.

*Secus*, where the resolution had been put into force and carried out completely.—BISHOP *v.* WANDSWORTH BOARD OF WORKS, *Q.B.D.*; 69 L. J. Q. B. 632; 82 L. T. 766.

16. *Street—Widening street—Compulsory purchase —Severance—Michael Angelo Taylor's Act*, 1817 (57 *Geo.* 3, *c. xxix.*), *ss.* 80, 96—*Metropolis Management Acts*, 1855 *to* 1890.—A local authority, requiring part of two houses for the purpose of widening a street, adjudged under Michael Angelo Taylor's Act that it was necessary to acquire the whole, and accordingly gave notice to treat for the whole. They subsequently informed the owner that his right of pre-emption of the part not required would be reserved to him. It being proved that possession of the whole was necessary in order to effect the widening,

Held, that the local authority could take the whole.—FERNLEY *v.* LIMEHOUSE BOARD OF WORKS, *Ch.D. Kekewich, J.*; 82 L. T. 524.

17. *Volunteer corps—Storehouse and drill-hall—Metropolis Management Acts — Exemptions.* — A building consisting of an armoury, storehouse, and drill-hall of a volunteer corps, which is vested in the commanding officer of the corps and is intended for the use of the corps only, is not exempt from the operation of the sanitary provisions of the Metropolis Management Act, 1855, on the ground that it is occupied and used solely for the purposes of the Crown.—WESTMINSTER VESTRY *v.* HOSKIN, *Q.B.D.*; [1899] 2 Q. B. 474.

See also Contract, 8; Hackney Carriage; Land-

lord and Tenant, 14; Local Government, 1; Water, 3, 4.

MIDDLESEX REGISTRY.—See Practice, 30.

MINE:—

1. *Gold mine—Joint lessees—Notice of abandonment by one lessee to the others.*—Written notice by a joint holder of a gold mining lease to his co-lessees that he is unable to contribute to the joint expenses and that they may do as they like with it, is an abandonment of his beneficial interest therein. The subsequent working of the lease by the other co-lessees out of their own resources is an acceptance of the abandonment.

Held, that neither the retiring lessee nor, on his bankruptcy, his official assignee was entitled to any share of the price realized by a sale of the lease by the other co-lessees.—PALMER *v.* MOORE, *P.C.*; [1900] A. C. 293; 69 L. J. P. C. 64; 82 L. T. 166.

2. *Minerals—Coal below low water-mark—Barony title—Adoption—Lease of coal.*—The doctrine of possession by prescriptive working of minerals applicable to the foreshore *ex adverso* of a barony granted with parts and pertinents, cannot be extended to a barony granted with power to work minerals *infra fluxum maris*, because these words show that the grant is limited to the minerals under the foreshore only. Nor can such prescriptive use be extended to a third barony where a barony with a bounding charter lies between.

The right of a proprietor of estates adjoining the sea to work the coal below low water-mark was challenged by the Crown during the proprietor's minority. The estates to which the minor had succeeded consisted in part of entailed and in part of unentailed lands. The administration of the unentailed lands was vested in the testamentary trustees of the minor's father, who were also curators of the minor. These trustees, without the concurrence of the minor, entered into a transaction with the Crown whereby they on their part accepted a lease of the whole coal below low water-mark *ex adverso* of both the entailed and unentailed lands, and the Crown agreed not to claim damages in respect of coal which had been worked in the past. After the proprietor came of age, he accepted an assignment of the lease, and subsequently applied for and obtained from the Crown a reduction of the royalty payable under the lease, and a modification of the whole mode of working the coal. When the proprietor so acted in regard to the lease, he was unaware that he had a claim to some of the coal below low water-mark. In an action brought by the proprietor fourteen years after he had reached majority, concluding, *inter alia*, for a declarator that he was not bound by the lease,

Held, reversing the decision of the First Division of the Court of Session, [1897] 24 R. 216, that the actings of the proprietor after he came of age barred him from challenging the lease.—LORD ADVOCATE *v.* WEMYSS, *H.L.* (*Sc.*); [1900] A.C. 48.

3. *Minerals—Lease—Open or unopened mine—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18) *s.* 4.—A settled estate was divided into two portions by a strip of land belonging to a different owner. A seam of coal underlay the whole. When the tenant for life of the settled estate came into possession the part of the seam underlying the northern portion of the estate was an opened mine. The tenant for life subsequently acquired the coal underlying the dividing strip. The tenant for life now proposed to grant a lease of the part of the seam underlying the southern part of the estate which had not yet been worked. This part of the seam it was practicable to work from the opened mine, but it was not commercially convenient, and is was therefore intended to sink a new shaft in the southern portion of the estate.

Held, that the part of the seam underlying the southern portion of the estate was an unopened mine.—MAYNARD'S SETTLED ESTATE, RE, *Ch.D. Kekewich, J.*, 60; [1899] 2 Ch. 347.

4. *Minerals—Opened mines—Rents and profits—Royalties—Capital or income.*—By a marriage settlement made in 1882 G., then the absolute owner of a real estate, conveyed it to trustees on trust for sale, and until sale to lease the unsold parts thereof and to hold the proceeds of sale, and the rents and profits until sold, upon trust for G. for life and after her death for G.'s husband for life, with remainder for the children of the marriage as the parents should appoint. The trustees were given power of leasing the hereditaments. Upon the estate were stone quarries which had been worked at intervals for about a century; but in 1882 and for four years previously they had not been worked. In 1895, the estate not having been sold, the trustees leased the stone in 45 acres, including the portion already worked, at a fixed rent with a royalty on the amount of stone sold. There was one child of the marriage.

Held (reversing the decision of the First Division of the Court of Session, [1898] 25 R. 475), that the quarries at the date of the marriage settlement were "opened mines," and the rent and royalty fell to be paid to G. as annual income from the estate, and did not fall to be accumulated for the benefit of the child of the marriage.—GREVILLE-NUGENT *v.* MACKENZIE *H.L.* (*Sc.*); [1900] A. C. 83; 69 L. J. P. C. 1; 81 L. T. 793.

5. *Subsidence—Damage—Liability for acts of predecessor in title.*—An action for damages done by subsidence caused by working a mine is a personal action, which determines on the death of the owner, and cannot be brought against a trustee or lessee who has not actively caused the subsidence.—HALL *v.* NORFOLK (DUKE), *Ch.D. Kekewich, J.*, 565; 69 L. J. Ch. 571; 82 L. T. 836.

6. *Working—Letting down surface—Right of support—Compensation.*—The owner of the surface of land does not by parting with the minerals under such land lose his common law right of support, and in the absence of express power, or necessary implication in the conveyance, the grantee of the minerals has no right to work them so as to let down the surface. This obligation is not affected by a provision that compensation shall be payable for damage to the surface.—NEW SHARLSTON COLLIERIES CO. *v.* WESTMORELAND (EARL), *H.L.*; 82 L. T. 725.

See also Master and Servant, 12; Settled Land, 4-6.

MISTAKE:—

*Money paid under compulsion of law—Money credited in claim—Receipt in full given—Want of* bonâ fides—*Action for recovery of money.*—The plaintiffs sued the defendant for work and labour done. In the writ they by mistake credited the defendant with the payment of a sum on account and claimed the balance. The defendant knowing that they had made a mistake paid the balance and obtained from them a receipt for the whole sum due from him to them. Subsequently, having discovered their mistake, the plaintiffs brought an action to

recover from the defendant the sum wrongfully accredited to him, as money had and received to their use.

Held, that, although the receipt had been given under compulsion of legal process, the defendant could not rely upon it as a defence to the action since he had not acted *bonâ fide*, and that the plaintiffs were therefore entitled to recover the sum claimed.—WARD & Co. *v.* WALLIS, *Q.B.D.*; [1900] 1 Q. B. 675; 69 L. J. Q. B. 423; 82 L. T. 261.

MORTGAGE:—

1. *Charge upon "all my real and personal estate whatsoever and wheresoever"—Enforcement—Definite property—Valid charge—Public policy—Vagueness.*—A charge by a man upon "all his real and personal estate whatsoever and wheresoever, and of what nature or kind soever, the same may be or consist," will not be void on the ground of vagueness or as offending against public policy, if it is possible, at the time when the charge is sought to be enforced, to construe fairly the document creating the charge, and to point to the property comprised in it.—KELCEY, RE, TYSON *v.* KELCEY, *Ch.D. Kekewich, J.*, 59; [1899] 2 Ch. 530; 81 L. T. 354.

2. *Costs—Equitable mortgage—Completion of legal mortgage—Procuration fee—Solicitor mortgagee—Mortgagees' Legal Costs Act*, 1895 (58 & 59 *Vict. c.* 25), *s.* 3.—K. in February, 1891, deposited certain deeds with a bank with intent to create an equitable mortgage, and signed a memorandum agreeing at any time or times upon the request of the bank to execute a legal mortgage in such form as the bank should require.

In March, 1891, K. gave S. a charge on the same property for £1,000.

In July, 1891, this charge was transferred by S. to C., and in February, 1892, notice was given to the bank.

In March, 1892, the plaintiff, a solicitor, took a new legal mortgage from K. and paid off the bank. Proceedings were taken for the realization of the security, and a foreclosure decree was made in April, 1893.

In February, 1898, an order was made for the taxation of the costs of the plaintiff in this action, including all costs properly incurred.

Upon a summons taken out by C. to vary the taxing-master's certificate,

Held, (1) that the plaintiff could not be allowed profit costs as he was not entitled to the benefit of the Mortgagees' Legal Costs Act, 1895, the taxation being really carried out under the order of April, 1893, and the Act not being retrospective; (2) that the plaintiff was entitled to the costs of the transfer and of investigation of title on the principle stated in *Wetherell* v. *Collins*, 3 Madd. 255; (3) that no procuration fee ought to be allowed.

*National Provincial Bank of England* v. *Games*, 31 Ch. D. 581, distinguished.—DAY *v.* KELLAND, *Ch.D. Cozens-Hardy, J.*; 82 L. T. 142.

3. *Covenant—"Tied" public-house—Collateral security for mortgage—Omission of "successors"—Assign and sub-lessee—Superior title.*—J. J., the owner of a public-house, mortgaged it, subject to a prior mortgage to J. T., to M. J. and W. J., trading together as "J. Brothers" as brewers and wine merchants. By an indenture of even date with this second mortgage, J. J. covenanted with the said M. J. and W. J., "trading in co-partnership as 'J. Brothers,'" and thereinafter "styled as 'J. Brothers,'" that he, the said J. J., his executors, administrators, and assigns, for so long as he or they should continue in possession of the said public-house, would purchase their beer and spirits from the said "J. Brothers." Subseqently J. J. and J. T. united in granting a sub-lease to H., who had at the time notice of the said covenant; and the business of "J. Brothers," together with the mortgage to them already mentioned, was transferred to the A. Brewery Co.

Held, that the covenant and the mortgage to "J. Brothers" must be read together, and that H. was bound to purchase his beer from the A. Brewery Co., notwithstanding the fact that "J. Brothers" had technically ceased to exist and that H. was not bound by the actual words of the covenant to purchase his beer from their "successors."

*Clegg* v. *Hands*, 38 W. R. 433, 44 Ch. D. 503, and similar cases, distinguished.

Held, that "assign" does not necessarily exclude "sub-lessee," and that the fact that H. was not the "assign," but the "sub-lessee," of J. J. did not relieve him from liability on the covenant, with notice of which he was affected.

*Bryant* v. *Hancock*, 46 W. R. 386, [1898] 1 Q. B. 716, [1899] A. C. 442, distinguished.

Held, that H. was bound to claim under his superior title; and that he must accordingly be considered, in the eye of the law, to derive his title, not from J. T., but from J. J.—JOHN BROTHERS (ABERGARW, BREWERY) *v.* HOLMES, *Ch.D. Kekewich, J.*, 236; [1900] 1 Ch. 188; 69 L. J. Ch. 149; 81 L. T. 771.

4. *Deposit of deeds—Subsequent purchaser for value without notice—Gross negligence—Priority.*—Gross negligence on the part of a subsequent purchaser for value without notice will disentitle him to protection against a prior incumbrancer, even though there is no question of fraud on his part.

A purchaser for value without notice of any incumbrance obtained a conveyance of the legal estate in certain houses, but did not require an abstract of title or production of the title deeds. He did ask where the deeds were, and was told that they were in the possession of the vendor, but would not be delivered up as they related to other property. It was subsequently discovered by the purchaser that the deeds had been deposited with a prior equitable mortgagee.

Held, that the purchaser had acted with gross carelessness and would not be allowed to deprive the mortgagee of her security.

*Ratcliffe* v. *Barnard*, 19 W. R. 764, L. R. 6 Ch. App. 652, commented on.

Decision of Romer, J., affirmed.—OLIVER *v.* HINTON, *C.A.*, 3; [1899] 2 Ch. 264; 81 L. T. 212.

5. *Distress—Receiver of mortgaged property—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 19, *sub-section* 1 (*iii.*); *s.* 24, *sub-sections* 1, 2, 3.—A mortgagee, under sub-section 1 (iii.) of section 19 of the Conveyancing Act, 1881, appointed a receiver of the rents of a mortgaged property. The rent of the property for one quarter was outstanding. The receiver declined to distrain, and thereupon the mortgagor put in a distress without the receiver's authority.

Held, that, after the appointment of the receiver, the mortgagor had no right to distrain, and that the distress was illegal.—WOOLSTON *v.* ROSS, *Ch.D. Cozens-Hardy, J.*, 556; [1900] 1 Ch. 788; 69 L. J. Ch. 363; 82 L. T. 21.

6. *Further advance—Second mortgage—Tacking—Trustees—Joint tenants.*—In October, 1864, certain property was mortgaged to A., B., and C. (who were trustees) as joint tenants, to secure £3,000 and interest. In February, 1866, the same pro-

perty was mortgaged to L. to secure £3,500 and interest. In October, 1876, a further charge was executed in favour of the first mortgagees to secure £1,000 and interest. A. died in May, 1883.

The plaintiffs in the action were the present trustees of the settlement of which the first mortgagees had been trustees, and the defendants were the present owners of the second mortgage.

B., who was a solicitor, had acted for all parties in carrying out the first and second mortgages and the further advance by the first mortgagees, and had actual notice of the second mortgage at the date of its creation, but he failed to communicate the fact of the second mortgage to his co-mortgagees at the time of the further advance and they had no personal knowledge of its existence.

Held, that the plaintiffs were not entitled to tack the amount due in respect of the further advance to the amount due on the first mortgage and so postpone the second mortgagees.

In the case of a mortgage of real estate to joint tenants to secure a debt due to them jointly, it cannot be said as against strangers that any one portion of the security or of the debt belongs to any one of the mortgagees; each is entitled to the whole, and if notice of a second incumbrance is given to any one of them, such notice creates an equity against one in respect of the whole sufficient to prevent any tacking.—FREEMAN *v.* LAING, *Ch.D. Byrne, J.*, 9; [1899] 2 Ch. 355; 81 L. T. 167.

7. *Lease—Mortgagor in possession, lease by—Mansion-house, furniture, and sporting rights—Foreclosure—Lease binding on mortgagee—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 18.—A mortgagor of land while in possession leased for fourteen years the mortgaged mansion-house, together with the furniture and with sporting rights over the whole of the mortgaged land. The mortgagees having foreclosed,

Held, that the lease was valid as against the mortgagees under section 18 of the Conveyancing Act, 1881.—BROWN *v.* PETO, *Q.B.D.*; [1900] 1 Q. B. 346; 69 L. J. Q. B. 141; 82 L. T. 264.

8. *Life policy—Personal covenant—Power of sale—Statute of Limitations* (37 & 38 *Vict. c.* 57), *s.* 8—*Moneys received on surrender of policy by mortgagee—Payment or acknowledgment—"In the meantime."*—Where a mortgagee, having received neither payment nor acknowledgment in respect of his mortgage for twenty-two years, at the end of that time surrenders to the insurance office a policy on the life of the mortgagor in order to realize part of his security, the surrender value of the policy so paid by the insurance company to the mortgagee will not operate as a payment or acknowledgment of the mortgage debt so as to take the case out of the Statute of Limitations.

The words "in the meantime" in section 8 of 37 & 38 Vict. c. 57 mean the period between the time at which the action or suit is brought and the time at which the debt or the remedy for it would have been barred.—CLIFDEN (LORD), RE, ANNALY *v.* AGAR-ELLIS, *Ch.D. Byrne, J.*, 428; [1900] 1 Ch. 774; 69 L. J. Ch. 478; 82 L. T. 558.

9. *Receipt clause—Execution induced by fraud of mortgagor's solicitor—Implicit confidence of mortgagor in solicitor—Misappropriation by solicitor—Estoppel—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 56.—K. had such confidence in his solicitor that he executed a mortgage deed (containing a receipt for the consideration money) at the request of his solicitor without ascertaining that the deed was a mortgage deed, but only knowing that in some way it dealt with his property. The deed was duly handed over by the solicitor to the mortgagee and the consideration money paid by the mortgagee to the solicitor.

Held, that as K. when he signed the mortgage deed knew he was "doing something with his estate," the deed must therefore be considered his deed (*Hunter* v. *Walters*, L. R. 7 Ch. App. 75), and that the payment by the mortgagee to the solicitor was a good discharge under section 56 of the Conveyancing Act, 1881.

The meaning of the term "a solicitor" in section 56 considered.—KING *v.* SMITH, *Ch.D. Farwell, J.*; 69 L. J. Ch. 598; 82 L. T. 815.

10. *Redemption—Clogging the equity of redemption—Collateral advantage to mortgagee—Leaseholds—Covenant for payment to mortgagee of one-third of the profit rent until the end of the term, though principal and interest paid before—Validity.*—A mortgagee may, provided the bargain is not unconscionable or oppressive, stipulate by the mortgage for a collateral advantage to himself; and if he does so, there is no presumption that the mortgagor entered into the contract under pressure.

A covenant in a mortgage of a lease that the mortgagor will, during the residue of the term (besides paying principal and interest), pay to the mortgagee one-third of the net profit rental received from under-tenants, and provisions that the relation of mortgagor and mortgagee shall continue, though all principal and interest may have been paid, do not amount to a clog or fetter upon the equity of redemption, and are therefore valid.

Decision of Byrne, J. (47 W. R. 297), reversed.—SANTLEY *v.* WILDE, *C.A.*, 90; [1899] 2 Ch. 474; 81 L. T. 393.

11. *Redemption—Public-house—Leasehold—"Tied house"—Once a mortgage always a mortgage.*—The principle of equity that nothing in a mortgage transaction will be permitted to clog, fetter, or impede the borrower's right to redeem is still valid and unimpaired.

A covenant in a mortgage of a leasehold public-house that the mortgagor shall, during the continuance of the lease, buy his beer only from the mortgagees, is a clog on the equity of redemption, inasmuch as it prevents the mortgagor from getting back the property unimpaired. The mortgagor is therefore entitled on redemption to an assignment of the premises free from the covenant.

*Santley* v. *Wilde, ante*, p. 90, [1899] 2 Ch. 474, distinguished.

Decision of Cozens-Hardy, J. (*ante*, p. 110), affirmed.—RICE *v.* NOAKES, *C.A.*, 629; 82 L. T. 784.

12. *Sale—Power of sale—Action to set aside sale—Laches.*—The mortgagee of a reversionary interest sold it under the power of sale in January, 1888. The reversioner had notice of the sale, and he then took legal advice as to his rights, but he took no steps to impeach the sale until December, 1897, when he commenced an action to set it aside. The reversion had fallen into possession in April, 1897.

Held, that, by reason of his *laches*, the plaintiff could not maintain the action.

Decision of Cozens-Hardy, J. (47 W. R. 430, [1899] 1 Ch. 873), affirmed.—NUTT *v.* EASTON, *C.A.*; [1900] 1 Ch. 29; 69 L. J. Ch. 46; 81 L. T. 530.

13. *Sale—Power of sale—Sale of part of mortgaged property—Grant of implied easements over unsold land—Light—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-sections* 1, 2, 4, 5; *s.* 19, *sub-section* 1—*Co-defendants—Third-party procedure—*

*Costs—R. S. C., ord.* 16, *r.* 55.—A conveyance by a mortgagee exercising his statutory power of sale of part of the mortgaged property will pass to the purchaser an implied easement as to light over the portion remaining unsold.

An owner of land brought an action for infringement of light and trespass against a neighbouring owner and a person engaged in building a wall for him. The builder, not being satisfied with the way in which the defence was being conducted, severed his defence, and was separately represented.

Held, that, under the circumstances of the case, he was justified in so doing, and entitled to be paid solicitor and client costs by his co-defendant.—BORN *v.* TURNER, *Ch.D. Byrne, J.*, 697; [1900] 2 Ch. 211; 69 L. J. Ch. 593.

14. *Ship — Accounts — Evidence.* — In taking accounts between a mortgagor and a deceased mortgagee of a barge, an account book kept by the latter in his own handwriting containing entries of payments made to him by the mortgagor as well as disbursements made by him on account of the barge is admissible on behalf of the mortgagee's executors in evidence as containing entries against interest.

*Taylor* v. *Witham*, 3 Ch. D. 605, followed.—HUDSON *v.* SWIFTSURE (OWNERS OF), *P.D. & Ad.D.*; 82 L. T. 389.

15. *Transfer—No notice to mortgagor — Sale by mortgagor and mortgagee without disclosing mortgage —Fraudulent retention of purchase-money by mortgagee—Satisfaction of mortgage.*—A solicitor conveyed certain land to a builder. The builder built some houses thereon and mortgaged it to the solicitor. The solicitor transferred the mortgage. No notice of such transfer was given to the builder. Subsequently the solicitor and the builder sold the land, which was conveyed by a deed containing a recital that it was free from incumbrances. The proceeds of sale were received by the solicitor, who retained the mortgage debt out of them. The solicitor till he absconded paid interest to the transferee.

Held, that the purchaser took the property subject to the mortgage, but the builder, having placed himself entirely in the hands of the solicitor, must have imputed to him the knowledge which the solicitor actually had, and must indemnify the purchaser against any payments to be made to the mortgagee.

Decision of Cozens-Hardy, J. (47 W. R. 620), affirmed.—DIXON *v.* WINCH, *C.A.*, 612; [1900] 1 Ch. 736; 69 L. J. Ch. 465; 82 L. T. 437.

See also Landlord and Tenant, 4, 18; Merger, 2; Partnership, 3; Principal and Agent, 1; Probate, 1; Will, 19.

NATAL, LAW of:—

*Husband and wife—Marriage contract—Registration—Mutual will—Natal Law No.* 22 *of* 1863, *s.* 7. —By section 7 of Natal Law No. 22 of 1863, passed to prevent community of goods attaching to certain marriages, persons married in South Africa can bring themselves under its provisions by a registered written instrument to that effect.

Held, that, by the true construction of that section, if the instrument is unregistered it is inoperative for all purposes and as between the parties.

Where husband and wife, not within Law No. 22, by mutual will directed their executors to sell the testator's estate as soon as convenient after the testator's death without specifying a date for payment of legacies directed by the testator, and so soon after the death of the testatrix as may be to pay the legacies directed by her,

Held, that by the true construction of the will the testator's legacies were payable at his death. The intention to dispose of everything was apparent, and the words did not necessitate the suspension of payment of testator's legacies with consequent intestacy as to the resulting income.—TAYLOR *v.* STURROCK, STURROCK *v.* STURROCK, *P.C.*; [1900] A. C. 225; 69 L. J. P. C. 29; 82 L. T. 97.

NEGLIGENCE. — See Banker, 2; Company, 6; Libel, 2; Master and Servant, 30; Mortgage, 4; Statute.

NEW ZEALAND, LAW of:—

*Railway—Effect of an Order in Council retaining a railway as Government property—Rights of debenture-holders—New Zealand Railways Construction and Land Act*, 1881 (44 & 45 *Vict. No* 37), *ss.* 123, 125, 126.—Under New Zealand Railways Construction and Land Act, 1881, ss. 125 and 126, the Governor of the Colony, having taken possession of a railway under section 123. is empowered on the happening of events in the later section specified to declare his intention to retain the railway as Government property.

Held, that on publishing an Order in Council giving effect to such intention, his title to the railway is absolute and paramount, and that the rights of debenture-holders whose debentures were authorized by a later Act in 1884 to be a first charge on the railway fall with the company's title.—COATES *v.* REG., *A.C.*; [1900] A. C. 217; 69 L. J. P. C. 26; 82 L. T. 162.

NUISANCE:—

1. *Interference with right of support—Excavation—Landowner — Drainage — Surface, letting down — Underground water—Water-logged land—Quicksand—"Running silt"—Pitch, stratum of—Ancient lights, interference with—Damages—Injunction—Gasworks Clauses Acts*, 1847, 1871 (10 & 11 *Vict. c.* 15, *s.* 29; 34 & 35 *Vict. c.* 41, *s.* 9)—*Lord Cairns' Act* (21 & 22 *Vict. c.* 27).—The plaintiff was the owner of land with houses on it. The adjoining land belonged to the defendants, a gas company incorporated by special Act, with power to purchase land by agreement only, and subject to the provisions of the Gasworks Clauses Acts, 1847 and 1871. Under their statutory powers the defendants proceeded to excavate their land for the purpose of erecting a gasometer. In so doing they penetrated an underground stratum of quicksand, or sand loaded with stagnant water, geologically known as "running silt," which extended under the plaintiff's land as well as their own, the silt or sand largely preponderating over the water. In draining their excavation the defendants withdrew a large quantity of the running silt from under the plaintiff's land and thus caused a subsidence of the surface with consequent structural injury to his houses. The liability of the defendants to proceedings for any "nuisance" caused by them in the execution of their works was preserved by section 9 of the Gasworks Clauses Act, 1871.

Held, that the defendants had no statutory authority so to construct their works as to occasion a nuisance, the fact that section 9 of the Gasworks Clauses Act, 1871, expressly preserved their liability for any nuisance, distinguishing the case from *London, Brighton, and South Coast Railway Co.* v. *Truman*, 11 App. Cas. 45; and that the defendants had committed a nuisance by withdrawing a

support of the plaintiff's land consisting of a stratum—not of water—but of wet sand or running silt.

*Popplewell* v. *Hodkinson*, L. R. 4 Exch. 248, distinguished.

Decision of North, J. (47 W. R. 222, [1898] 2 Ch. 614), affirmed.

It being proved that the proposed gasometer would obstruct ancient lights in the plaintiff's houses,

Held, that the plaintiff was entitled to an injunction, since his right would not be adequately protected or vindicated by damages.—JORDESON *v.* SUTTON GAS Co., *C.A.*; [1899] 2 Ch. 217; 68 L. J. Ch. 457; 80 L. T. 815.

2. *Reasonable use of property—Occupiers of flats in one building—Residential occupier and restaurant keeper.*—It is relevant in nuisance cases to inquire whether the defendant was making a reasonable use of his premises in doing the acts complained of.

*Dictum* of Kekewich, J., in *Reinhardt* v. *Mentasti*, 38 W. R. 10, 42 Ch. D. 685, at p. 690, dissented from.

Different flats in one building were let to the plaintiff for residential purposes and to A., a restaurant keeper, for the purpose of his business. When the plaintiff took her flat there were only private residences in the building. The plaintiff brought an action against the common landlord and A. to restrain nuisance by heat, smell, and noise arising from A.'s use of his premises. The action was discontinued as against the landlord on his making certain structural alterations to abate the nuisance by heat, but A. denied liability, and contested the whole action.

Held, that the defendant A. was entitled to make a reasonable use of his premises for the purpose of his business, but not to make an unreasonable use of them, and, on the facts, that he had made an unreasonable use of his premises, which substantially interfered with the plaintiff's enjoyment of her flat; and therefore that the plaintiff was entitled to an injunction.

Rule in *Ball* v. *Ray*, 21 W. R. 282, L. R. 8 Ch. App. 467, at p. 469, applied.—SANDERS-CLARK *v.* GROSVENOR MANSIONS CO., *Ch.D. Buckley, J.*, 570; [1900] 2 Ch. 373; 69 L. J. Ch. 579; 82 L. T. 758.

See also Highway, 1; Justices, 4; Local Government, 14; Tramway, 1.

PARTITION:—

1. *Conversion—Money received on sale—Distribution—"Person becoming absolutely entitled"—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 8—*Leases and Sales of Settled Estates Act*, 1856 (19 & 20 *Vict. c.* 120), *s.* 23.—Land was sold under the Partition Act, 1868, and by an order of court a testator's share of the proceeds was paid out to the trustees of his will, and was invested otherwise than in land, in accordance with the trusts of the will. One of beneficiaries of the said trust fund died intestate.

Held, that his share of the fund so invested devolved on his legal personal representative, and not on his heir-at-law.—MORGAN, RE, SMITH *v.* MAY, *Ch.D. Stirling, J.*, 670.

2. *Conversion—Claim for sale by infant as sole plaintiff—Defendants interested in moiety desiring a sale—Sale directed if parties other than infant found entitled to moiety—Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6.—An infant's share in realty will not be converted by a sale of such interest in a partition action in which the infant was plaintiff, where the judgment directed a sale, if (as was found to be the fact) the defendants were entitled to a moiety, although the infant has in his pleadings requested a sale; the form of the judgment precluding the view that the sale was made at the request of the infant.—NORTON *v.* NORTON, *Ch.D. Byrne, J.*, 140; [1900] 1 Ch. 101; 69 L. J. Ch. 31; 81 L. T. 724.

3. *Costs—Inquiries—Discretion of court—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 10—*Ord.* 65, *r.* 14 (b).—In a partition action the property long ago had been severed in moieties, one of which was held by the defendant for life with remainders over, and the other had to be divided among a great number of persons. The parties representing the different aliquot parts appeared in chambers. Subsequently, a partition action was brought, and an ordinary judgment directed with one special inquiry. Upon a question arising whether any special directions to be given as to the incidence of the costs,

Held, that, since the Partition Act the usual practice had been to give the costs of all parties out of the proceeds of sale. That ord. 65, r. 14 (*b*) was not inapplicable to such a case, and that it did not appear that the plaintiffs would suffer any injustice if the ordinary practice were departed from. But that in all the circumstances the usual order as to costs would be made.

*Belcher* v. *Williams*, 45 Ch. D. 510, followed.—GRAHAM *v.* CLINTON (LORD), *Ch.D. Stirling, J.*; 81 L. T. 717.

4. *Practice—Form of judgment—Permanent improvements — Allowance.* — A tenant in common, claiming partition, is entitled whether charged with occupation rent or not, to have in the judgment for partition an inquiry as to expenditure properly made in permanent improvements to the property, during the co-ownership, and the inquiry should be reciprocal.

Observations on the authorities.

*Williams* v. *Williams*, [1899] W. N. 66, 47 W. R. Dig. 143, approved.—KENRICK *v.* MOUNTSTEVEN, *Ch.D. Cozens-Hardy, J.*, 141.

PARTNERSHIP:—

1. *Dissolution — Goodwill — Name of old firm—Partner's name.*—On the dissolution of a partnership, where no provision is made about the use of the firm name, but the goodwill, apart from the benefit of the firm name, is not to be sold, but is to be divided between the partners, each partner is at liberty to use the firm name so long as he does not thereby hold out his late partner as his partner in business.

A man does not necessarily hold out his late partner as his partner in business by using the old firm name, even though the old firm name is the name of his late partner.—BURCHELL *v.* WILDE, *C.A.*, 491; [1900] 1 Ch. 551; 69 L. J. Ch. 314; 82 L. T. 576.

2. *Goodwill—Sale of business—Soliciting customers.*—One of two partners bought out the other under their articles. The articles provided that the outgoing partner might set up a similar business in the neighbourhood.

Held, that the proviso was merely declaratory, and did not authorize solicitation of old customers.—GILLINGHAM *v.* BEDDOW, *Ch.D. Cozens-Hardy, J.*; [1900] 2 Ch. 242; 69 L. J. Ch. 527; 82 L. T. 791.

3. *Mortgage of share by one partner—Dissolution—Right to an account—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 31.—By section 31 of the Partnership Act, 1890, a mortgagee of a share in a partnership has a right to an account and to ascertain what the share of his mortgagor really

is from the date of the dissolution of the partnership. The mortgagor is not entitled to say that he has settled the value of his share with his partner before the date of dissolution, and thus take away his mortgagee's right to an account for the purpose of ascertaining that share.—WATTS *v.* DRISCOLL, *Ch.D. Farwell, J.*, 521; 82 L. T. 255.

See also Bankruptcy, 15; Inland Revenue, 29; Practice, 32.

PATENT:—

1. *Chemical process—Infringement—Use abroad—Part of manufacture of commercial article—Sale in England.*—The sale in England of an article imported from abroad, in the manufacture of which a process patented in this country has been used, is an infringement of the patent, even although the process is only the first part of the manufacture, which also consists of subsequent processes not patented.—SACCHARIN CORPORATION *v.* ANGLO-CONTINENTAL CHEMICAL WORKS, *Ch.D. Buckley, J.*, 444.

2. *Grant to two patentees—Agreement for sale—Covenants for validity—Death of one grantee—Joint and several covenants.*—A provision in an agreement for the sale of letters patent granted to two persons that an assignment should be executed and should contain a covenant by the vendors that the letters patent is valid, is enforceable against the representatives of one of the vendors who has died after the agreement and before assignment, and such representatives are liable for damages for breach of the agreement in this respect.

Decision of Cozens-Hardy, J. (47 W. R. 518, [1899] 2 Ch. 289), reversed.—NATIONAL COMPANY FOR DISTRIBUTION OF ELECTRICITY, &c. *v.* GIBBS, *C.A.*, 499; [1900] 2 Ch. 280; 69 L. J. Ch. 457; 82 L. T. 443.

3. *Infringement—Foreign-made article—Evidence—Presumption—Injunction—Damages—Alternative relief.*—In an action by patentees of an article exclusively manufactured abroad, claiming an injunction and damages for the user of the patented article in England, the only evidence of infringement adduced was that of an expert, who deposed that the plaintiffs' patents related to three separate and distinct modes of producing the article in question; that it was not possible to tell, from an examination of any particular parcel, under which process it has been produced, but that it must have been produced under one or other of these three processes. The defendant called no evidence, and claimed a nonsuit.

Held, that the plaintiffs were not entitled to any injunction, as they had not proved that any particular patent had been infringed. On the question of damages, the court found as a fact that the plaintiffs' patents covered every possible mode of producing the patented article, and that one of these patents must therefore have been infringed, and that the nature and extent of the wrong done to the plaintiffs did not depend upon the particular patent infringed. An inquiry was therefore directed, without mentioning any particular patent, whether any and what damages had been sustained by the plaintiffs by reason of the user by the defendant of the patented article.

*Semble*, it is not always essential to establish the particular alternative under which relief is claimed, provided that the rights of the plaintiff and the obligations of the defendant are identical under each of the alternatives, and that the alternatives exhaust every possible contingency and are mutually exclusive. — SACCHARIN CORPORATION (LIMITED) *v.* QUINCEY, *Ch.D. Cozens-Hardy, J.*; [1900] 2 Ch. 246; 69 L. J. Ch. 530; 82 L. T. 792.

4. *Infringement — Patented articles bought in England and sent abroad for sale—"Making use of" the invention—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *Schedule I., Form D—Damages—Assessment.*—A person who transports patented articles from place to place in the United Kingdom, but so that the articles are not serving the purpose for which they are patented, does not "exercise" or "put in practice" the patented invention; but the export abroad of such articles with a view to a sale is at least indirectly a "making use" of an invention, and is an infringement within the meaning of Schedule I., Form D, of the Patents, Designs, and Trade-Marks Act, 1883.

The measure of damages is what the defendants would have had to pay for permission to do that which they wrongfully did. — BRITISH MOTOR SYNDICATE *v.* TAYLOR, *Ch.D. Stirling, J.*, 345; [1900] 1 Ch. 577; 69 L. J. Ch. 377; 82 L. T. 106.

5. *Infringement—Petition for revocation—Amendment by disclaimer—Conditions to be imposed—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20.—*Deeley* v. *Perkes*, [1896] A. C. 496, does not lay down any general rule as to the conditions to be imposed on a patentee, who, after the commencement of an action, desires leave to amend the specification of his patent by way of disclaimer, but the conditions to be imposed will depend on the circumstances of each case.—LUDINGTON CIGARETTE MACHINE CO. *v.* BARON CIGARETTE MACHINE CO., *C.A.*, 505; [1900] 1 Ch. 508; 69 L. J. Ch. 321; 82 L. T. 173.

6. *Utility—What sufficient to support a patent.*—Utility in patent law does not mean either abstract utility, or comparative or competitive utility, or commercial utility, but an invention better in some respect, but not necessarily in every respect, than the preceding knowledge of the trade as to a particular fabric.

An invention is patentable which offers the public a useful choice.

A very small amount of utility is sufficient to support a patent.—WELSBACH INCANDESCENT GAS LIGHT CO. *v.* INCANDESCENT GAS LIGHTING CO., *Ch.D. Buckley, J.*, 362; [1900] 1 Ch. 843; 82 L. T. 293.

PAWNBROKER:—

*Purchase at auction—Right to the chattel—Property passing—Pawnbrokers Act*, 1872 (35 & 36 *Vict. c.* 93), *s.* 19.—By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 19: "A pledge pawned for above ten shillings shall, when disposed of by the pawnbroker, be disposed of by sale by public auction, and not otherwise. . . . A pawnbroker may bid for and purchase at a sale by auction, made or purporting to be made under this Act, a pledge pawned with him; and on such purchase he shall be deemed the absolute owner of the pledge purchased."

Held, that no property was given to the pawnbroker by this section as against the true owner of the pledge. — BURROWS *v.* BARNES, *Q.B.D.*; 82 L. T. 721.

PEER:—

*Title or dignity of honour acquired by marriage—Divorce—Re-marriage to a commoner—Injunction to prevent the wife from using her former title.*—A peeress, not in her own right, but who has derived her title from marriage with a peer, and who, after

procuring a decree of dissolution of the marriage, marries a commoner, loses the right to use the title so acquired, and will be restrained by injunction from continuing its use.—COWLEY *v.* COWLEY, *P.D. & Ad.D.*, 463; [1900] P. 118; 69 L. J. P. 59; 82 L. T. 466.

PHARMACY:—

*Poison—Sale of—Agent only authorized to take orders and give receipts—Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *s.* 15.—By section 15 of the Pharmacy Act, 1868, it is enacted that no person shall sell or keep an open shop for the retailing, dispensing, or compounding poisons not being a duly registered pharmaceutical chemist or chemist and druggist.

The respondent, who carried on the business of a seedsman and florist, acted as agent for a chemical company who manufactured a certain weed-killer which contained a poison—namely, arsenic. The respondent did not keep the article on his premises, but was authorized to take orders for it, which he sent on to the manufacturers, and to receive payments and give receipts.

Held, that he had not committed any offence under section 15 of the Pharmacy Act, 1868.—PHARMACEUTICAL SOCIETY *v.* WHITE, *Q.B.D.*, 335; [1900] 1 Q. B. 454; 81 L. T. 821.

POLICE:—

1. *Pension on retirement—Mode of computation—Annual pay—Special allowance—Police Act*, 1900 (53 & 54 *Vict. c.* 45), *s.* 1; *Schedule I., Parts* 1, 3.—A constable in the Metropolitan Police force had received for five consecutive years before the date of his retirement a special allowance of seven shillings per week (in addition to his ordinary weekly pay) in respect of his employment on special duty at the Houses of Parliament throughout those years.

Held, by Channell, J. (Bucknill, J., dissenting), that, in calculating the amount of the retiring pension to which he was entitled, the amount of the special allowance was not "pay," and ought not to be reckoned as part of his "annual pay" within Schedule I., Part 1, of the Police Act, 1890.

Held, also (by Channell and Bucknill, JJ.), that "annual pay" means the entire amount received as pay in the course of the year, and not fifty-two times the weekly pay.—UPPERTON *v.* RIDLEY, *Q.B.D.*, 494; [1900] 1 Q. B. 680; 69 L. J. Q. B. 475; 82 L. T. 233.

2. *Throwing stones—Power to lay information—No authority of urban council—Towns Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 28—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 53), *ss.* 171, 253.—By section 28 of the Towns Police Clauses Act, 1847, everyone who to the annoyance and danger of the passengers wantonly throws stones is liable to a penalty.

By section 171 of the Public Health Act, 1875, the provisions of the Towns Police Clauses Act, 1847, with respect to the above was "for the purpose of regulating such matters in urban districts" incorporated in that Act.

It is provided by section 253 of the Public Health Act, 1875, that "proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved or by the local authority of the district in which the offence is committed."

Held, that the district superintendent of police could lay an information under section 28 of the Towns Police Clauses Act, 1847, although not the party aggrieved or authorized by the local authority.—JOBSON *v.* HENDERSON, *Q.B.D.*; 82 L. T. 260.

See also Justices, 1; Poor Law, 7.

POOR LAW:—

1. *Rating—Appeal against assessment to quarter sessions—Parish council—Notice to—Service of proper notice upon not a condition precedent to entertaining appeal—Poor Relief Act*, 1743 (17 *Geo.* 2, *c.* 38)—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73).—The service of notice on the town council of a municipal borough is not a condition precedent to the hearing by the quarter sessions of appeals from a poor rate.

*Reg.* v. *Justices of Kent*, 80 L. T. Rep. 622, not followed.—REG. *v.* DE GREY, KING'S LYNN DOCKS, EX PARTE, *Q.B.D.*, 348; [1900] 1 Q. B. 521; 69 L. J. Q. B. 341; 82 L. T. 324.

2. *Rating—Appeal from quarter sessions—Gravel pit—Method of rating when partially exhausted.*—A company were, at the time of the making of a rate, in rateable occupation of three and a-half acres of land for the purpose of extracting gravel therefrom, which they worked at the rate of two acres per annum. At the date of the rate the gravel from two and a-half acres had been extracted, and the land was used for storage purposes only. The gravel in the remaining acre was in process of being extracted when the rate was made.

On appeal to quarter sessions, it was held that the annual value of the land in the company's occupation at the time of the making of the rate ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let to a tenant for one year, regard being had to the value of the gravel in the unexhausted acre of land, added to the value of the exhausted two and a-half acres for storage purposes.

Held (per Channell J.), that, though at the time when the rate was made the company was only working gravel in one acre, they must be rated for three and a-half acres on the gravel pit value of at least two acres, inasmuch as they were working—both during the preceding year and up to and at the date of the rate—at the rate of two acres per annum. If the two and a-half acres were to be treated separately and rated at storage value only, the remaining acre should be rated at double the rate imposed, because the company was working it at the date of the rate at the rate of getting two acres of gravel per annum.

Bucknill J., *dissentiente*, held that, as the two and a-half acres were valueless at the time of making the rate for the purpose for which they were acquired, they could only be assessed at the actual value of their occupation at the time of making the rate in question.—FARNHAM FLINT, &c., CO. *v.* FARNHAM UNION, *Q.B.D.*, 376; 82 L. T. 123.

3. *Rating—Change of occupation—Payment of proportion—Period for making the rate—Period from allowance by justices—Issue of distress warrant.*—The appellant was summoned on a complaint preferred on behalf of the overseers to show cause why he had not paid a certain poor rate.

The rate was allowed by the justices on the 21st of October, 1898, and was intended for the period from the 29th of September, 1898, up to the 25th of March, 1899. The premises, in respect of which the appellant was rated, were occupied by him from before the 29th of September, 1898, up to the 30th of November, 1898, and the complaint was in respect of the proportion of the rate from the 29th of September to the 30th of November, 1898.

Held, that the appellant was only liable to pay the proportion from the 21st of October to the 30th of November, 1898.—DAVIS *v.* WOODFIELD, *Q.B.D.*; 81 L. T. 782.

4. *Rating—Lairages—Profit-earning capacity—Evidence of receipts and expenditure—Structural value—Ordinary method of ascertaining rental value unavailable—Principle of assessment.*—The appellants were the owners and occupiers of certain lairages, consisting of lands and buildings situated on the side of the River Mersey. These hereditaments were assessed to the poor rate. In ascertaining the rental value of these premises for the purpose of assessing the rate it was not possible to compare them with other similar hereditaments, as no other lairages existed in the neighbourhood; nor by merely considering the structural value of the buildings and the value of the land on which they stood was it possible to ascertain the rent a hypothetical tenant from year to year would give. The profit-earning capacity of the hereditaments, together with the structural value, were therefore taken into consideration, and evidence of the receipts and expenditure of the appellants in the conduct of the business of the lairages was admitted.

Held, that such evidence was admissible, and that the proper principle of assessment had been adopted.—MERSEY DOCKS *v.* BIRKENHEAD UNION, *C.A.*, 259; [1900] 1 Q. B. 143; 69 L. J. Q. B. 260; 81 L. T. 798.

5. *Rating—Land used for exhibition of advertisements—Advertisement hoardings—Advertisement contractor—Advertising Stations (Rating) Act,* 1889 (52 & 53 *Vict. c.* 27), *s.* 3.—An advertisement contractor hired from builders and owners of land the right to affix advertisements upon the hoardings erected by the builders during building operations, and affixed thereto the advertisements of the persons whose advertisements he had agreed to exhibit.

Held, that the advertisement contractor was not a person who permitted the land on which the hoardings stood to be used for the exhibition of advertisements within the meaning of section 3 of the Advertising Stations (Rating) Act, 1889, and that he was not rateable, as beneficial occupier, in respect of such land.—BURTON *v.* ST. GILES-IN-THE-FIELDS, &c., UNION, *Q.B.D.*, 222; [1900] 1 Q. B. 389; 69 L. J. Q. B. 184; 82 L. T. 24.

6. *Rating—Market garden—Land covered with greenhouses—"Agricultural land"—"Buildings or other hereditaments"—Agricultural Rates Act,* 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 5, 9.—Glasshouses within a market garden usued solely for purposes connected therewith are not "agricultural land" within the meaning of the Agricultural Rates Act, 1896, so as to entitle the occupier to the partial exemption given by that Act.

Decision of the Court of Appeal (46 W. R. 401, [1898] 1 Q. B. 683), affirmed.—SMITH *v.* RICHMOND, *H.L.*, 115; [1897] A. C. 448; 81 L. T. 269.

7. *Rating—Police station—Residences of officers.*—Premises erected by a county council for the purposes of a police station, in addition to cells for prisoners and other offices constituting the police station, comprised three dwelling-houses exclusively occupied by the superintendent, inspector, and sergeant respectively and their families for their domestic use, all three residences being within the boundary wall of the police station. These dwelling-houses might be visited and inspected at any time, and in respect thereof a certain sum was deducted as rent from the salaries of the officers. The officers might be required to move elsewhere at any moment, but whilst they were attached to the station it was necessary that they should be resident within or adjacent to the station, and when appointed they were compelled to reside in such houses. There was frequent communication passing between the officers and those in charge of prisoners, and no prisoner could be locked up, bailed, or remanded unless one of the three officers was present.

Held, that the three dwelling-houses of the officers were a part of the police station, and were therefore with the police station exempt from rateability to poor rate.—CROSS *v.* WEST DERBY UNION, *Q.B.D.*; 81 L. T. 645.

8. *Rating—Public-house—Assessment—Rateable value—Trade profits.*—When assessing licensed premises for the poor rate, the existence of the licence and the amount of business done thereon is proper matter of inquiry and consideration. Evidence of the actual profits made by the occupier are also admissible, but is to be avoided where possible.

*Dodds* v. *South Shields Assessment Committee,* 43 W. R. 532, [1895] 2 Q. B. 133, commented on.

Decision of the Court of Appeal ([1899] 1 Q. B. 667, 47 W. R. Dig. 148) affirmed.—CARTWRIGHT *v.* SCULCOATES UNION, *H.L.*, 394; [1900] A. C. 150; 69 L. J. Q. B. 403; 82 L. T. 157.

9. *Rating—Separate assessment of different portions of same hereditament.*—The mere fact that the different portions of one undivided hereditament are capable of commanding rents if let to different occupiers does not impose any obligation upon the rating authority to assess and rate the different portions separately.

Whether for rating purposes a particular area of land is to be treated as one hereditament or as more than one is a question of fact.—NORTH-EASTERN RAILWAY CO. *v.* YORK UNION, *Q.B.D.*; [1900] 1 Q. B. 733; 69 L. J. Q. B. 376; 82 L. T. 201.

10. *Rating—Sewage carrier—Sewage carrier partly above, partly below ground—Liability to be rated.*—The respondents were the governing body of a united drainage district, and they constructed a sewage carrier for conveying the sewage of the district to the sea. The total length of the sewage carrier was about 17½ miles, of which some 2½ miles passed through or over land situated in the parish of R., which land was previous to the construction of the sewage carrier, and still remained so, rated for the relief of the poor.

The appellants were the assessment committee of the said parish of R., and they assessed the respondents in respect of the whole of that portion of the sewage carrier which passed through or over land in the parish of R.

The quarter sessions court held that such portion only of the sewage carrier in the parish of R. as was carried on concrete arches was rateable, but that those parts of it which were laid either below the natural surface of the land or on an embankment covered and grassed over were ordinary underground sewers, and came within the exception of rating applicable thereto.

Held, on appeal, that as there had been some interference with the surface of the ground, and as it was impossible to dissever those parts of the sewage carrier which were above from those parts below the natural surface of the ground, the whole of the carrier that passed through or over the land of the appellants was a rateable subject, and liable to be rated accordingly.—NEWPORT UNION *v.* YSTRADY-

FODWG SEWERAGE BOARD, *Q.B.D.*, 382; [1900] 1 Q. B. 365; 69 L. J. Q. B. 280; 82 L. T. 56.

11. *Relief — Improper relief — Strike — Wilful refusal to work—"Sudden and urgent necessity"—Poor Law Act*, 1601 (43 *Eliz. c.* 2), *ss.* 1, 2—*Poor Law Act*, 1834 (4 & 5 *Will.* 4, *c.* 76), *ss.* 15, 42, 52, 54, 105—*Poor Law Audit Act*, 1848 (11 & 12 *Vict. c.* 91), *s.* 4—*Vagrants Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.—The payment by poor law guardians out of the poor rates of any money for setting to work or for the relief of able-bodied men, who are at the time able to obtain and perform work at wages sufficient to support themselves (and their wives and families, if any), is unlawful, and ought to be disallowed by the auditor on auditing the guardians' accounts. But this statement of the law does not include relief given to or for the wives and children of such men; and it is also without prejudice to, and is in no way to affect, the power of the Local Government Board to remit such disallowed payments, even although unlawfully made, under the statute 11 & 12 Vict. c. 91, s. 4, or any other statute enabling them so to do.

Decision of Romer, J. (80 L. T. Rep. 618, 47 W. R. Dig. 149), reversed.

It is not, however, lawful for guardians to refuse relief to those who are in immediate physical need of it, and are at the time unable to obtain and perform work, on the gronnd that such persons have reduced themselves to their present incapacity to obtain and perform work by their own wilful neglect and refusal to work in the past.—ATTORNEY-GENERAL *v.* MERTHYR TYDFIL UNION, *C.A.*, 403; [1900] 1 Ch. 516; 69 L. J. Ch. 299; 82 L. T. 662.

12. *Separation of parish from union—Adjustment of rights and interests — "Property" of union—"Fixing" amount to be paid by union to parish—Poor Law Amendment Act*, 1834 (4 & 5 *Will.* 4, *c.* 76), *s.* 32—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 24 (2) (d), 26 (1).—By section 32 of the Poor Law Amendment Act, 1834, the Local Government Board may make an order for the separation of a parish from a union, and in such case the board are required to ascertain the proportionate value to every parish of the union of the "workhouses or other property" held or enjoyed by the union for the use of the poor, and to "fix the amount" to be received or paid by every parish affected by the separation.

On the separation of a parish from a union under this section, and on the adjustment of the rights and interests of the union and parish respectively,

Held, that annual sums which the union is entitled to receive from the county council of the county under the Local Government Act, 1888, in respect of the salaries of registrars and the costs of the officers of the union, are "property" within the meaning of the section, and that the Local Government Board have jurisdiction to apportion the same and to fix the amount to be paid by the union to the parish in respect of such sums.

Held, also, that an apportionment of these annual sums according to the rateable values of the union and parish respectively, as shown by the valuation lists in force during the year, is a "fixing of the amount" to be paid by the union to the parish within the meaning of the section; and that the Local Government Board have jurisdiction so to make the apportionment and to order that the union shall in each year pay to the parish the amounts of such annual sums so fixed according to the rateable values.—REG. *v.* WILLESDEN GUARDIANS, *Q.B.D.*; 82 L. T. 385.

13. *Settlement—Irremovability—Division of parish—County of Wilts (Calne, &c.) Confirmation Order*, 1890, *arts.* 15, 16.—By article 15 of the Wilts (Calne, &c.) Confirmation Order, 1890, as between C. Within and C. Without, every person who on or before the 25th of March, 1890, has acquired a settlement in C. shall be deemed to have acquired such settlement either in C. Within or C. Without, according as the acts or circumstances conferring such settlement shall have been done either in C. Within or C. Without. And if such acts have been done partly in one and partly in the other, then according to the last place of residence, except where such person shall have ceased to reside in either C. Within or C. Without. The provisions of this clause were to have effect unless or until the settlement shall be duly determined to be in some other parish.

By article 16 of that order it is provided that any person who shall have acquired a status of irremovability in the parish of C. shall be deemed to have acquired such status from C. Within or C. Without, according as he resided on the 25th of March, 1890, or if he was in receipt of relief as he was residing when he became chargeable.

A pauper went to reside in May, 1887, in C. parish, in that portion of the parish which became C. Within, when by the order of 1890 C. was divided into C. Within and C. Without.

In September, 1891, he ceased to reside in the parish of C. Within, and has not resided there since.

Held, that he had not acquired a settlement in C. Within when he left in September, 1891.—CALNE UNION *v.* ST. MARY, ISLINGTON, *Q.B.D.*; 69 L. J. Q. B. 400; 82 L. T. 121.

14. *Settlement—Removal of pauper—Irremovability—Break of residence.*—A., a pauper, having an original settlement in the C. Union, had by residence become irremovable in the E. Union, and was sent to the E. Workhouse. Her son was in the C. Workhouse, and, in order to be with him, she obtained her discharge from the E. Workhouse and went to reside for a week with a relative in another union in order to break her status of irremovability in the E. Union, after which she returned to the E. Workhouse, in order to be sent to the C. Union.

Held, that an order for her removal to the C. Union was rightly made.—CAMBRIDGE UNION *v.* EDMONTON UNION, *Q.B.D.*, 559; [1900] 2 Q. B. 111; 69 L. J. Q. B. 584; 82 L. T. 495.

See also Inland Revenue, 13; Justices, 1; Lunacy, 4.

POWER:—

1. *Appointment — Execution — Limited power — Exercise by will—General words of appointment—General powers—No reference to limited power—Intention.*—A testatrix had two general powers of appointment in addition to a limited power to appoint the income of certain property to her husband for life. By her will, which contained no reference to the limited power or to the property subject thereto, she gave, devised, and bequeathed all her real and personal estate, and appointed all real and personal estate over which she might have a power of appointment unto her husband absolutely.

Held, that the testatrix had clearly expressed her intention of exercising every power she had in favour of her husband, and that the limited power was therefore exercised. — REW, RE, REW *v.* WIPPELL, *Ch.D. Kekewich, J.*; [1899] 2 Ch. 536; 81 L. T. 384.

2. *Appointment—Power to appoint invested fund—*

*Appointment of specified sums of cash—Increase in value of investments.*—A father by his will gave to trustees a sum of £30,000 (to be invested as he directed), upon trust to pay the interest and annual proceeds thereof to his daughter during her life, and after her death the same sum, together with the interest and annual proceeds thereof, was to be held on such trusts as the daughter should appoint in favour of her children or grandchildren, with a trust over in default of appointment.

The daughter by her will recited verbatim the gift in the father's will, and then, in exercise of the power, appointed that "the said sum of £30,000, together with the interest and the annual proceeds thereof, by the said will of my father to be held in trust for me, my children and grandchildren, and over which I have such power of appointment as aforesaid," should after her death be held by the trustees of her father's will upon trust as to £1,000 "part thereof" for her daughter Emmeline; upon trust as to five sums of £1,000, £4,000, £6,000, £6,000, and £6,000 respectively, each of which was described as "other part of the said sum of £30,000," on trust for five others of her children respectively, and upon trust as to another sum of £6,000, which was described as "the residue of the said sum of £30,000," for her other child. At the time of her death the securities on which the £30,000 had been invested were worth £39,000.

Held, that the testatrix was dealing with the fund as an invested fund, and that the whole of it was appointed in the proportions indicated by her will.—CRUDDAS, RE, CRUDDAS *v.* SMITH, *C.A.*; [1900] 1 Ch. 730; 69 L. J. Ch. 355; 82 L. T. 514.

3. *Appointment—Transfer of property by all parties interested—Release of power.*—Any dealing with property subject to a power of appointment which is inconsistent with the exercise of that power, releases the power.—FOAKES *v.* JACKSON, *Ch.D. Farwell, J.*, 616; [1900] 1 Ch. 807; 69 L. J. Ch. 352.

4. *Execution—Power to be exercised by will attested by two witnesses—Donee of power a domiciled French subject—Holograph will exercising power unattested—Wills Act, ss.* 9 *and* 10—*Lord Kingsdown's Act* (24 & 25 *Vict. c.* 114).—Testatrix, by the will of her father, who died in 1824, was given a general power of appointment over a fund in court "by will, or any writing in the nature of a will, to be respectively executed by her in the presence of and attested by two witnesses." Testatrix, being a domiciled French subject, in 1894 made a holograph will in the French language, and thereby disposed of the fund in question. This will was not attested, and was consequently invalid according to English law, but it was admitted to probate in England by reason of its being valid according to the law of the domicil of the testatrix.

Held, (1) that neither sections 9 and 10 of the Wills Act nor Lord Kingsdown's Act applied, inasmuch as the testatrix was domiciled abroad; (2) that to enable the will of the testatrix to operate as an execution of the power, the special formalities (such as attestation) required by the instrument creating the power should be complied with, and it was not enough that the will of the testatrix was valid as a will, according to the law of her domicil.

*In re Price, Tomlin* v. *Latter, ante*, p. 373, approved.—BARRETTO *v.* YOUNG, *Ch.D. Byrne, J.*; [1900] 2 Ch. 339; 69 L. J. Ch. 605.

5. *Execution—Special power of appointment by will—Will made prior to creation of power.*—A special power of appointment authorizing the donee to appoint by will in favour of a particular person, will not be exercised by a will made by the donee prior to the creation of the power, wherein the testator appointed to such person all the residue of the property over which at the time of his death the testator should have a disposing power.—HAYES, RE, TURNBULL *v.* HAYES, *Ch.D. Byrne, J.*; [1900] 2 Ch. 333.

See also Limitation Statutes, 5; Will, 15, 16, 22.

PRACTICE:—

1. *Account—Certificate—Entries disallowed—Discretion of court—Digging of pitch.*—Where an account ordered by the court is limited to pitch dug and won from certain specified lands, entries relating to pitch in other lands must be excluded, and a certificate made in disregard of this rule will be varied by disallowing them.—BENNICOURT *v.* LE GENDRE, *P.C.*; [1900] A. C. 173; 69 L. J. P. C. 21.

2. *Appeal—Appeal as to costs only—Judge's discretion not exercised—Costs, charges, and expenses—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49.—Notwithstanding section 49 of the Judicature Act, 1873, an order as to costs, which are in the judge's discretion, is, if made in pursuance of a general rule which excluded the exercise of that discretion, subject to a right of appeal.

*The City of Manchester*, 27 W. R. 697, 5 P. D. 221, followed on this point.

*Charles* v. *Jones*, 35 W. R. 88, 33 Ch. D. 80, not followed.

There is no right of appeal against an order as to discretionary costs on the ground only that the same order deals with trustees' charges and expenses, as to which there is no appeal.

*Charles* v. *Jones* approved on this point.

*In re Chennell, Jones* v. *Chennell*, 26 W. R. 595, 8 Ch. D. 492, disapproved.—BEW *v.* BEW, *C.A.*, 124; [1899] 2 Ch. 467; 81 L. T. 284.

3. *Appeal—Appeal from inferior court—Right to appeal from High Court to Court of Appeal—Jurisdiction to give leave to appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 45—*Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 5.—Where a Divisional Court, after deciding an appeal from an inferior court, refuses leave to appeal, the Court of Appeal has jurisdiction to grant leave to appeal.—GODMAN *v.* MOSES, *C.A.*, 689.

4. *Appeal—Court of Appeal—Application to Divisional Court to set aside judgment of official referee—Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1 (5).—Where an action has been tried before an official referee, and an application is made to a Divisional Court to set aside the judgment of the official referee, the decision of the Divisional Court is final, and there is no appeal to the Court of Appeal without leave.—DAGLISH *v.* BARTON, *C.A.*, 50; [1900] 1 Q. B. 284; 81 L. T. 551.

5. *Appeal—Jurisdiction—Appeal to House of Lords from interlocutory order of the Court of Appeal in Ireland—Appellate Jurisdiction Act*, 1876 (39 & 40 *Vict. c.* 59), *ss.* 3, 12—*Supreme Court of Judicature Act* (*Ireland*), 1877 (40 & 41 *Vict. c.* 57), *s.* 86.—An appeal does not lie to the House of Lords from an interlocutory order of the Queen's Bench Division in Ireland, or from an order of the Court of Appeal in Ireland made on appeal therefrom.—GOSFORD (EARL) *v.* IRISH LAND COMMISSION, *H.L.*; 81 L. T. 330.

6. *Appeal—Petition of right—Contract—Construction—Canada, Law of—Quebec.*—An appeal lies to the Queen in Council from a decision of the Court of Queen's Bench on a petition of right.

The respondent contracted with the Government of Quebec to do certain work for a term of years at one agreed price. The contract did not contain any undertaking on the part of the government to employ the respondent for all or any of such work.

Held, that no such undertaking could be implied, and that the respondent could not recover damages against the Crown for not employing him to do all or any part of such work during the specified period.—REG. *v.* DEMERS, *P.C.*; [1900] A. C. 103; 69 L. J. P. C. 5; 81 L. T. 795.

7. *Appeal — Special leave — Appeal* in formâ pauperis—*Jurisdiction of Privy Council to stay an order for sale, pending appeal.*—Where a petitioner had obtained leave to appeal in regular form, an order granting leave to prosecute the appeal *in formâ pauperis* was made.

On petition for special leave to appeal (1) from a decree in a matrimonial separation suit; (2) in a mortgage suit; (3) from an order for execution of the last-mentioned decree,

Held, that there being ground for appealing from the mortgage decree, the leave should be extended to both suits, which were mixed up together.

The Privy Council have no jurisdiction to order a stay, pending the appeal, of a sale directed by the court below in execution of its decree in (2).—QUINLAN *v.* CHILD, *P.C.*; [1900] A. C. 496.

8. *Assignment—Debt—Security—Power to assignee to sue in name of assignor—Absolute assignment—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.—The plaintiffs made an advance to a customer who, in consideration thereof, assigned to them the whole of his rights and interest under an agreement between himself and others, of whom the defendant was one, as security for the repayment on demand of the advance, and by the assignment he appointed the plaintiffs his nominees in pursuance of the provisions of the agreement, with power to exercise all his rights thereunder either in his name or in the plaintiffs' own name, and he appointed them his attorneys in that behalf. In an action to recover from the defendant moneys alleged to be due under the agreement,

Held, that the assignment was not an absolute assignment within the meaning of section 25, sub-section 6, of the Judicature Act, 1873.

*Tancred* v. *Delagoa Bay Railway Co.*, [1889] 23 Q. B. D. 239, and *Comfort* v. *Betts*, [1891] 1 Q. B. 737, distinguished.—MERCANTILE BANK OF LONDON *v.* EVANS, *C.A.*; [1899] 2 Q. B. 613; 81 L. T. 376.

9. *Attachment—Commission—Trustee—Solicitor—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54).—Under a will the persons entitled to possession of the B. estates might sell the heirlooms, but were to replace them out of the proceeds of sale by articles of a similar character. F. was co-trustee with C., the tenant for life of the B. estates, and C. with the consent of F. sold the heirlooms, and received the purchase-money, but did not purchase other articles in their place. The purchaser paid F. £200 in connection with the sale. Before F. (who was a solicitor) was appointed a trustee he received £200 from an insurance company as commission on policies effected through him on C.'s life as security for trust money lent to C. On the death of C. the B. estates passed to the plaintiff, who commenced an action for the administration of the estate of C., and an order was made directing F. to pay the plaintiff the £200 received in connection with the sale of the heirlooms, and also the £200 received from the insurance company. F. failed to comply with that order, and the plaintiff applied for leave to issue a writ of attachment against him.

Held, that the payment of the £200 received as commission from the insurance company ought not to be enforced by attachment as the matter was not within the exception in section 4 of the Debtors Act, 1869; but that attachment ought to issue in respect of the £200 paid by the purchaser of the heirlooms.—BERWICK (LORD) *v.* LANE, *C.A.*; 81 L. T. 797.

10. *Attachment—Married woman—Judgment debtor—Order for payment into court—Default—Writ of attachment—Separate estate—Married Women's Property Act*, 1882 (44 & 45 *Vict. c.* 21), *ss.* 1 (2), 18, 24—*Debtors Acts*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5; 1878 (41 & 42 *Vict. c.* 54)—*R. S. C., ord.* 42, *rr.* 4, 24.—A married woman, married before 1882, was, as administratrix of a deceased intestate, ordered to pay into court a sum forming part of the estate. In default a motion was made for leave to issue a writ of attachment against her.

Held, that, in the absence of proof of a breach of trust or *devastavit*, an order for payment by the defendant out of her separate estate would not be appropriate and that the order for the issue of the writ of attachment ought to go.—TURNBULL, RE, TURNBULL *v.* NICHOLAS, *Ch.D. Stirling, J.*, 136; [1900] 1 Ch. 180; 69 L. J. Ch. 187; 81 L. T. 439.

11. *Attachment—Undertaking to execute an indenture—Rules of Court*, 1883, *ord.* 41, *r.* 5.—Where defendants committed a breach of their undertaking forthwith to execute an indenture,

Held, that there ought either to be service in accordance with ord, 41, r. 5, of the Rules of Court, 1883, or a four-day order. An order therefore was made that the defendants should on or before the 5th of December, or subsequently within four days of the service of the order, execute the deed tendered to them by the plaintiff.—HALFORD *v.* HARDY, *Ch.D. Kekewich, J.*; 81 L. T. 721.

12. *City of London Court—Jurisdiction—Issue of summons with leave—Cause of action arising within the city—London (City) Small Debts Extension Act*, 1852 (15 & 16 *Vict. c. lxxvii.*), *s.* 39—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 74, 185.—In the City of London Court it is not necessary, in actions where the jurisdiction of the court is based on the cause of action arising within the city, that the leave of the judge or registrar should be obtained for the issue of the summons.—FELTON *v.* BOWER, *Q.B.D.*, 349; [1900] 1 Q. B. 598; 69 L. J. Q. B. 351; 82 L. T. 419.

13. *Costs — Action against public authority — Solicitor and client costs—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (6).—Where an action is dismissed against a public body acting in execution of statutory or other public duty, the Public Authorities Protection Act, 1893, s. 1, gives the defendant corporation solicitor and client costs in the action, but the Act does not apply to appeals.

Decision of the Court of Appeal, *sub nomine, Fielding* v. *Morley Corporation*, 47 W. R. 295, [1899] 1 Ch. 1, affirmed.—FIELDING *v.* MORLEY (MAYOR) *H.L.*, 545; [1900] A. C. 133; 69 L. J. Ch. 314; 82 L. T. 29.

14. *Costs—Action against public authority—Trial with jury—Jurisdiction of judge to deprive successful authority of costs—Good cause—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (b)—*Ord.* 65, *r.* 1.—The power given by ord. 65, r. 1, to the judge at the trial of an action to deprive a successful party of costs is not taken away or

affected by section 1 (*b*) of the Public Authorities Protection Act, 1893; and, therefore, if in an action brought against a public authority for any act done in pursuance of any Act of Parliament or of any public duty or authority, judgment is obtained by the defendants after a trial with a jury, the judge has, for good cause, a discretion to deprive the successful defendants of costs; and in determining what is good cause the judge may take into consideration the antecedent conduct of the party which led to the litigation.

*Cree* v. *St. Pancras Vestry*, [1899] 1 Q. B. 693, not followed. — BOSTOCK *v.* RAMSEY DISTRICT COUNCIL, *Q.B.D.*, 254; [1900] 1 Q. B. 357; 69 L. J. Q. B. 108; 81 L. T. 756.

15. *Costs — Arbitration — Reference of action— Costs of reference in discretion of arbitrator—Award for less than £50—Scale of costs—R. S. C.*, 1883, *ord.* 65, *r.* 12.—Where an action of contract is referred to arbitration, whether compulsorily or by consent, upon the terms that the costs of the action shall abide the event of the award, and the costs of the reference and award shall be in the discretion of the arbitrator, if the arbitrator awards the plaintiff a sum less than £50 and orders that the defendant shall pay the plaintiff's costs of the reference and award, such costs may be taxed on the High Court scale, although by virtue of ord. 65, r. 12, the plaintiff's costs of the action can only be taxed on the county court scale.

*Moore* v. *Watson*, 15 W. R. 429, L. R. 2 C. P. 314, overruled.

*Galatti* v. *Wakefield*, 4 Ex. D. 249, 27 W. R. Dig. 59, followed. — STREET *v.* STREET, *C.A.*, 450; [1900] 2 Q. B. 57; 69 L. J. Q. B. 574; 82 L. T. 648.

16. *Costs—Debenture-holder's action—Insufficient assets.*—Where the assets in a debenture-holder's action were sufficient to pay off the first debenture-holders in full, but not sufficient to pay the second and third debenture-holders in full,

Held, that the plaintiff in the action was only entitled to party and party costs.—QUEEN'S HOTEL CO., CARDIFF, RE, VERNON TIN PLATE CO., RE, *Ch.D. Cozens-Hardy, J.*, 567; [1900] 1 Ch. 792; 69 L. J. Ch. 414; 82 L. T. 675.

17. *Costs—Higher scale—Special ground—Allegation of fraud—Ord.* 65, *r.* 9.—The mere fact of an allegation of fraud being made in an action by the unsuccessful party is not a special ground for obtaining costs on the higher scale under ord. 65, r. 9, even when the amount at stake is large and the questions of law and fact raised are difficult.—ASSETS DEVELOPMENT CO. *v.* CLOSE, *Ch.D. Buckley, J.*, 699.

18. *Costs—Order of county court, action upon.*—An action cannot be maintained in the High Court upon an order of a county court for the payment of costs. —FURBER *v.* TAYLOR, *C.A.*, 689.

19. *Costs—Probate action—Three wills—Severance in defence.*—In a probate action the validity of the earliest of three wills was established. Of the four defendants in the action, who were all beneficiaries under the first will, the two who were executors of the first and second wills received the same benefits under the second will, while the other two were cut out under the second will. All four were cut out under the third will.

Held, that there was such a divergence of interests between the two pairs of defendants that the latter pair was justified in appearing separately, and was therefore entitled to have a separate taxation and payment of costs.—BAGSHAW *v.* PIMM, *C.A.*, 422; [1900] P. 148; 69 L. J. P. 45; 82 L. T. 175.

20. *Costs—Security for costs—Foreigner resident abroad—General inquiry—Claimant to fund in court —Person in position of plaintiff.*—As a general rule a claimant under a general inquiry cannot be required to give security for costs.

Where a solicitor was ordered to pay into court a fund in his hands belonging to a client subject to the claims of certain alleged incumbrancers thereon, and an inquiry was directed who was entitled thereto, a foreign claimant resident out of the jurisdiction was ordered to give security for costs upon the ground that, in the special circumstances of the case, the inquiry was equivalent to an interpleader issue in which the claimant was in the position of a plaintiff.—MILWARD & CO., RE, *C.A.*; [1900] 1 Ch. 405; 69 L. J. Ch. 247; 82 L. T. 339.

21. *Costs—Set off—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*R. S. C., ord.* 65, *r.* 14.—An order may be made allowing a judgment debtor to set off against the damages due from him damages due to him from the judgment creditor on a judgment in another action, notwithstanding the existence of an order under the Solicitors Act, 1860, s. 28, charging the first-mentioned damages with a solicitor's costs.

So held by A. L. Smith and Vaughan Williams, L.JJ., the latter doubting.—GOODFELLOW *v.* GRAY, *C.A.*; [1899] 2 Q. B. 498; 81 L. T. 314.

22. *Costs — Taxation — Barrister — Fees.* — A. brought an action against B., which was dismissed with costs. A. appealed, and the Court of Appeal, without calling on counsel for the respondent, dismissed the appeal with costs. A. objected to pay the fee of B.'s leading counsel in the Court of Appeal on the ground that such counsel was not present at the hearing of the appeal.

Held, that the objection must be overruled; and that the court would not disturb the uniform practice extending over forty years, of allowing the fees of non-attending counsel in party and party taxation.—CHARMAN *v.* BRANDON, *Ch.D. Kekewich, J.*; 82 L. T. 369.

23. *Costs — Taxation — Fixed costs — Substituted service of writ—Ord.* 3, *r.* 7—*Ord.* 65, *r.* 27 (38)—*Central Office Practice rule* 18.—On a taxation of costs under ord. 3, r. 7, the plaintiff claimed £2 10s. for costs of substituted service of the writ. The master allowed £1 only on the ground that by the practice adopted at chambers that was the sum invariably allowed.

Held, that the practice could not be justified.—FLATAU *v.* CULLEN, *C.A.*, 36; 81 L. T. 402.

24. *Creditors' deed—Account—Discretion—R. S. C., ord.* 55, *r.* 10.—The court will, in the exercise of its discretion, under ord. 55, r. 10, not order an account of the dealings and transactions of a trustee under a creditors' deed of arrangement, where it can determine the questions between the parties without such order, and where such order would have mischievous results, notwithstanding that the trustee may have been guilty of some misconduct in his duties.—CAMPBELL *v.* GILLESPIE, *Ch.D. Cozens-Hardy, J.*, 151; [1900] 1 Ch. 225; 69 L. J. 233; 81 L. T. 514.

25. *Discovery—Affidavit of documents—Claim of privilege — Sufficiency of affidavit.*—Where a defendant in making an affidavit of documents claims that certain documents in his possession are privileged from inspection on the ground that they relate solely to his own case and do not tend to

support the plaintiff's case, it is not necessary for him to state further that they do not tend to impeach his own case.—ATTORNEY-GENERAL *v.* NEWCASTLE-UPON-TYNE (MAYOR), *C.A.*, 38; [1899] 2 Q. B. 478; 68 L. J. Q. B. 1012; 81 L. T. 311.

26. *Discovery—Interrogatories—Objections to answer—Ord.* 31, *rr.* 1, 6.—Each question in an interrogatory must be taken by itself and the reason for refusing to answer stated. It is no ground for refusing to answer an interrogatory that objection may be taken to a portion of it.

In an action for slander the plaintiff administered interrogatories asking whether the defendant had spoken the words complained of and in whose presence.

Held, that the interrogatories were not unreasonably wide, fishing, or oppressive, and that the defendant was bound to answer them.—DALGLEISH *v.* LOWTHER, *C.A.*, 37; [1899] 2 Q. B. 590.

27. *Discovery—Interrogatories—Officer of company—Knowledge—Matters previous to formation of company—Course of employment—Sufficiency of answers—R. S. C., ord.* 31, *rr.* 5, 24.—A corporation answering interrogatories by the proper officer is in the same position as an individual. The officer, therefore, who answers on behalf of the corporation cannot be compelled to inquire of the officers, servants, or agents of the corporation as to matters which happened before the corporation came into existence, or their knowledge of which was not acquired by them as servants of the corporation and in the ordinary course of its business.—WELSBACH INCANDESCENT GAS LIGHT CO. *v.* NEW SUNLIGHT INCANDESCENT CO., *C.A.*, 595; [1900] 2 Ch. 1; 69 L. J. Ch. 546.

28. *Discovery—Particulars—Affidavit of documents—Documents of title—Privilege—Production.*—As the authorities stand, privilege can be claimed for several deeds which are merely described as "a bundle of documents." The fact, however, that a transaction is embodied in a document which is protected from production on the ground of privilege, does not take away the right to have particulars of the transaction, if the same is pleaded in too general a way.—MILBANK *v.* MILBANK, *C.A.*, 339; [1900] 1 Ch. 376; 69 L. J. Ch. 287; 82 L. T. 63.

29. *Discovery—Privilege—Solicitor and client, communications between—Evasion of statute—Production of documents.*—The privilege from production of confidential communications between a solicitor in his professional capacity and his client does not extend to communications which came into existence for the purpose of the client's procuring advice as to the mode in which he might evade the provisions of a colonial statute imposing a duty in respect of property.—REG. *v.* BULLIVANT, *C.A.*; [1900] 2 Q. B. 163; 69 L. J. Q. B. 657; 82 L. T. 493.

30. *Discovery—Privilege—Solicitor's correspondence and bill of costs—Note by solicitor of order in judge's chambers—R. S. C., ord.* 31, *r.* 18 (2).—A statement in a letter from a solicitor to his client reporting proceedings in chambers, and communicated for the purpose of obtaining information or instructions from the client necessary for the conduct of the action, is privileged as a professional confidential communication. But those parts of a bill of costs which consist merely of memoranda or notes of proceedings in chambers recorded by a solicitor are not so privileged.

*Semble*, there is no valid distinction between notes of proceedings in open court and of those in chambers.

*Greenough* v. *Gaskell*, 1 My. & K. 98, at pp. 102-104, and *In re Worswick*, 36 W. R. 685, 38 Ch. D. 370, at p. 373, followed.—AINSWORTH *v.* WILDING, *Ch.D. Stirling, J.*, 539; [1900] 2 Ch. 315.

31. *Evidence—Foreign State—Status and boundaries of—Judicial cognizance—Application to Foreign Office.*—The court takes judicial cognizance not only of the status, but also of the boundaries of foreign States, and if in doubt will apply for information to the Secretary of State for Foreign Affairs, whose reply is conclusive.—FOSTER *v.* GLOBE VENTURE SYNDICATE, *Ch.D. Farwell, J.*; [1900] 1 Ch. 811; 69 L. J. Ch. 375; 82 L. T. 253.

32. *Evidence—Production of books—Partnership—Order upon person not a party*—Ex parte *application—Form of order—R. S. C., ord.* 37, *r.* 7.—An order may be made *ex parte* against a person not a party to the action to attend before an examiner for the purpose of producing documents.—ZUMBECK *v.* BIGGS, *Ch.D. Kekewich, J.*, 507; 82 L. T. 654.

33. *Execution — Leave to issue execution under R. S. C., ord.* 42, *r.* 23—*Charging order under R. S. C., ord.* 46, *r.* 1—*Death of judgment debtor—Liability of estate.*—The effect of obtaining leave to issue execution against an executor under ord. 42, r. 23, is to dispense with the necessity of obtaining a judgment against the executor, but is not equivalent to obtaining a judgment against him. A charging order under ord. 46, r. 1, has only such effect as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14, 15, and 3 & 4 Vict. c. 82, s. 1. Under these Acts a charging order can only be made against a person against whom a judgment has been obtained.

It follows, therefore, that a creditor who has obtained judgment against a debtor cannot, after the death of the debtor, obtain a charging order *nisi* against the executor of the deceased judgment debtor without first obtaining judgment against the executor.

*Finney* v. *Hinde*, 27 W. R. 413, 4 Q. B. D. 102, and *Haly* v. *Barry*, 16 W. R. 654, L. R. 3 Ch. App. 452, discussed.

Decision of Stirling, J., *ante*, p. 233, affirmed.—STEWART *v.* RHODES, *C.A.*, 354; [1900] 1 Ch. 386; 69 L. J. Ch. 174; 82 L. T. 337.

34. *Jurisdiction — Private international law—American creditor suing in English court—Californian Code.*—Where an American court had made an order authorizing a person who had recovered judgment in that court against an American company to bring actions against an English company "in any and all proper courts in his own name or in the name of the said American company,"

Held, that the jurisdiction of the American court was limited to the exact scope of the Californian Code conferring it, and that in an action brought by the said person in an English court he was not properly authorized to sue, and could not sue, in the name of the said American company.—BARBER *v.* MEXICAN LAND CO., *Ch.D. Stirling, J.*, 235.

35. *Landlord and tenant—Lease—Specific performance—Undertaking not to defend—Lease found invalid—Leave given to defend—Jurisdiction.*—In an action for specific performance of an agreement to purchase leasehold houses, the defendant gave an undertaking not to deliver any defence in the event of the plaintiffs undertaking not to move for judgment in default of defence until a date named.

The defendant subsequently found that the lease was invalid.

Held, that the court had jurisdiction to give the defendant leave to deliver a defence notwith-

standing his undertaking.—SCOTT *v.* MOXON, *Ch.D. Kekewich, J.*; 81 L. T. 774.

36. *Leave to discontinue—Auxiliary proceedings before another tribunal—Costs incident to those proceedings costs in the action—R. S. C., ord.* 26, *r.* 1.—A plaintiff seeking to discontinue an action upon terms of paying the defendant's costs in that action will not be compelled as part of his bargain to pay the costs incurred by the defendant in auxiliary proceedings taken by the plaintiff before another tribunal arising out of the same case, and the result of which caused the plaintiff to discontinue his action. — LLOYDS BANK *v.* PRINCESS ROYAL COLLIERY CO. (No. 1), *Ch.D. Byrne, J.*, 460; 82 L. T. 559.

37. Mandamus—*Justices—Application to state case—Decision "erroneous in point of law"—Previous decision of High Court binding on justices—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33 (1). —A magistrate ought not to be ordered to state a case, upon the ground that his decision was erroneous in point of law, when he has decided in accordance with a previous decision of the Queen's Bench Division upon the same point from which there was no right of appeal.—REG. *v.* SHIEL, *C.A.*; 82 L. T. 587.

38. *Middlesex Registry—Middlesex deed—Rectification of register—Jurisdiction to order—Land Registry (Middlesex Deeds) Act* (54 & 55 *Vict. c.* 64), *s.* 1—*Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *s.* 95—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 7.—The court now has power to order the Register of Middlesex deeds to be rectified, and, in exercise of this jurisdiction, ordered the registration of certain forgeries purporting to be assignments of leaseholds in Middlesex, dated in 1887, and also the registration of certain mortgages, dated in 1898, of the same property, to be vacated.

*Gibbs* v. *Sydney*, 49 L. T. Rep. 132, 31 W. R. Dig. 210, not followed.—STEPHENSON *v.* YORKE, *Ch.D. Buckley, J.*, 430; [1900] 1 Ch. 505; 69 L. J. Ch. 253; 82 L.T. 55.

39. *Nonsuit—Discontinuance—Ord.* 26, *r.* 1.—A plaintiff can no longer elect to be nonsuited. Should he wish to discontinue the action at the trial, he must do so under ord. 26, r. 1, by leave of the judge.

Decision of the Court of Appeal (46 W. R. 340, [1898] 1 Q. B. 636), affirmed.—FOX *v.* STAR NEWSPAPER, *H.L.*, 321; [1900] A. C. 19; 69 L. J. Q. B. 117; 81 L. T. 562.

40. *Originating summons—Benefit of written contract and option to repurchase vested in trustee for bankrupt—Construction of contract—"Written instrument"—"Interested"—Ord.* 54 A, *rr.* 1, 4. — A summons was taken out under order 54*A* by the trustee of a bankrupt who claimed an interest under a contract of sale of certain real estate and option of repurchase conferred on the bankrupt, asking certain questions which involved the construction of the written document.

Held, (1) that the contract was an instrument within the meaning of the rule; (2) having regard to the decision in *Buckland* v *Papillon*, L. R. 1 Eq. 477, that the plaintiff was a person interested within the meaning of the rule; (3) that the scope of the rule was not limited to cases where an action might be brought, but that the limit was the discretion of the court on the question of construction provided by rule 4; (4) that having regard to *Palmer* v. *Johnson*, 13 Q. B. D. 351, the execution of the conveyance which had taken place did not destroy the right of repurchase contained in the contract.—MASON *v.* SCHUPPISSER, *Ch.D. Stirling, J.*; 81 L. T. 147.

41. *Palatine Court of Lancaster—Taxation—Costs—Scale.*—The order of the 28th of November, 1884, of the Chancery Court of the County Palatine of Lancaster, "as to court fees and solicitors' costs" only introduces a modification of the lower scale of costs established by the order of the 27th of November, 1884, and has no application to any cases to which that lower scale did not apply.—MANCHESTER REAL ICE SKATING CO., *C.A.*, 490; [1900] 1 Ch. 573; 69 L. J. Ch. 421; 82 L. T. 513.

42. *Parties—Joinder—Action against company and directors—Causes of action—Misjoinder—Separate relief against separate defendants*—"Actio personalis moritur cum personâ"—*Deceased director—Legal personal representatives, liability of—Directors' Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3.—Where an action is brought by a shareholder against the company and its directors for relief in respect of an improperly issued prospectus, the fact that the relief claimed against the several defendants may differ in detail is no ground for objection that the action is bad as joining separate causes of action against separate defendants, for in substance there is only one cause of action—namely, the improper issue of the prospectus. Neither is it improper to join in such an action the legal personal representatives of a deceased director alleged to have been a party to the issue of the prospectus.

Whether the maxim "*Actio personalis moritur cum personâ*" applies in the case of a deceased director who may have incurred liability under section 3 of the Directors' Liability Act, 1890, *quære.*

*Gower* v. *Couldridge*, [1898] 1 Q. B. 348, and *Thompson* v. *London County Council*, [1899] 1 Q. B. 840, explained.—FRANKENBURG *v.* GREAT HORSELESS CARRIAGE CO., *C.A.*; [1900] 1 Q. B. 504; 69 L. J. Q. B. 147; 81 L. T. 684.

43. *Payment out—Married woman—Assignment—Affidavit of no settlement.*—Where a fund has been assigned by a wife and both husband and wife refuse to make an affidavit of no settlement, the fund may be ordered to be paid out on an affidavit of no settlement made by some person likely to be well informed.

*Rowland* v. *Oakley*, 14 Jur. 845, followed.—TIMOTHY *v.* CROWN, *Ch.D. Cozens-Hardy, J.*; 82 L. T. 142.

44. *Payment out—Petition—Distribution of fund in court—Assignment of share—Rectification of deed—Jurisdiction—Defective title—Subsequent acquisition of good title.*—When a person purports to convey one-sixth of a fund in court representing real estate, though only entitled to one-ninth share, and afterwards becomes entitled to one-sixth, the court will make the good title subsequently acquired available to make the assignment effectual.

*Noel* v. *Bewley*, 3 Sim. 103, followed.

The jurisdiction of the court with regard to rectification of deeds on petition considered.

*In re Bird's Trusts*, 3 Ch. D. 214, 25 W. R. Dig. 97, and *Lewis* v. *Hillman*, 3 H. L. Cas. 607, considered.—HOFFE'S ESTATE ACT, RE, *Ch.D. Kekewich, J.*, 507; 82 L. T. 556.

45. *Pleading — Counterclaim — Counterclaim in reply—Right of plaintiff to plead set-off to counterclaim—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-section* 3—*Ord.* 19, *r.* 3; *ord.* 21, *rr.* 10-17. —The plaintiffs claimed a balance of an account. The defendants counterclaimed for damages for breach of contract. The plaintiffs in their reply

denied the contract, and further pleaded that, if there was such a contract, the defendants had broken it, and they claimed damages for such breach.

Held, that although the cause of action in respect of which the plaintiffs claimed damages in their reply existed before the issue of the writ, the plaintiffs were entitled to raise the matter in their reply, and were not bound to introduce it into their statement of claim by amendment.

*Toke* v. *Andrews*, 30 W. R. 659, 8 Q. B. D. 428, approved.—GIBBS *v.* NEVILLE, *C.A.*, 532; [1900] 2 Q. B. 181; 69 L. J. Q. B. 514; 82 L. T. 446.

46. *Sale by the court—Debenture-holders' action—Property forming debenture-holders' security in jeopardy—Motion for judgment on admissions in pleadings—R. S. C., ord.* 51, *r.* 1b.—The court—on motion for judgment on admissions in the pleadings in a debenture-holders' action, in which the plaintiff sued on behalf of himself and all other debenture-holders, and the debenture-holders were entitled to a charge on the property of the company—directed a sale of the property of the company under ord. 51, r. 1*b*, upon proof of the insolvency of the company and the jeopardy of the property comprising the debenture-holders' security, although the principal moneys secured by the debentures were not due, no interest thereon being in arrear for six months, and no resolution having been passed, or order made, for the winding up of the company.

In such a case the admitted allegations of the statement of claim should be verified by affidavit. —DAY AND NIGHT ADVERTISING CO., RE, UPWARD *v.* DAY AND NIGHT, &c., CO., *Ch.D. Cozens-Hardy, J.*, 362.

47. *Summons in chambers — Adjournment into court—Costs of adjournment—Ord.* 55, *rr.* 15, 15a; *ord.* 26, *r.* 1—"*The court or a judge*"—*Right of suitor to take an order from the judge personally.*—A party to a summons in chambers in the Chancery Division has a right to have the summons adjourned into court, but his right, in cases where the rules do not make an order by the judge in person necessary, is subject to the discretion of the court as to the costs of the adjournment, which will not be exercised against him merely because his application has failed.

The words "the court or a judge" in ord. 26, r. 1, do not mean only the judge in person, and an order made by a master in the Chancery Division is an order made by the court or a judge.

*Lambton* v. *Parkinson*, 35 W. R. 545, and *In re Watts*, 31 W. R. 262, 22 Ch. D. 5, distinguished.—LLOYDS BANK *v.* PRINCESS ROYAL COLLIERY CO. (No. 2), *Ch.D. Byrne, J.*, 427.

48. Subpœna—*Issue of—Oppression—Ord.* 27, *rr.* 26-34—*Abuse of the practice of the court.*—Although a *subpœna ad testificandum* may be issued at any time, the court will set aside the service of a *subpœna* which is issued at a time when it cannot be effective by any possibility, and can only be oppressive to the witness.—LONDON FINANCE CORPORATION *v.* KAUFMAN, *Ch.D. North, J.*, 458; 69 L. J. Ch. 196.

49. *Trial—Mode of trial—Trial with jury—Leave to defend given without any condition or direction as to mode of trial—Right of defendant to trial with jury—R. S. C.*, 1883, *ord.* 14, *rr.* 6, 8; *ord.* 36, *r.* 6. —Where on a summons under order 14 an order has been made giving the defendant leave to defend without any condition or direction as to mode of trial, the judge at chambers cannot on a subsequent summons deprive the defendant of his right under ord. 36, r. 6, to have the action tried with a jury. —WOOLFE *v.* DE BRAAM, *C.A.*, 161; 81 L. T. 533.

50. *Trial—New trial—Verdict of jury—Discovery of fresh evidence.*—A new trial will not be granted upon the ground that fresh evidence has been discovered, which could not with reasonable diligence have been discovered before the trial, unless that fresh evidence is so conclusive as to make it practically certain that the verdict would be different if it were adduced.—YOUNG *v.* KERSHAW, *C.A.*; 81 L. T. 531.

51. *Undertaking in an order—Attachment—Service of order on solicitors—Motion for committal—Rules of Supreme Court*, 1883, *ord.* 42, *r.* 7; *ord.* 44, *r.* 2.—Where defendants in an action committed a breach of an undertaking given by them and embodied in an order of the court which was not served on them personally, plaintiffs asked for leave to issue a writ of attachment.

Held, that the order might be enforced by committal without service, and that the proper remedy for the breach of an undertaking is by committal, and not by attachment.—D—— *v.* A. & Co., *Ch.D. Cozens-Hardy, J.*, 429; [1900] 1 Ch. 484; 69 L. J. Ch. 382; 82 L. T. 47.

See also Administration, 7; Admiralty, 1, 3, 6; Annuity; Bankruptcy, 10, 14, 15, 18; Company, 28, 29; Contract, 4; County Court; Crown; Divorce, 5-17; Landlord and Tenant, 3, 13, 18; Merger, 2; Mortgage, 13; Partition, 3, 4; Prohibition; Railway, 5; Solicitor, 1, 6, 12; Trade Union, 1; Trustee, 5.

PRESCRIPTION ACT.—See Easement, 1, 3.

PRINCIPAL and AGENT:—

1. *Power of attorney—Power to mortgage—Excess of authority—Liability of donor.*—D. gave G. a power of attorney authorizing him to buy, sell, charge, and transfer in any form whatsoever any estate, stocks, or funds, "following his letters of instructions and private advices which, if necessary, shall be considered part of these presents." G. executed a mortgage upon property to which D. became entitled upon the death of his mother.

Held, that the power authorized the execution of the mortgage, although as between D. and G. the mortgage was unauthorized.—DAVY *v.* WALLER, *Ch.D. North, J.*; 81 L. T. 107.

2. *Undisclosed principal—Unauthorized agent—Ratification—Contract—Contract made by person in his own name on behalf of another without authority.* —A contract made by a person in his own name, but intending to act for another in making it, though without authority from him, can be ratified by that other person, although the intending agent did not disclose at the time of making the contract that he was acting for someone else.

So held by the Court of Appeal (Collins and Romer, L.JJ.; A. L. Smith, L.J., dissenting).—DURANT *v.* ROBERTS, *C.A.*, 476; [1900] 1 Q. B. 629; 69 L. J. Q. B. 382; 82 L. T. 217.

See also Contract, 15; Frauds, Statute of, 2; Solicitor, 13; Stock Exchange, 1-4; Vendor and Purchaser, 3, 20.

PROBATE:—

1. *Administration—Creditor—Mortgage of leasehold by sub-demise—Outstanding day held in trust—Limited grant.*—A lessee of certain premises mortgaged them by sub-demise for the residue of the term less the last day which he covenanted to hold in trust for the mortgagee. The mortgagee entered into possession of the premises. The mortgagor died

intestate and insolvent. The mortgagee assigned his interest in the premises. The assignee desired to surrender his interest, but difficulties arose from the existence of the outstanding day. The assignee applied for administration of the estate of the mortgagor, limited to the outstanding day.

Held, on proof of due citation of the next-of-kin, that the grant might be made as asked for.—KINGWELL, IN GOODS OF, *P.D. & Ad.D.*; 81 L. T. 461.

2. *Administration—Creditor—Statute-barred debt—Notice to next-of-kin.*—The deceased died intestate and a lunatic in a county lunatic asylum. At the time of his death he was indebted to the guardians. Subsequently the guardians were informed that the deceased was entitled to a small amount of property. Their debt was then barred by the Statute of Limitations. The only next-of-kin of the deceased was a lunatic daughter in the same asylum and also indebted to the guardians for maintenance. On an application for a grant of letters of administration to a nominee of the guardians,

Held, that, though a creditor for a statute-barred debt might obtain a grant of letters of administration, notice must be given to the daughter.—DRUCE, IN GOODS OF, *P.D. & Ad.D.*; 81 L. T. 458.

3. *Administration — Disappearance — Practice — Administration* de bonis non—*Former administratrix—Revocation of grant—Fresh grant to one of the next-of-kin.*—The practice by which a grant of administration may be revoked and a fresh grant made in the absence of the holder of the outstanding grant, is not confined to cases where administration has been taken by the creditors.

Where an intestate died leaving a widow and six children by a former marriage, and the widow, who obtained administration, could not be found, the court, upon the application of the children, revoked the grant and directed administration *de bonis non* in favour of one of their number.—LOVEDAY, IN GOODS OF, *P.D. & Ad.D.*; [1900] P. 154; 69 L. J. P. 48; 82 L. T. 692.

4. *Administration—Foreign domicil—Next-of-kin out of the jurisdiction—Assets and some beneficiaries in England—No executor—Grant to stranger without citing next-of-kin—Practice—Administration with will annexed—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—The testatrix, who died domiciled in the Republic of Hayti, left a will which was valid by the law of her domicil, but not executed with the formalities prescribed in the Wills Act. There was no appointment of executors, but the will contained the words: "M. E. Bordu of Port-au-Prince and Mr. J. B. Wallace, of Liverpool, shall carry out my last wishes." The only estate in England consisted of a sum of £1,260 7s. 11d. in the hands of Mr. Wallace's firm.

The sole next-of-kin, who was entitled in distribution to half the fund, was in Hayti and had not been cited; but the persons entitled to the other half were in England, and assented to Mr. Wallace being appointed administrator with the will annexed.

The court appointed Mr. Wallace administrator (with the will annexed) under section 73 without requiring the next-of-kin to be cited.—MOFFATT, IN GOODS OF, *P.D. & Ad.D.*; [1900] P. 152; 69 L. J. P. 98.

5. *Administration—Intestacy—Shares in foreign railways—Legal estate outstanding in the intestate—Beneficial owner a bankrupt—Limited grant to trustee in bankruptcy.*—A. being the owner of certain shares in two foreign railway companies handed the certificates to C., who received the dividends as beneficial owner until he became bankrupt, after which the trustee in C.'s bankruptcy received such dividends as became payable. A. died, never having divested himself of the legal estate in the shares; and administration to his estate was granted to B., who died leaving part of the estate unadministered. Upon the application of the trustee in C.'s bankruptcy,

The court granted administration to him, in respect of the unadministered estate of A., limited to the shares in the two foreign railway companies.—AGNESE, IN GOODS OF, *P.D. & Ad.D.*; [1900] P. 60; 69 L. J. P. 27; 82 L. T. 204.

6. *Administration — Renunciation—Retractation—Administration* de bonis non—*Joint grant to three persons—Practice.*—In 1896 A. H. T. died bankrupt and intestate, leaving a widow, who was his second wife, and six children surviving. His estate was in the hands of an official receiver in bankruptcy. The widow and children duly renounced all rights to administration, and the official receiver took the grant to A. H. T.'s estate, and also a grant *de bonis non* to the estate of A. H. T.'s first wife.

In 1899 the administrator, having paid all the debts, desired to be relieved of his office, and with his concurrence the court permitted the widow and children to retract their renunciations; revoked the letters of administration; and made a joint grant to the widow and two of the children, in respect of that portion of A. H. T.'s estate remaining unadministered, thus giving them the right, as of course, to take administration *de bonis non* in the estate of A. H. T.'s first wife.—THACKER, IN GOODS OF, *P.D. & Ad.D.*; [1900] P. 15; 69 L. J. P. 1; 81 L. T. 790.

7. *Administration—Renunciation by sole next-of-kin—Grant to person next entitled though without interest.*—The deceased died intestate, leaving his sister as sole next-of-kin and entitled to his estate. She renounced her right to administration and consented to a grant of letters of administration being made to the deceased's uncle, who, if the sister had not survived, would have been entitled to share in the estate, but under the circumstances possessed no interest. On an application by the uncle for a grant of letters of administration,

Held, that the grant might be made as desired.—TRIGG, IN GOODS OF, *P.D. & Ad.D.*; 69 L. J. P. 47; 82 L. T. 626.

8. *Administration—Revocation—Previous administration action*—Res judicata—*Acquiescence.*—In 1892 letters of administration to an estate were granted to the defendant in the present action as the cousin and one of the next-of-kin of the intestate, and on the 27th of December, 1892, the defendant commenced Chancery proceedings for the administration of the estate. The present plaintiff made a claim in these proceedings to be entitled as one of the next-of-kin to a share in the distribution of the estate. This claim was disallowed by the chief clerk, and the plaintiff took no further steps in the proceedings. On the 21st of April, 1896, a final order for distribution of the estate was made in the Chancery action, and all further proceedings therein were stayed. On the 7th of June, 1898, the plaintiff commenced the present action to revoke the letters of administration granted in 1892 and to obtain a grant in her own favour.

Held, that, as the only object of the present action was to recover the property which had been distributed, the court would not assist the plaintiff in her attempt to obtain a grant which would be useless to her, seeing that she could institute pro-

ceedings in Chancery even though the letters of administration had not been revoked.

Held, also, that, though the matter was not *res judicata* against the plaintiff by reason of the Chancery proceedings, she had been guilty of such delay and acquiescence as to disentitle her to maintain an action against those who had received the estate by virtue of those proceedings.—MOHAN *v.* BROUGHTON, *C.A.*, 371; [1900] P. 56; 69 L. J. P. 20; 82 L. T. 29.

9. *Intestacy—Father and son—Doubt as to who died first—Probate Act*, 1857 (20 & 21 *Vict. c.* 77)—*Grant under section* 73.—Where a person who left no will was presumed to have died "in or since 1863," and his father died in 1866, also intestate, the court made a grant under section 73 to a brother of the presumed deceased, no representative of the father's estate having been appointed.—HARLING, IN GOODS OF, *P.D. & Ad.D.*; [1900] P. 59; 69 L. J. P. 32; 81 L. T. 791.

10. *Practice—New trial—Motion for—Findings of jury—Legatee preparing will in his own favour.*—On a motion for a new trial made by the executors after the court had excluded from probate a pecuniary legacy exhausting nearly the whole of the testator's estate to his confidential agent who had drawn the will, it appeared that the jury had properly found that the testator knew and approved its contents except as regards the above bequest, which he did not know and approve of, but had in a rider expressed its belief that the testator intended to give to said legatee half his property,

Held, that the motion was properly refused. The rider did not neutralize but rather supported the verdict, for, if correct, it showed that the will did not truly express the testator's intention.—FARRELLY *v.* CORRIGAN, *P.C.*; [1899] A. C. 563.

11. *Will — Administration — Surviving executor absent from England—No intention to return or to continue to act—Application for grant* de bonis non *on behalf of assignee of reversionary interest.*—Where a surviving executor, after proving the will and codicil, left England not intending to return or continue to act, the court, on motion, granted administration *de bonis non*, with the will and codicil annexed, to the nominee of the assignees of the residuary legatee. — CAMPION, IN GOODS OF, *P.D. & Ad.D.*, 288; [1900] P. 13; 69 L. J. P. 19; 81 L. T. 790.

12. *Will—Codicils—Informalities—Infants interested.* — Where a testatrix left three testamentary papers, two of which contained certain informalities and affected the interests of infants, the court, being of opinion that if the usual practice were insisted upon and the documents propounded in solemn form, the result would be to establish all three documents, granted probate thereof, on motion, to the executors.—O'BRIEN, IN GOODS OF, *P.D. & Ad.D.*; [1900] P. 208; 69 L. J. P. 55.

13. *Will—Law of Chili—Evidence—Grant of administration with will annexed to the widow.*—A testator died domiciled in Chili, leaving a will, appointing two executors, one of whom died without taking probate. The other was believed to be in Bolivia, but no response had been obtained to repeated applications made to him. The only property in this country of any value consisted of a debt which it was desired to collect.

The court accepted the affidavit of a notary, who was not a qualified Chilian lawyer, as evidence of the law of Chili; and, upon his evidence that the powers and duties of an executor in that country would only extend to seeing that the estate was duly administered by the acting heiress, who in this case was the testator's widow, the court made to her a grant of administration, with the will annexed. — WHITELEGG, IN GOODS OF, *P.D. & Ad.D.*; [1899] P. 267; 81 L. T. 234.

14. *Will — Executor — Disappearance of person named as — Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Substantial estate—Grant to one of the residuary legatees.*—The executor named in a will took some steps towards obtaining probate, but, after drawing a sum of £25 from the estate on account of costs, appeared to have departed from the country in embarrassed circumstances, leaving no address, and apparently with no intention of returning.

Held (all parties interested under the will consenting), that, although the estate was of substantial value, administration with the will annexed might be granted, upon motion, under section 73, to one of the persons named as residuary legatees without notice to the executor.—MASSEY, IN GOODS OF, *P.D. & Ad.D.*; [1899] P. 270; 81 L. T. 493.

15. *Will — Lost will — Small estate—Proof on motion—Consent of next-of-kin dispensed with.*—The court will now, in the case of a small estate, entertain an application to prove, upon motion, the contents of a lost will, without requiring, as an absolute condition, the consent of all persons interested in the estate.

*In the Goods of Pearson*, [1896] P. 289, qualified. —APTED, IN GOODS OF, *P.D. & Ad.D.*; [1899] P. 272; 68 L. J. P. 123; 81 L. T. 459.

16. *Will—Revocation—Third will—Destruction of will—*Animus revocandi*—Dependent relative revocation.*—The deceased executed three wills, the third of which revoked all former wills. Under the first of the three his wife took almost all his property absolutely. Under the third she was entitled to a limited interest. Before his death the deceased informed his wife that he had been unjust to her in the third will, that he intended to destroy it, and that he desired his property to go by the first will. He summoned a witness, repeated what he had said to his wife, tore up the will, and gave the witness the pieces to burn.

Held, that the doctrine of dependent relative revocation applied; that the deceased had not destroyed the third will with an absolute *animus revocandi*, but solely with the intention of reviving the first will; and that probate ought to be granted of the third will on proof of its contents.—COSSEY *v.* COSSEY, *P.D. & Ad.D.*; 69 L. J. P. 17; 82 L. T. 203.

17. *Will—Stranger—Grant of administration with will annexed to stranger—"Special circumstances"—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—Where all parties interested in the estate of the deceased had entered into a compromise, with a view to putting an end to all further disputes and litigation, upon the basis that B., a stranger in blood, who had been employed by the deceased in auditing his accounts, should apply for and obtain a grant of letters of administration with the will and codicils annexed, the court, upon his application, and subject to the consents of all the persons interested in the estate, and subject to an affidavit of the fitness of the proposed administrator being filed, made the grant to him under section 73.—POTTER, IN GOODS OF, *P.D. & Ad.D.*; [1899] P. 265; 69 L. J. P. 53; 81 L. T. 234.

PROHIBITION:—

*Salford Hundred Court—Jurisdiction—"Cause of action"—Plea to the jurisdiction—Want of—Salford Hundred Court of Record Act*, 1868 (31 & 32 *Vict. c. cxxx.*), *ss.* 6, 7.—The expression "the cause of action" in section 6 of the Salford Hundred Court of Record Act, 1868, means the whole cause of action.

*Whitehead* v. *Butt*, 7 Times L. R. 609, approved.

By section 7 of the Act, "Save and except as aforesaid, no defendant shall be permitted to object to the jurisdiction of the court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the court shall have jurisdiction for all purposes."

Held, that a defendant, against whom judgment had been signed in default of appearance in an action in the Salford Hundred Court, where the claim did not exceed £50, could not get a writ of prohibition on the ground that the cause of action did not arise within the jurisdiction of the court, as section 7 conferred jurisdiction on the court in such a case in the absence of a plea to the jurisdiction.

*Chadwick* v. *Ball*, 14 Q. B. D. 855, 33 W. R. Dig. 172, followed.—PAYNE *v.* HOGG, *C.A.*, 417; [1900] 2 Q. B. 43; 69 L. J. Q. B. 579; 82 L. T. 584.

See also Telegraph, 1.

PUBLIC AUTHORITIES PROTECTION ACT.—See Limitation Statutes, 6; Local Government, 3; Practice, 13, 14.

PUBLIC HEALTH.—See Justices, 4; Landlord and Tenant, 27; Local Government, 2, 8-20; Metropolis, 4-7; Police, 2; Scotland, Law of, 1; Vendor and Purchaser, 2; Water, 2.

RAILWAY:—

1. *Lands Clauses Acts—Compensation for injuriously affecting—Intention to use land for special purpose—Adaptability.*—Notice was given by a railway company to treat for the purchase of a part of a piece of land which the claimants had recently purchased with the intention of building a school thereon. The land was specially suitable for that purpose, and no other site in the vicinity was equally suitable. The construction of the railway would render the remaining part of the land less suitable for a school. The claimants had not begun to build the school.

Held, that, in assessing compensation for injuriously affecting the land retained by the claimants, their intention to build a school thereon and the suitability of the land for that purpose ought to be taken into consideration.—BAILEY *v.* ISLE OF THANET LIGHT RAILWAYS CO., *Q.B.D.*, 589; [1900] 1 Q. B. 722; 69 L. J. Q. B. 442; 82 L. T. 713.

2. *Level crossing—Speed of trains—Railway Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 48—*Infringement of statute by public body—Information by Attorney-General—Injunction—Injury to public, evidence of not necessary.*—Upon an information filed by the Attorney-General to restrain a public body with statutory powers from infringing a term introduced into their Act in the interests of the public, as a condition of the exercise of their powers, it is not necessary to prove that injury to the public results from that infringement.

A railway company was by a special Act, which incorporated the Railways Clauses Act, 1845, empowered to carry their railway across a turnpike road on the level. They constantly drove their trains over the level crossing, which adjoined a station, at a speed exceeding four miles an hour, in contravention of the provisions of section 48 of the Railways Clauses Act, 1845.

On an information filed by the Attorney-General to restrain them from so doing they set up by way of defence that there was no proof of any injury occasioned to the public by their contravention of the section, and that the inconvenience caused to the public by reason of the existence of the crossing would be increased if they complied with it.

Held (affirming the judgment of Bruce, J., [1899] 1 Q. B. 72, 47 W. R. Dig. 169), that as the information was filed by the Attorney-General to enforce the express terms of an enactment made by the Legislature in the interests of the public, the court could not entertain the question whether injury to the public was in fact occasioned by the contravention of the Act, but were bound to grant the injunction.

*Attorney-General* v. *Great Western Railway Co.*, L. R. 7 Ch. 767; *Attorney-General* v. *Cockermouth Local Board*, L. R. 18 Eq. 172; and *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*, 21 Ch. D. 752, followed.—ATTORNEY-GENERAL *v.* LONDON AND NORTH-WESTERN RAILWAY CO., *C.A.*; [1900] 1 Q. B. 78; 69 L. J. Q. B. 26; 81 L. T. 649.

3. *Obligation to preserve drainage of lands—Limit of time—Railways Clauses (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 33), *s.* 65.—The appellant company acquired lands for the purposes of their undertaking from the respondent's predecessor in title under a conveyance reciting a decree arbitral following on a statutory reference. The conveyance contained a declaration that "the said railway company shall be bound and obliged to preserve the effective drainage of the lands in so far as the same may be interfered with by the railway works."

Held (reversing the judgment of the court below), that this obligation was not of unlimited duration, but was subject to the limit of time prescribed by section 65 of the Railways Clauses (Scotland) Act, 1845, which was incorporated in the private Act of the company.—GREAT NORTH OF SCOTLAND RAILWAY CO. *v.* FIFE (DUKE), *H.L.* (*Sc.*); 82 L. T. 425.

4. *Quasi-easement—Minerals demised separately from surface—Right reserved to lessee to sink new pits in surface—Reasonable approval of lessor—Purchase of surface by railway company—Compensation—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 68.—A., the freeholder of certain lands (containing some 355 acres), demised the minerals in them to B. for a term of sixty years. The lease contained a proviso that B. and his assigns should be entitled to sink new pits in any part of the surface over the demised minerals, "but so that the position of such pit or pits be subject to the reasonable approval of the said lessor, his heirs or assigns, or his or their agents for the time being." A. afterwards let part of the surface to B. on a tenancy from year to year, and subsequently he agreed with the Great Western Railway Co. to sell to them five acres of the surface so let.

The Great Western Railway Co. gave B. a notice to treat for his interest in those five acres. B. on the same day notified A. of his intention to sink a pit in the five acres agreed to be sold to the Great Western Railway Co. He never gave any such notice to the railway company.

On arbitration as to the compensation to be given B., the arbitrator awarded him £100 in respect of his yearly tenancy of the surface of the five acres taken, and £8,900 in respect of the damage done to his interest in the demised minerals by the right to sink a pit in the five acres being taken from him.

Held, that the right to sink a pit in the five acres

sold by A. was an interest which the sale to the railway company had injuriously affected within section 68 of the Lands Clauses Consolidation Act, 1845, and that B. was therefore entitled to the £8,900 awarded by the arbitrator in respect of it.—MASTERS *v.* GREAT WESTERN RAILWAY CO., *Q.B.D.*; 69 L. J. Q. B. 673; 82 L. T. 819.

5. *Receiver and manager—Cost of litigation—"Other outgoings"—Jurisdiction of court—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4—*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.—Since the passing of the Judicature Act, 1890, there can be doubt that the court has power to order the payment of costs of proceedings under a special Act, though the special Act contains no provision for this purpose.

A railway company incurred costs in defending an action brought by a contractor for a large sum. During the course of the proceedings a receiver and manager of the company was appointed on the petition of a judgment creditor, and inquiries as to creditors were directed by the receivership order. Leave was given to the company to continue to attend the proceedings commenced by the contractor.

Held, that the costs incurred in resisting the contractor's claim were not "other outgoings" within the meaning of section 4 of the Railway Companies Act, 1867, but that all such costs incurred since the receivership order ought to be treated as incurred in pursuance of the inquiries directed by that order, and ought to be paid in priority to any future payments to any creditors of the company who had benefited by the opposition to such claim.—WREXHAM, MOLD, &c., RAILWAY CO., RE, *C.A.*, 311; [1900] 1 Ch. 261; 69 L. J. Ch. 291; 82 L. T. 33.

6. *Way-leave—Deed—Construction.*—By deed in 1854 H. agreed to grant to a railway company a way-leave and right to make railways through his land for a term of 1,000 years, the company paying H. a specified rent on coal carried over "any part of the railways comprehended in" a Bill which afterwards became the company's special Act of 1854, and which should be shipped at Port B. For more than forty years rent was paid by the company for coal carried over the railways and shipped at Port B., when the coal passed over H.'s land, but no rent was paid or claimed for coal so carried and shipped when not passing over H.'s land. In an action brought by H.'s successor against the company,

Held, that the words of the deed were unambiguous; that the fact that the parties had interpreted the words wrongly could not affect the construction; that the company were liable to pay rent upon coal conveyed over any part of the railways comprehended in the special Act and shipped at Port B., even though it did not pass over H.'s land; and that the plaintiff was entitled to an account for the six years' prior to the issue of the writ.

Decision of the Court of Appeal, [1899] 1 Ch. 656, affirmed.—NORTH-EASTERN RAILWAY CO. *v.* HASTINGS (LORD), *H.L.*; [1900] A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429.

See also Arbitration, 6, 7; Easement, 5; Inland Revenue, 30, 32; Local Government, 23; Master and Servant, 20, 21.

RATING.—See Highway, 2; Local Government, 5, 21-23; Metropolis, 8-10; Poor Law, 1-10; Scotland, Law of, 1.

RESTRAINT of TRADE.—See Contract, 16.

REVENUE.—See Inland Revenue.

RIVER:—

*Pollution—Putrid solid matter—Right of impounding or diverting water—Rivers Pollution Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 2, 17, 20.—The defendant had been for many years the owner of weaving sheds on the bank of a river, and, before the passing of the Rivers Pollution Act, 1876, had acquired a right of diverting and impounding water for the purpose of his business. The water higher up the stream contained vegetable refuse, which, if it had been allowed to flow along the natural course of the river, would not have become putrid. But when it settled in the defendant's impounding reservoir it became putrid, and, when the reservoir was periodically cleared out by opening sluices, the effluent contained the vegetable refuse which had so become putrid. The effluent consisted of 97·6 per cent. of water and 2·4 of solid matter. Proceedings having been taken against the defendant, in which it was alleged that he put putrid solid matter into the river contrary to the provisions of section 2 of Rivers Pollution Act, 1876,

Held, that the defendant was protected from liability under the Act by section 17.

Held, also (by A. L. Smith and Rigby, L.JJ.), that the matter put into the river by the defendant was not solid matter.

*Per* Vaughan Williams, L.J.—*Quære*, whether the proper time for considering whether the matter was solid was not the moment of commencing the operation of flushing rather than the moment when the matter came into contact with the stream.—RIBBLE (RIVER) JOINT COMMITTEE *v.* HALLIWELL, *C.A.*, 22; [1899] 2 Q. B. 385; 81 L. T. 38.

See also Local Government, 13, 19.

SALE of GOODS:—

1. *Contract for sale by description—Implied condition—Acceptance—Passing of property—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 13, 17, 35.—Where a specific article is sold by description without having been seen by the buyer, there is an implied condition, under section 13 of the Sale of Goods Act, 1893, that the goods shall correspond with the description, and the vendor cannot make the property pass by delivering something which does not correspond with the description.—VARLEY *v.* WHIPP, *Q.B.D.*, 363; [1900] 1 Q. B. 513; 69 L. J. Q. B. 333.

2. *Memorandum—Loose case and memorandum book—Name of seller only on case—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.—A purchaser of goods signed a memorandum in a paper book, in which orders were generally put, slipped into a leather cover. The name of the seller did not appear in the memorandum, but was stamped upon the cover.

Held, that this was a sufficient memorandum to satisfy section 4 of the Sale of Goods Act, 1893.—JONES *v.* JOYNER, *Q.B.D.*; 82 L. T. 768.

See also Trade-Mark, 3.

SCHOOL:—

1. *School board—Disqualification of member—Member "concerned . . . in any work done under the authority of such board"—Sale of gravel and sand to contractor with the board—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 34.—The respondent, a member of a school board, supplied sand and gravel to a builder who had entered into a contract with the said school board for the erection of some school buildings. The sand and gravel were used in the course of the said contract being carried out, and the respondent,

when selling the said sand and gravel to the contractor, knew they would be so used.

By section 34 of the Elementary Education Act, 1870, it is enacted that "No member of a school board shall in any way share or be concerned in the profits of any bargain or contract with, or any work done under the authority of, such school board."

Held, that the respondent had committed an offence within the above section, he having been concerned in work done under the authority of the school board of which he was a member.—BARNACLE *v.* CLARK, *Q.B.D.*, 336; [1900] 1 Q. B. 279; 69 L. J. Q. B. 15; 81 L. T. 484.

2. *Subscriber to school—Management of school vested in subscribers*—Bonâ fide *subscriber.*—In a case in which the management of a school and the right to appoint the teachers were, under a deed, vested in the subscribers to the school to the amount of twenty shillings and upwards,

Held, that certain persons, on behalf of whom subscriptions were sent to the treasurer of the school on the day of the election of head master, with a view to their voting at such election, and whose subscriptions were returned by him to the person sending the same, were not *bonâ fide* subscribers with a right to vote at such election.

It appears to be a right inherent in such a body of subscribers to refuse to admit a new subscriber for good cause.—NOTT *v.* WILLIAMS, *Ch.D. Byrne, J.*, 316.

SCOTLAND, LAW of:—

1. *Cost of opposing bill in Parliament—Burgh—Public Health (Scotland) Act*, 1867 (30 & 31 *Vict. c.* 101), *s.* 95—*Rates*—Ultra vires.—The magistrates and council of Leith, who were also the local authority for public health, incurred costs in opposing in Parliament a bill for amalgamating the burghal territory of Leith and Portobello with an enlarged district subject to the government of the new and extended corporation of the city of Edinburgh, and they succeeded in having the bill thrown out as regards Leith,

Held, affirming the decision of the Second Division of the Court of Session, (1897) 25 R. 126, that it was *ultra vires* of the magistrates to include the expenses of the opposition in the public health assessment as expenses "incurred in executing" that act.

*Attorney-General* v. *Mayor of Brecon*, 10 Ch. D. 204, distinguished.—LEITH COUNCIL *v.* LEITH HARBOUR AND DOCKS COMMISSIONERS, *H.L.* (*Sc.*); [1899] A. C. 508; 81 L T. 98.

2. *Succession — Vesting — Postponed period of distribution—Conditional institution.*—A testator directed his trustees to allow his widow the liferent use of his house and such allowance as they thought necessary, and "on the dissolution and winding-up of the firm of B. & Co." (of which he was a partner), "in the event of the predecease of my said wife, and if she then survives, on her death, to realize my whole means and estate and to divide the same into four equal shares, and pay one share to each of my children" A., B., C., and D., "or to their respective heirs." The widow survived the testator, and the firm had not been wound up. C. and D. survived the testator, but were dead.

Held, affirming the decision of the First Division of the Court of Session, (1898) 25 R. 811, but not on the same reasoning, that the interests of the children were not in suspense, but had vested a *morte testatoris.*—BOWMAN *v.* BOWMAN, *H.L.* (*Sc.*); [1899] A. C. 518.

3. *Succession — Will — Provision for widow—Partial intestacy*—Terce, jus relictæ, *and* legitim.—A testator by his will made a provision for his wife declaring it to be in full of all claims by her of *terce* and *jus relictæ* or otherwise. Through the death of certain devisees before vesting took place, the residue fell into intestacy.

Held, affirming the decision of the First Division of the Court of Session, (1898) 25 R. 899, that the declaration was to be construed as excluding the widow's claim in so far only as conflicting with the will, and, an event happening which the testator never contemplated, the widow was entitled both to her provision and to *terce* and *jus relictæ* out of such heritables and movables as had fallen into intestacy. —NAISMITH *v.* BOYES, *H.L.* (*Sc.*); [1899] A. C. 495.

4. *Water—"Heritor"—Church and manse—Assessment of way-leave—Scottish Act*, 1663 (*c.* 21 *or c.* 31). —The Scottish Act, 1663 (c. 21 or c. 31): "Wher competent manses are alreadie built, ordaines the heritors of the paroche to releive the minister and his executors of all costs charges and expenses for repairing of the forsaids manses." A conduit of the Glasgow Waterworks Commissioners was carried underground through lands in a parish in virtue of grants of way-leave in perpetuity, obtained from the proprietors of the land.

Held, affirming the decision of the First Division of the Court of Session, (1899) 1 F. 523, that the commissioners were liable under the Act of 1663 to assessment in respect of their conduit as "heritors" of the parish for the repair of the manse.—GLASGOW CORPORATION *v.* M'EWAN, *H.L.* (*Sc.*); [1900] A. C. 91.

SETTLED LAND:—

1. *Capital moneys—Improvements—Estates in England and Ireland settled by one settlement upon the same trusts—Application of proceeds of sale of Irish estates in payment for improvement of English estates —Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (3).—The tenant for life of estates in England and Ireland which were settled by the same will and upon the same trusts, laid out considerable sums on improvements upon the estates in England in pursuance of a scheme approved of by the trustees of the settlement, and was desirous that the trustees should apply capital moneys in their hands, being the proceeds of the sale of part of the estates in Ireland, in repaying him the sums already laid out on such improvements, and in completing the improvements authorized by the scheme which was left at the chambers of the judge. On a summons by the tenant for life against the trustees as defendants,

Held, that the capital moneys in the hands of the trustees arising from the sale of part of the estates in Ireland might be applied in payment for improvements on the estates in England in accordance with the principle of *Re Mundy's Settled Estates*, [1891] 1 Ch. 399, and similar cases.—COOTE *v.* CADOGAN, EYRE-COOTE, RE, *Ch.D. North, J.*; 81 L. T. 535.

2. *Drainage—Improvement without scheme—Incidental expenses and outgoings—Income or capital—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 25, *and* 26—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 13, 15.—A testator gave his residuary estate to trustees on trust for conversion and investment, then to pay the income in the manner therein directed to three persons as tenants for life, then to hold the estate for the children of one of them. The investment clause contained a power to invest

on freehold ground-rents, and power was given to the trustees to postpone the sale of any part of the estate. Part of the estate retained by them unsold consisted of three leasehold houses held for the residue of long terms, and upon these large sums had to be expended by the trustees in putting in modern systems of drainage.

Held, that the drainage expenses were improvements within the meaning of the Settled Land Acts, and that under the circumstances they should be borne by capital.—THOMAS, RE, WEATHERALL *v.* THOMAS, *Ch.D. Byrne, J.*, 409; [1900] 1 Ch. 319; 69 L. J. Ch. 198.

3. *Heirlooms—Application of proceeds of sale of heirlooms for repair of unsold heirlooms—Salvage—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 37, *sub-section* 2.—A settlement made by will included several large estates, with three mansion-houses and the pictures, china, and furniture therein, which were settled as heirlooms. Two of the mansion-houses were sold under orders of court made in pursuance of the provisions of the Settled Land Acts, and certain pictures, china, and furniture removed therefrom, for which no room could be found in the remaining mansion-house and the town house of the tenant for life for the time being, were warehoused. Of the other pictures for which room was found in the remaining mansion-house, some were in a bad state of repair, and required the expenditure of a considerable sum for the preservation. On an originating summons taken out by the tenant for life, to which the trustees of the settlement were made defendants, for authority to sell the warehoused heirlooms, and that the trustees might have liberty out of the proceeds of sale to repair the remaining heirlooms,

Held, that the tenant for life might sell the warehoused heirlooms, and that the trustees might, out of the proceeds of sale, spend such a sum as was necessary in repairing the remaining heirlooms, with liberty to apply in chambers as to the amount to be spent for that purpose.—WALDEGRAVE (EARL) *v.* SELBORNE (EARL), *Ch.D. North, J.*; 81 L. T. 632.

4. *Lease—Tenant for life—Building lease—Reservation of minerals—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 7, 13, 17, 20—*Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78).—The Settled Land Act, 1882, does not enable a tenant for life to grant a building lease of the surface reserving the mines and minerals.—NEVILL AND NEWELL'S CONTRACT, RE, *Ch.D. Kekewich, J.*, 181; [1900] 1 Ch. 90; 69 L. J. Ch. 94; 81 L. T. 581.

5. *Lease—Tenant for life—Building lease—Reservation of minerals—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 13, 17.—A tenant for life has power, under section 6 of the Settled Land Act, 1882, to grant a lease of settled land containing a reservation of the mines and minerals.

*In re Nevill and Newell's Contract, ante*, p. 181, [1900] 1 Ch. 90, overruled.—GLADSTONE, RE, GLADSTONE *v.* GLADSTONE, *C.A.*, 531; [1900] 2 Ch. 101; 69 L. J. Ch. 455; 82 L. T. 515.

6. *Lease — Tenant for life — Surface reserving minerals—Power of leasing.*—Where, under a settlement, a tenant for life has power to lease all or any part of the settled lands for building purposes, and also power to lease mines of coal, iron, or other materials, either with or without the surface lands, those powers enable him to lease the settled lands for building purposes, reserving the minerals under the lands so leased.

*Cockerell* v. *Cholmeley*, 10 B. & C. 564, discussed and distinguished.—DUKE OF RUTLAND'S SETTLED ESTATES, RE, DUKE OF RUTLAND *v.* MARQUIS OF BRISTOL, *Ch.D. Byrne, J.*; [1900] 2 Ch. 206; 69 L. J. Ch. 603.

7. *Scheme for improvement approved by trustees, who had not capital moneys in their hands—Improvements executed at expense of tenant for life—Reimbursement—Settled Land Act*, 1882, *ss.* 21, 22, 25, 26.—Trustees for the purposes of the Settled Land Acts may approve a scheme by the tenant for life for the execution of improvements thereunder, although at the time of giving such approval they have not in their hands capital moneys for the execution of such improvements; and when, after such approval, the tenant for life, with the knowledge of such trustees, has expended money for such purpose, it is lawful for the trustees, if such early expenditure is for the advantage of all parties concerned, and subject to the proper certificate being obtained, to reimburse him out of capital moneys which may subsequently come to their hands.—NORFOLK (DUKE) PARLIAMENTARY ESTATES, RE, *Ch.D. Byrne, J.*, 328; [1900] 1 Ch. 461; 69 L. J. Ch. 236; 82 L. T. 613.

8. *Trustee — Will — Crown — Escheat* — Bona vacantia—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (2), 22 (5).—A testator gave a life interest in all his property to his wife. There was no remainder over on her death nor any residuary gift. There were trustees appointed by the will who were also appointed trustees for the purposes of the Settled Land Act, 1882.

The testator's widow as tenant for life under the Settled Land Act sold part of the freehold estate of the testator, and handed over the proceeds of sale to the trustees. On the widow's death it was found that the testator had no heir or next-of-kin.

There was in the trustees' hands a sum of £1,900 the proceeds of the sale of the testator's freehold estate. On summons by the trustees claiming to be beneficially entitled to the money in their hands,

Held, that the Crown was entitled to the money as *bona vacantia*.—BOND RE, PANES *v.* ATTORNEY-GENERAL, *Ch.D. Kekewich, J.*; 82 L. T. 612.

SETTLEMENT:—

1. *Construction—Meaning of "income"—Tithes—Rent-charges under the Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114)—*Voluntary abatements to tenants—Unlet property—Personal occupation of unlet property.*—In calculating the amount of "income"—as the word is used in a popular sense—actually derived from landed estates for any particular year, it is right to deduct from the gross receipts sums payable by way of tithe and of rent-charges under the Improvement of Land Act, 1864, created by the predecessor in title of the person whose "income" is being calculated; and also such voluntary abatements of rent to tenants as are fairly necessitated by the circumstances of the case. The owner of the "income" is not to be credited with rent for any part of the property which happens to be unlet during the particular year.

Decision of Kekewich, J. (*ante*, p. 165), affirmed.—BATEMAN (LADY) *v.* FABER, *C.A.*, 625.

2. *Domicil—Infant—Husband a domiciled Austrian—Ratification—Repudiation—Austrian law—Application of English law.*—In 1864 an Irish lady, an infant, married an Austrian at Berne. Previously to her marriage she executed a settlement. According to the law of her domicil after marriage, which was Austrian, she was unable to ratify the contract, or to place it out of her power to revoke it.

In 1893 the husband and wife executed a document in Austria to annul the settlement.

Held, that the wife never had, either before

marriage or after, power to make an irrevocable settlement.

The effect of the change of the domicil was that the English doctrine as to the repudiation of a contract by an infant within a reasonable time became inapplicable by reason of the impossibility of effectually ratifying it.

Decision of Cozens-Hardy, J. (47 W. R. 571, [1899] 2 Ch. 569), reversed.—VIDITZ *v.* O'HAGAN, *C.A.*, 516; [1900] 2 Ch. 87; 69 L. J. Ch. 507; 82 L. T. 480.

3. *Portions—Term for raising portions—Infants — Contingent portions — Maintenance.*— Portions, whether payable at a certain age or not, are so far contingent as not to be raisable, but to sink into the land, where children do not live to want their portions—*i.e.*, where the children being sons do not attain twenty-one, or being daughters do not attain that age or marry. They are, however, so far considered vested as to carry with them such a rate of interest or such allowance as the court may deem necessary for the reasonable maintenance of the children.—GREAVES' SETTLED ESTATES, RE, JONES *v.* GREAVES, *Ch.D. Farwell, J.*; 69 L. J. Ch. 596; 82 L. T. 799.

4. *Rent-charge—Term to secure—Arrears of rent-charge—Whether raisable by sale of inheritance.*—A legal rent-charge was by deed charged upon and payable out of land, and besides the usual powers of distress and entry, a term was limited by the deed to the use of trustees upon the usual trusts if the rent-charge fell into arrear by mortgage or demise for all or part of the term, or by other reasonable means to raise the arrears.

Held (applying *Hall* v. *Hurt*, 2 J. & H. 76, 10 W. R. Ch. Dig. 5), that the limiting of the term negatived the right to have arrears raised by a sale of the inheritance.—BLACKBURNE *v.* HOPE EDWARDES, *Ch.D. Buckley, J.*, 701.

5. *Settlor's life interest—Forfeiture—Separation deed—Alienation by law—Receiving order.*—By a settlement, dated in 1859, and made upon the marriage of A. and B. certain property of the husband was vested in trustees upon trust to invest the same, and to pay the interest, dividends, and annual produce thereof unto or permit the same to be received by the husband until he should be outlawed, or be found or declared a bankrupt, or become an insolvent debtor within the meaning of some Act of Parliament for the relief or relating to insolvent debtors, or should do or commit any other act, or any other event should occur whereby the income or any part thereof would or might if thereby settled absolutely upon or in trust for him become alienated by law or vested in any other person or persons; and from and after the decease of the husband, or the sooner determination of the trust thereinbefore declared for his benefit, upon trust to pay the whole of such interest, dividends, and annual produce unto, or permit the same to be received by, the wife and her appointees or assigns during her life for her separate use; and subject thereto upon trust for the children of the marriage as therein mentioned.

A receiving order was made against the husband in 1885, but was rescinded in February, 1886.

By a separation deed dated in September, 1886, and made between the husband and the wife, the husband covenanted that he would, during their joint lives if they should so long live separate from each other, allow the wife to receive for her own benefit the interest, dividends, and annual income of the property therein mentioned, being the property brought into the marriage settlement by the husband.

Held (*dissentiente* Vaughan Williams, L.J.), that the covenant in the separation deed operated as an equitable assignment of the husband's life interest; and that consequently a forfeiture had occurred.—SPEARMAN, RE, SPEARMAN *v.* LOWNDES, *C.A.*; 82 L. T. 302.

6. *Voluntary settlement by young lady only just of age—Rescission—Undue influence—Fiduciary relationship—Independent advice—Power of revocation —Duty of solicitor—Costs.*—Where a young person is minded to make a voluntary settlement in favour of a parent, it is not enough that he should have independent advice unless he acts on that advice: it is the duty of a solicitor independently advising an intending settlor to protect him against himself, and not merely against the personal influence of the donee in the particular transaction; and if his advice is not accepted he should decline to act further for the intending settlor.

In every voluntary settlement of this kind a power of revocation should be inserted.

Voluntary settlement of a young lady just of age set aside with costs against the relation in whose favour it was made and by whose undue influence it had been executed: trustee, being the solicitor who had drawn the settlement, disallowed his costs of the action in which the settlement was set aside. —POWELL *v.* POWELL, *Ch.D. Farwell, J.*; [1900] 1 Ch. 243; 69 L. J. Ch. 164; 82 L. T. 84.

See also Inland Revenue, 6; Married Woman, 1; Mine, 3, 4.

SHANGHAI:—

*Consular court—Consular and Marriage Fees Order in Council, 1900—Land taken for public purposes—"Extension" of roads—Shanghai Land Regulation VI. of 1869—Construction.*—Shanghai Regulation VI. of 1869 authorized the municipal council of that place to take the respondent's land as being required for the "extension of the lines of roads at present laid down as means of communication in the settlement." A proviso directed that no appropriation "for roads other than those already defined" shall be sanctioned or held lawful.

Held, that, on the true construction of the regulation, "extension" is not restricted to the enlargement of an existing road by adding to its length or breadth, but includes new lateral branches therefrom; and that the roads "already defined" are the roads mentioned in the whole of the preceding part of the regulation including the extensions.—SHANGHAI MUNICIPAL COUNCIL *v.* MCMURRAY, *P.C.*; [1900] A. C. 206; 69 L. J. P. C. 19; 82 L. T. 101.

SHERIFF:—

*Rates—Duty of sheriff to pay—Seizure of goods of person liable to pay rates—Goods "taken in execution" —35 Geo. 3, c. 73, s. 195.*—By 35 Geo. 3, c. 73, s. 195, where in a certain metropolitan parish the goods of any person liable to pay a rate by virtue of the Act shall have been "taken in execution" by a sheriff before the rate shall have been paid, the sheriff upon demand by the rate-collector is "directed and required in the first place" to pay the rate to the collector.

A sheriff seized under a *fi. fa.* the goods of a judgment debtor who was at the time liable to pay to the vestry as the rating authority of the parish a certain rate made in conformity with the Act. A demand was made on the sheriff by the rate-collector for the amount of the rate; but the sheriff, having subsequently received from the

debtor the amount of the judgment debt, withdrew from possession without having paid the rate.

Held, that the sheriff was liable to the vestry for the rate.—ST. MARYLEBONE VESTRY *v.* SHERIFF OF LONDON, *Q.B.D.*; [1900] 1 Q. B. 111; 69 L. J. Q. B. 69.

See also Bankruptcy, 4; Landlord and Tenant, 4.

SHIP:—

1. *Bill of lading—Contract of sale—Documents—Alteration of, before execution—Cash against surrender of documents—Tender of altered documents—Sufficiency of tender.*—A contract for the sale of wheat to be shipped from New Orleans to Hamburg provided that payment should be net cash against surrender of documents, which were to consist of the bill of lading, certificate of inspection, and policy of insurance.

On the 3rd of September, 1898, the sellers appropriated to the sale a quantity of wheat on board a certain vessel, and on the 8th of September tendered to the purchasers the three documents, two of which were altered and one of which was unaltered.

The purchasers refused to accept and pay for the documents by reason of the erasures and alterations therein, and, on a formal tender being made on the 12th of September, they again refused to accept them.

As tendered, the bill of lading contained a marginal note reading "stored in holds 3 and 4." The figures 3 and 4 had been substituted for the figures 2 and 3, which had been erased; the certificate of inspection stated that the wheat was in holds 3 and 4; the figures "and 4" had been added after the figure 3, and the figures "2 and," which had been in the certificate before the figure 3, were struck through; and the certificate of insurance was unaltered and stated the wheat to be in holds 3 and 4, which was the fact, so that as tendered all three documents agreed and were in accordance with the facts.

The mistake arose through an error, and, having been discovered, was corrected as above described in the bill of lading and the certificate of inspection before those documents were executed. The certificate of insurance was correct from the first and was unaltered.

The ship arrived in Hamburg on the 14th of September, and on the 16th of September the documents were again tendered, together with two confirmatory documents showing that the alterations were made before the execution of the documents, and were proper alterations as agreeing with the facts.

Held, by Darling, J., that the tenders on the 8th and 12th of September were good tenders of the documents, and ought to have been accepted by the purchasers, as, upon such tenders, the purchasers were put upon inquiry and were bound to look at all the documents, and, as one of the documents was unaltered and the altered documents agreed with the unaltered one, they ought to have come to the conclusion that the altered documents were altered before execution, and were perfect documents in the sense that they absolutely agreed with the facts.—SALOMON *v.* NAUDSZUS, *Q.B.D.*; 81 L. T. 325.

2. *Bill of lading—Description of goods—"Marked and numbered as in the margin"—Mistake—Bills of Lading Act,* 1855 (18 & 19 *Vict. c.* 111), *s.* 3.—By the Bills of Lading Act, 1855, s. 3, "Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped . . ."

A bill of lading described goods as "marked and numbered as in the margin." Some of the goods shipped were marked and numbered differently from the description in the margin, but this marking and numbering did not affect or denote the substance, quality, or commercial value of the goods.

In an action for damages for short delivery, brought by the consignee against the shipowners' agents, who had signed the bill of lading,

Held, that the defendants were not prevented by the Bills of Lading Act, 1855, s. 3, from showing that there was a mistake in the marginal description, and that these goods formed part of the quantity set forth in the bill of lading, and were shipped as part of the plaintiff's consignment.

*Bradley* v. *Dunipace*, 1 H. & C. 521, distinguished.—PARSONS *v.* NEW ZEALAND SHIPPING CO., *Q.B.D.*; [1900] 1 Q. B. 714; 69 L. J. Q. B. 419; 82 L. T. 327.

3. *Bill of lading—Freight—Exemptions in bill of lading—Errors in the navigation or management of the vessel—Injury caused by drainage pipe leading through cargo space—Act of United States,* 13*th February,* 1893, *relating to Navigation* (*the Harter Act*), *s.* 3.—Bills of lading incorporating the United States Navigation Act of 1893 (the Harter Act) were given in respect of a cargo laden on board a vessel bound from a port of the United States, and by the 3rd section of that Act the owners of a vessel transporting merchandize from any United States port are not, if they have exercised diligence to make the vessel seaworthy, responsible "for damage or loss arising from faults or errors in navigation or in the management of the said vessel." During the voyage on which the cargo was being carried, sea water accumulated in the forecastle of the vessel, and the boatswain, in attempting to free a drainage pipe which led from the forecastle through part of the cargo space and thence through the side of the vessel into the sea, and was intended to carry off water from the forecastle, broke through the side of such pipe into the cargo space, and thus caused water to flow into that space and damage the cargo. The owner of the cargo sought to recover for the damage thus done by way of counterclaim in an action for balance of freight brought by the shipowners against the owner of the cargo in a county court having admiralty jurisdiction. The judge of the county court gave judgment in favour of the defendant on the counterclaim.

Held, on appeal, that the appeal must be allowed and the counterclaim dismissed, as the damage sought to be recovered by the defendant resulted from an error in the management of the vessel within the Harter Act and the exemptions provided for by the bills of lading.

*The Glenochil*, [1896] P. 10, 44 W. R. Dig. 148, followed.—"RODNEY." THE, *P.D. & Ad.D.* 527; [1900] P. 112; 69 L. J. P. 9; 82 L. T. 27.

4. *Bottomry—Absence of maritime interest—Bond payable on vessel putting into port short of port of destination—Payment of bottomry loan by cheque or approved draft—Insurance of bond.*—A bottomry instrument may be valid though it does not stipulate for maritime interest, and notwithstanding that it be made payable if the vessel on which the money is lent on bottomry "shall, in the course of the voyage on which she is now being despatched, go into any port of refuge to repair there."

*The Cecilie*, 4 P. D. 210, 27 W. R. 198, followed. —"HAABET," THE, *P.D. & Ad.D.*, 223; [1899] P. 295; 81 L. T. 463.

5. *Cargo — Coals — Reshipment — Unfitness.*— A vessel carrying a cargo of coals had to put into a port of refuge for repairs, which necessitated the discharge of the cargo. When the repairs were completed the master refused to reship the cargo of coals as being in an unfit state for reshipment, owing to danger of spontaneous combustion.

In an action by the owners of the cargo against the shipowners for breach of contract,

Held, that the cargo being unfit for reshipment at the date of bringing the action, and there being no evidence to show how long a time must elapse before the cargo would be in a fit condition, the master was justified in refusing to reship it.

Held, also, that the time which would be occupied in rendering the cargo fit, and the cost of so doing were elements to be taken into consideration by the master at the time when he had to make up his mind to carry the cargo or not.—"SAVONA," THE, *P.D. & Ad.D.*; 69 L. J. P. 95.

6. *Cargo—Contract—Sale of wheat for shipment in United States—"Clearance not later than May* 31"—*Certificate of clearance given before completion of loading—Meaning of "clearance."*—Wheat was sold for shipment at Galveston, in the United States, by a specified vessel for Havre, "clearance" to be not later than the 31st of May.

A certificate of clearance was obtained on the 28th of May. Part only of the cargo was then on board, the rest being alongside ready to be loaded. The loading was not completed until the 2nd of June, when the vessel sailed.

By the statute of the United States the master must furnish a manifest of the cargo "on board, whereupon the collector shall grant a clearance." It was, however, customary to grant a clearance before the completion of loading, and such a clearance was valid and effective for all purposes, and entitled the vessel to sail immediately.

Held, that the vessel had obtained a "clearance" within the meaning of the contract, when the certificate of clearance was granted.—THALMANN *v.* TEXAS STAR FLOUR MILLS, *C.A.*; 82 L. T. 833.

7. *Charter-party—Advance freight—Destruction of part of cargo before sailing—Liability to pay advance freight on cargo destroyed.*—By a charter-party it was provided that the charterers should load a full and complete cargo at a certain rate of freight per ton on the quantity to be delivered to the consignees, the freight to be due and paid "two-thirds in cash three days after sailing, ship lost or not lost, and the balance on unloading and right delivery of the cargo." A portion of the cargo which had been loaded on board was destroyed by fire—a peril mutually excepted in the charter-party—before the sailing of the ship. Three days after sailing the shipowners claimed two-thirds advance freight on the whole cargo, including the part destroyed.

Held, that the shipowners were not entitled to the advance freight on the part of the cargo which had been destroyed.

Judgment of Lord Russell of Killowen, C.J. (47 W. R. 365, [1899] 1 Q. B. 193), affirmed.—WEIR *v.* GIRVIN, *C.A.*, 179; [1900] 1 Q. B. 45; 69 L. J. Q. B; 168; 81 L. T. 687.

8. *Charter-party—Agreement to load cargo "say about* 2,800 *tons"—Obligation to load more than* 2,800 *tons.*—The charterer of a ship the capacity of which was 2,880 tons agreed by a contract of charter-party to load "a cargo of ore, say about 2,800 tons." He loaded 2,840 tons.

Held, that he had performed his contract.

*Morris* v. *Levison*, 24 W. R. 517, 1 C. P. D. 155, distinguished.—MILLER *v.* BORNER, *Q.B.D.*, 588; [1900] 1 Q. B. 691; 69 L. J. Q. B. 429; 82 L. T. 258.

9. *Charter-party—Ballast—Obligation of shipowner to supply.*—By a charter-party which did not involve a demise or parting with possession of the ship by the shipowners, she was, consideration of a certain sum per month, to be placed at the disposal of the charterers to be employed by them in the conveyance of lawful merchandize and (or) passengers between certain ports, and it was stated that she was let for the sole use and benefit of the charterers for two or three round voyages at charterers' option commencing not later than a day specified, by which day she was to be placed with "clear holds" at the disposal of the charterers at the port of New York, they having the "whole reach or burthen" of the vessel, proper and sufficient room being reserved to the owners for the officers, crew, tackle, apparel, furniture, provisions and stores, and the vessel was not to be required to load more than she could reasonably stow and carry over and above her tackle, provisions, stores, and fuel.

Held, by the Court of Appeal (A. L. Smith and Collins L.JJ., Vaughan Williams, L.J., doubting) that the terms of the charter-party did not rebut the ordinary implication in the case of a charter-party by which the obligation of supplying any ballast that may be necessary for the safe navigation of the ship rests upon the shipowner.—WEIR *v.* UNION STEAMSHIP CO., *C.A.*; [1900] 1 Q. B. 28; 69 L. J. Q. B. 193; 81 L. T. 553.

10. *Ship — Charter-party — Bill of Lading — Excepted port—Port of Manchester—Meaning—Immaterial addition.*—A contract for the sale of a cargo of wheat per *Vanduara* provided that the vessel should discharge at any safe port in the United Kingdom. The vessel was chartered by the sellers to discharge at any safe port in the United Kingdom (Manchester excepted), and the bill of lading was in the same terms.

By the Manchester Ship Canal Act, 1885, and by the Customs regulations, the port of Manchester included the whole of the ship canal, but in the commercial meaning it included only Manchester and the waters adjacent thereto.

In the wider meaning Manchester was, but in the more limited meaning was not, a safe port for the *Vanduara*.

Held (affirming the decision of the Queen's Bench Division), that Manchester within the meaning of the charter-party and bill of lading was not a safe port for the *Vanduara*, and that therefore the addition of the words "Manchester excepted" was not a material alteration of the contract of sale so as to release the buyers.—GOODBODY AND BALFOUR'S ARBITRATION, RE, *C.A.*; 82 L. T. 484.

11. *Charter-party—Cargo in frozen condition—Decrease of amount that could be stowed—Full and complete cargo.*—In an action against charterers for not loading a full and complete cargo of wet woodpulp, it appeared from the charter-party that the contemplated loading was to be in midwinter, at which time, as the evidence showed, wet woodpulp arrived at the port of loading, and was loaded, in a frozen condition. In this condition it would not stow so closely as when unfrozen, and consequently a lesser amount could be loaded than if the pulp had been in a normal condition.

Held, that the charterers in loading as much wet

woodpulp in a frozen condition as the ship would carry had performed their obligation to load a full and complete cargo.

Decision of the Court of Appeal ([1899] 2 Q. B. 364) affirmed.—ISIS STEAMSHIP CO. *v.* BAHR, *H.L.*; [1900] A. C. 340; 69 L. J. Q. B. 660; 82 L. T. 571.

12. *Charter-party—"Cargo to be brought to and taken from alongside steamer"—"Any custom of the port to the contrary notwithstanding"—Exclusion of custom.*—By a charter-party a ship was to proceed to the Surrey Commercial Docks and there deliver a cargo of timber, "the cargo to be brought to and taken from alongside at charterer's risk and expense, any custom of the port to the contrary notwithstanding."

A custom of the port of London with regard to timber ships required the shipowner to place the timber either into barges or on to the quay.

Held, that the custom of the port was excluded by the charter-party, and that the charterers were bound to pay the expense of taking the cargo from the ship's rail to the barges or on to the quay.—BRENDA STEAMSHIP CO. *v.* GREEN, *C.A.*, 321; [1900] 1 Q. B. 518; 69 L. J. Q. B. 445; 82 L. T. 66.

13. *Charter-party—"Cargo of steam coal as ordered by charterers"—Colliery guarantee—Strike clause—Colliery on strike.*—It was agreed by a charter-party that the ship should sail to Cardiff, and proceed to such loading berth as the freighters might name, and should there load "a cargo of steam coal as ordered by the charterers," which they bound themselves to ship, except in the event of (*inter alia*) strike of shippers' pitmen; the vessel to be loaded as customary, "but subject in all respects to the colliery guarantee, in —— colliery working days as may be arranged, any claim for demurrage in loading to be settled with colliery direct." The charterers, for the purpose of fulfilling their obligation under the charter-party, contracted with a colliery for a cargo of steam coal, subject to the usual exception as to strikes. Subsequently a strike of pitmen took place, which extended to 85 per cent. of the South Wales collieries, including the before-mentioned colliery. The charterers, in performance of their obligation under the charter-party, tendered to the shipowners the guarantee of that colliery, by which the colliery proprietors undertook to load the ship in twenty days after she should be ready to receive cargo, subject to the usual exception as to strikes. The shipowners objected to the colliery guarantee, as not being in accordance with the charter, on the ground that the colliery was then on strike. The strike still continuing for three months after the arrival of the ship at Cardiff, her loading was in consequence delayed for that period. Steam coal might have been obtained from other collieries in the district which remained working during the strike, although at a very high price.

In an action by the shipowners against the charterers for damages for the detention of the ship.

Held, that the shipowners were not entitled to object to the colliery guarantee as not being in accordance with the charter-party, and that the action was not maintainable.—DOBELL *v.* GREEN, *C.A.*; [1900] 1 Q. B. 526; 69 L. J. Q. B. 454; 82 L. T. 314.

14. *Charter-party—Colliery guarantee—Incorporation with charter-party — Demurrage — "Colliery working days"—Contract—Time for delivery—Time of essence of contract—Option to cancel.*—By a charter-party the charterers agreed to load a ship in twelve working days, "demurrage as per colliery guarantee." The colliery guarantee contained clauses excepting from the lay days, Sundays, holidays, and time lost through strikes, and providing that all holidays and full-day stoppages should be deemed to commence at 5 p.m. on the working day preceding, and to end at 7 a.m. on the working day following, such holiday or stoppage. In case the vessel, whether on demurrage or not, should be able to complete loading by 5 p.m. on the day preceding any Sunday, holiday, or other stoppage of work, time should not count either for loading or demurrage until 7 a.m. on the day on which work should be resumed. Demurrage was to be at the rate of £13, payable per colliery working day.

After the expiration of the lay days a strike occurred at the colliery which prevented the charterers from loading the vessel. In an action for demurrage,

Held, that time lost through a strike was not to be included in the term "colliery working days," and that the charterers were not liable for demurrage during such time.

Judgment of Lord Russell of Killowen, C.J. (79 L. T. Rep. 487), reversed.

A colliery company agreed by contract in writing to deliver 25,000 tons of coal in equal monthly instalments of from 1,000 to 2,000 tons, to be shipped into collier vessels, the time for loading as per colliery guarantee; provided that if from stoppage of their works through strikes the colliery company should be prevented from delivering the full quantities, the purchasers should have the option of cancelling the contract so far as related to coals to be delivered during the stoppage. The colliery guarantee provided that the vessel in this case should be loaded in sixteen days, demurrage to be at the rate of £13 per day. The sixteen days expired on the 31st of March, 1898; on the 9th of April a strike occurred at the colliery and on the 24th of May the colliery company wrote to say they could not load the vessel.

Held, that there had been a breach of contract on the 24th of May and not before; and that the purchasers were not bound to exercise their option for the benefit of the vendors.

Judgment of Lord Russell of Killowen, C.J. (79 L. T. Rep. 487), affirmed.—SAXON STEAMSHIP CO. *v.* UNION STEAMSHIP CO., UNION STEAMSHIP CO. *v.* DAVIS, *C.A.*; 81 L. T. 246.

15. *Charter-party—Despatch money—Demurrage—Option to average days for loading and discharge.*—A charter-party provided that the charterers were to have "the option of averaging days for loading and discharging, in order to avoid demurrage . . . despatch money at the rate of ten shillings per hour to be paid for any time saved in loading or discharging, to be settled in loading or discharging ports respectively."

The vessel was loaded within the time allowed, and the charterers claimed despatch money for the days saved, and the amount so due to them was indorsed on the charter-party. At the port of discharge the lay days were exceeded, and the shipowners claimed in respect thereof demurrage.

Held, that the charterers could not exercise their option of averaging days of loading and discharge, because the question of how the time saved at port of loading was to be treated must be considered as closed when the vessel sailed from port, and therefore the shipowners were entitled to claim in full demurrage.—OAKVILLE STEAMSHIP CO. *v.* HOLMES, *Q.B.D.*, 152.

16. *Charter-party — Demurrage — Discharge of*

*cargo "with all despatch as customary"—Contract by charterers with railway company for supply of trucks for discharge—Insufficient supply of trucks by company—Liability of charterers.*—A charter-party provided that "the ship is to be discharged with all despatch as customary."

The custom and practice of the port of discharge was to discharge the cargo into railway trucks, and to procure such trucks from one railway company.

For the discharge of the cargo the consignees, in accordance with the custom, had contracted with a railway company for the supply of trucks to receive the cargo.

A delay in the discharge of the ship was caused by the railway company not providing a sufficient supply of railway trucks alongside to receive the cargo; but the consignees had not been guilty of any personal neglect, and had done their best to get the customary appliances for the discharge of the ship, and had used such appliances, when obtained, with proper despatch.

In an action by the shipowners against the consignees for demurrage or damages for the detention of the vessel,

Held, that the consignees, having done their best to get the customary appliances for the discharge of the ship, and having used the same with proper despatch, had discharged the ship "with all despatch as customary," and were therefore not liable for the delay of the vessel caused by the insufficient supply of trucks.—LYLE SHIPPING CO. *v.* CARDIFF CORPORATION, *Q.B.D.*; 69 L. J. Q. B. 93; 81 L. T. 642.

17. *Charter-party — Demurrage — Exceptions — Delay caused by collision, but not owing to shipowner's default.*—By a charter-party made on the 12th of January, 1899, it was agreed that the vessel should proceed to Poti, and there load a a cargo for Baltimore or Philadelphia. By clause 4 of the charter-party (amongst other exceptions), "all unavoidable accidents or incidents and all causes beyond the control of the shippers, consignees, or the charterers, which might prevent or delay the delivery of the ore at port of shipment, and (or) the loading or discharging during the said voyage were always mutually excepted." The cargo was to be loaded in ten running days, Sundays and holidays excepted, and all hours on demurrage over and above the said days were to be paid for at a certain rate, charterers having the option of averaging time for loading and discharging. Subject to the exceptions in clause 4, the charterers guaranteed cargo and quay-berth ready at Poti, counting from the time the steamer had received free *pratique* and written notice had been given to charterer's agent to that effect.

By noon on the 11th of February, 1899, the vessel had arrived at Poti and had received free *pratique*, and notice to that effect had been given to the charterer's agent. Owing to the number of steamers waiting to be loaded, a quay-berth was not ready for her. The lay-days began to count at noon on the 11th of February, and the ten running days expired on the 24th of February. At this date a quay-berth had not been provided for the vessel, and while lying at anchor in the Poti roads she sustained serious damage by collision, in consequence of which she was obliged, on the 7th of March, to proceed to Constantinople to repair. If it had not been for the collision she would have obtained a quay-berth by the 8th of March, and would have completed her loading by the 16th of March. On the 19th of April she again arrived at Poti, but again, owing to the number of steamers, was unable to obtain a qu berth until the 2nd of June. The loading completed, and the vessel left Poti on the 10th June, and arrived at Philadelphia on the 14th July, and discharged her cargo in two days.

Held, that demurrage was enforceable ag the charterers from the 19th of April to the of June, and that they were not protected by exceptions in clause 4. There having been default on the part of the owners, the period demurrage was resumed upon the return of t vessel to Poti.—TYNE SHIPOWNING CO. *v.* LEAD *Q.B.D.*, 590; [1900] 2 Q. B. 12; 69 L. J. Q 353.

18. *Charter-party—Demurrage—Time for loadi —"Thirty-six running hours on terms of usual collier guarantee."*—By a charter-party between the plaintiffs and defendants it was provided that th plaintiffs' vessel should proceed to Grimsby and there load a cargo of coal in the usual manner according to the custom of the place, from such colliery as the charterers might direct; and that the loading time should be thirty-six running hours "on terms of usual colliery guarantee."

The vessel arrived at the usual loading dock at Grimsby, and was ready to load on the 19th of July. Owing to the coal strike in South Wales a very large number of vessels were waiting to load coal at Grimsby, and the plaintiffs' vessel was unable to get a berth at a coal tip until the 29th of July, when she was loaded within thirty-six hours. The coal was loaded from collieries at which no "colliery guarantee" was in use.

Held, that the defendants were not liable to pay demurrage, because there was a "usual colliery guarantee" in use at Grimsby, by which the time for loading did not commence until the vessel came under a coal tip.—SHAMROCK STEAMSHIP CO. *v.* STOREY, *C.A.*; 81 L. T. 413.

19. *Charter-party—Demurrage—"Working days of twenty-four hours."*—The appellant shipowners agreed by charter-party to provide the respondents with ships for the carriage of iron ore during a period of twelve months. The charter-party contained a clause as follows: "Charterers or their agents to be allowed 350 tons per working day of twenty-four hours, weather permitting (Sundays and holidays excepted), for loading and discharging . . . to count from 6 a.m. of the day following the day when steamer is reported, unless she be reported before noon. . . . Steamer to work at night if required, also on Sundays and holidays, such time not to count as lay days unless used."

Held (affirming the judgment of the court below), that the charterers were entitled to twenty-four hours in which to load or discharge each 350 tons. —FOREST STEAMSHIP CO. *v.* IBERIAN IRON ORE CO., *H.L.*; 81 L. T. 563.

20. *Charter-party—Salvage services—Division of sum awarded for—Construction of charter-party.*—A charter-party provided (clause 2) that the shipowner should maintain the chartered vessel (the steamship *Pocklington*) in a thoroughly efficient state for and during the service. Clause 6 provided that if any damage prevented the working of the vessel for more than twenty-four hours the hire should cease. By clause 13 the vessel had liberty to tow and assist vessels in distress, and to deviate for the purpose of saving life or property. By clause 20 all derelicts and salvage were to be "for owners' and charterers' equal benefit." The shipowners obtained an award in the Admiralty Court for a large sum for salvage services rendered by *The Pocklington* in towing another vessel in distress.

Through performing those services the hull, engines, and towing gear of *The Pocklington* were strained and damaged, and she incurred expenses and losses attributable to the salvage services in respect of repairs, the costs of gear used in towage, loss of hire for several days whilst she was under repair, and other matters. In an action by the charterers against the shipowners to recover a moiety of the salvage earned by *The Pocklington*,

Held, that the defendants were entitled to deduct from the amount awarded by the Admiralty Court all such losses and expenses incurred by them (including loss of hire) as were attributable to the salvage services, and that the balance only ought to be divided between themselves and the plaintiffs. —BOOKER & Co. *v.* POCKLINGTON STEAMSHIP Co., *Q.B.D.*; [1899] 2 Q. B. 690; 69 L. J. Q. B. 10; 81 L. T. 524.

21. *Collision—Anchor lights—"At or near the stern"—Regulations for Preventing Collisions at Sea, Article* 11.—The decision of the Court of Appeal in *The Gannet*, [1899] P. 230, 47 W. R. Dig. 184, reversed on the facts so far as *The Gannet* was held to be in fault.—"GANNET," THE, *H.L.*; [1900] A. C. 234; 69 L. J. P. 49; 82 L. T. 329.

22. *Collision—Anchor lights—Vessel exceeding* 150 *feet in length—"In the forward part of the vessel"—Regulations for Preventing Collisions at Sea*, 1897, *art.* 11.—By article 11 of the Regulations for Preventing Collisions at Sea, 1897, a vessel of 150 feet or upwards, when at anchor, shall carry "in the forward part of the vessel" a white light, and another at or near the stern.

A vessel, 313 feet in length, at anchor, carried her forward light in the fore-rigging abreast of the foremast, 72 feet from the stem.

Held, that the light was carried "in the forward part of the vessel" within the meaning of article 11.

Decision of Bucknill, J. (*ante*, p. 431, [1900] P. 43), on this point dissented from.—"PHILADELPHIAN," THE, *C.A.*, 514; 69 L. J. P. 101; 82 L. T. 601.

23. *Collision—Damage—Nominal and real damage.* —The wrongful deprivation of another of his property is ground for substantial damage, and it is immaterial that he has provided himself with what supplies the place of the detained or injured article.

The appellants' steamboat wrongfully ran down the respondents' lightship *Comet*, whereupon the owners provided a substitute which was kept for the purpose.

Held, that this circumstance was not a matter which lessened the wrongdoer's liability.

Decision of the Court of Appeal ([1899] P. 127, 47 W. R. Dig. 183) affirmed.

*The City of Peking*, 39 W. R. 177, 15 App. Cas. 438, explained and distinguished.—"MEDIANA," THE, *H.L.*, 398; [1900] A. C. 113; 69 L. J. P. 35; 82 L. T. 95.

24. *Collision — Damage — Vessel turning in the Thames not a crossing vessel—Bye-laws for the Navigation of the River Thames*, 1898, *art.* 48.—A steam vessel partly athwart the River Thames, and not in motion through the water or moving ahead or astern over the ground, but slowly swinging to her anchor in the act of turning round, is not a vessel crossing the river within the 48th article of the Thames Bye-laws, 1898, which provides that steam vessels and steam launches crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river.—"JOHN HOLLWAY," THE, *P.D. & Ad.D.*, 416; [1900] P. 37; 69 L. J. P. 15; 81 L. T. 726.

25. *Collision caused by running foul of sunken barge —Damage—Liability of owner of wreck, where not abandoned, for negligence of independent contractor employed by him to raise wreck.*—The owner of a vessel sunk in the fairway of a navigable river, who has not abandoned the wreck, but has agreed to have her raised by an independent contractor, is answerable in damages for the loss sustained by the owners of another vessel running foul of the wreck without negligence, in consequence of the wreck being improperly lighted.

Decision of Barnes, J. (47 W. R. 398), affirmed.—"SNARK," THE, *C.A.*, 279; [1900] P. 105; 69 L. J. P. 41; 82 L. T. 42.

26. *Collision—Fog—Duty to keep course and speed —Whistle—Regulations for Preventing Collisions at Sea, arts.* 16 *and* 21.—The steamship *C.*, while proceeding at the rate of about three knots an hour in a thick fog, heard the whistle of another steamship about four points on the port bow. *The C.* kept her course and speed, and the whistle of the other vessel was heard to be apparently broadening. Shortly afterwards the other steamship was seen close to and bearing five or six points on the port bow of *The C.* The engines of *The C.* were then at once stopped and reversed, but a collision occurred.

Held, that *The C.* was in part to blame for the collision for having failed, in accordance with art. 16 of the Regulations for Preventing Collisions, when the whistle of the other steamship was first heard, to stop her engines and afterwards to navigate with caution until all danger of collision was over, and was not justified in continuing her speed under article 21. Although article 21 of the Regulations for Preventing Collisions at Sea directing a ship to keep her course and speed is a general rule, it is qualified by article 16, and hence, where two steamships in a fog are crossing, each ought to stop her engines if she hears the whistle of the other forward of her beam.—"CATHAY," THE (No. 1), *P.D. & Ad.D.*; 81 L. T. 391.

27. *Collision—Fog—Failure to stop and ascertain position of approaching vessel—Regulations for Preventing Collisions at Sea, art.* 16.—It is the duty of a steam vessel in a fog, under article 16, on first hearing forward of her beam another vessel's fog signal, to stop her engines and to keep them stopped until, by hearing further signals, she ascertains the position of the other vessel.—"RONDANE," THE, *P.D. & Ad.D.*; 82 L. T. 828.

28. *Collision—Lights—Breach of article* 5 *of the Regulations for Preventing Collisions at Sea—Merchant Shipping Act*, 1894, *s.* 419, *sub-section* 4.—Where a steamer collided with a sailing ship which after sunset was showing no lights, the court held that, although there was some look-out on the steamer, nevertheless the absence of the lights could not in the circumstances have possibly caused or contributed to the collision; and that, therefore, the sailing ship was not to be deemed to be in fault under section 419, sub-section 4, of the Merchant Shipping Act, 1894.—"ARGO," THE, *C.A.*; 82 L. T. 602.

29. *Collision—Tug and tow—Judgment by default against tow—Proceeds of sale of tow paid into court—Plaintiffs' vessel and tug held both to blame—Judgment against tug for half damage—Measure of tug's liability—Right of owners of tug to have credit for sum paid into court.*—In an action against a tug and a tow for damage by collision, the owners of the tow allowed judgment to go by default, and the proceeds of the sale of the tow—viz., £855—

were paid into court. The plaintiffs' vessel and the tug were found both to blame, and judgment was given against the tug for half the damage. The total damage sustained by the plaintiffs' vessel was £4,146.

Held, that the plaintiffs were entitled to take the £855 out of court, and that the owners of the tug were liable to pay the plaintiffs £2,073 without having any credit given to them for the £855.—"MORGENGRY," THE, "BLACKCOCK," THE, *C.A.*, 121; [1900] P. 1; 69 L. J. P. 3; 81 L. T. 417.

30. *Collision—Tug and tow and a ship of war—Duty of single vessels to avoid crossing course of large fleet—Exemption of her Majesty's ships from Regulations for Preventing Collisions at Sea—Order in Council of June, 1899, applying collision regulations to her Majesty's ships—Regulations for Preventing Collisions at Sea, arts.* 19, 21, 27, 29—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 419, 741.—The statutory sanction imposed by section 419 of the Merchant Shipping Act, 1894, for a breach of the collision regulations has no application to a merchant trader which is crossing the course of one of her Majesty's ships from starboard to port, because the obligations imposed by articles 21 and 27 are only applicable to ships both of which are bound to obey the regulations.

Under ordinary circumstances a tug and tow are not justified in crossing ahead of a fleet of warships which has the tug and tow on the starboard hand, and the tug and tow ought not to keep their course and speed under article 21 of the collision regulations.

A vessel which neglects, in disregard of articles 27 and 29 of the collision regulations, to depart from any of the collision regulations is not to be deemed in fault under section 419 of the Merchant Shipping Act, 1894.—"SANSPAREIL," THE, *C.A.*; 82 L. T. 606.

31. *Docks—Dock-master, duty of—Requisition to remove vessel—Obstruction—West India Dock Act* (1 & 2 *Will.* 4, *c. lii*), *s.* 101.—Section 101 of the West India Dock Act provides that every master or other person in charge or command of a vessel, having placed such vessel within 200 yards of the entrance to any of the docks to which the Act applies, "who shall not immediately remove such vessel from within such distance on being therewith required by the dock-master," shall incur a penalty "for every hour that such obstruction shall remain after such requisition."

Held, that a notice or requisition, signed by a dock-master, with the name of the vessel left blank, and handed by him to his deputy, with instructions to serve it upon any master who should place his vessel within the proscribed limit, and which was afterwards served by such deputy upon the respondent, was a sufficient requisition within the Act.

Held, also, that it is not necessary that the vessel should be proved to have actually obstructed navigation to constitute the offence.—DUCKHAM *v.* GIBBS, *Q.B.D.*, 239; [1900] 1 Q. B. 394; 69 L. J. Q. B. 127.

32. *General average—Depreciation in cargo—Maintenance of cattlemen—Fodder for cattle.*—The plaintiffs shipped in the defendants' steamship a cargo of live cattle for carriage from Buenos Ayres to the United Kingdom under a charter-party, which provided that average (if any) should be adjusted according to the York-Antwerp Rules; and that the vessel should on no account call at Brazilian or Continental ports before landing her live stock. The reason of this proviso was that by the law of the United Kingdom live cattle could not be landed in the United Kingdom if the ship carrying them had touched at the ports specified. In the course of the voyage the vessel sprang a leak, and it became necessary for the safety of all concerned to put into Bahia, a Brazilian port, for repairs. Consequently the cattle could not be landed in the United Kingdom, and were sold in Antwerp, realising less than they would have done if they had been sold in the United Kingdom.

Held, that the loss sustained by the owners of the cattle was the subject of general average contribution.

During the execution of the repairs to the vessel at Bahia the owners of the cattle incurred expense in the maintenance of the cattlemen in charge of cattle on the ship and in the supply of fodder and water to the cattle.

Held, that these expenses were not recoverable in general average either under the York-Antwerp Rules, 1890, or at common law.—ANGLO-ARGENTINE LIVE STOCK AGENCY *v.* TEMPERLEY STEAMSHIP CO., *Q.B.D.*, 64; [1899] 2 Q. B. 403; 69 L. J. Q. B. 900; 81 L. T. 296.

33. *General average—Loss of freight.*—The plaintiffs' ship was chartered to carry coal from Cardiff to Esquimalt. In the course of the voyage the coal heated to such an extent that, if the voyage to Esquimalt had been continued, the ship and cargo would have been burnt. The captain, for the safety of ship, freight, and cargo, put into Buenos Ayres and discharged the coal. It was found to be in such a condition that it could not be reloaded and carried to Esquimalt. The coal was therefore condemned and sold at Buenos Ayres, and the voyage to Esquimalt was abandoned, and the chartered freight was lost.

Held, that the freight had not been lost in such circumstances as to make the loss the subject of general average contribution.—IREDALE *v.* CHINA TRADERS' INSURANCE CO., *Q.B.D.*, 48; [1899] 2 Q. B. 356; 69 L. J. Q. B. 783; 81 L. T. 231.

34. *Registration—General lighthouse fund—Fees—Merchant Shipping* (*Mercantile Marine Fund*) *Act*, 1898 (61 & 62 *Vict. c.* 44), *s.* 3, *Schedule I.*—The Merchant Shipping (Mercantile Marine Fund) Act, 1898, Schedule I., gives a scale of the fees which are to be paid on the transfer of British ships "according to the gross tonnage represented by the ships or shares of ships transferred." Fifty-eight shares in a ship, each share being one-sixty-fourth, were transferred to a firm by twenty different bills of sale.

Held, that the firm was liable to pay a separate fee, according to the scale, on the tonnage represented by the shares comprised in each bill of sale, and not merely to pay one fee upon the total of the tonnage represented by all the shares transferred.—HARROWING STEAMSHIP CO. *v.* TOOHEY, *Q.B.D.*; [1900] 2 Q. B. 28; 69 L. J. Q. B. 447; 82 L. T. 677.

See also Admiralty, 1-7; Conflict of Laws, 1; Conspiracy; Inland Revenue, 17; Insurance, 4-12; Master and Servant, 15, 16; Mortgage, 14.

SHOP:—

"*Public-house or refreshment-house*"—*Hotel*—"*Domestic servant*"—*Page-boy—Shop Hours Act*, 1892 (55 & 56 *Vict. c.* 62), *ss.* 9, 10.—Any place of business having a public-house licence is a shop within the meaning of the Shop Hours Act, 1892, notwithstanding that it is an establishment which would ordinarily be termed a hotel, and not a public-house.

A young person employed as a page and messenger boy in such an establishment held not to be wholly employed as a domestic servant within the meaning of the same statute.—SAVOY HOTEL CO. *v.* LONDON COUNTY COUNCIL, *Q.B.D.*, 351; [1900] 1 Q. B. 665; 69 L. J. Q. B. 274; 82 L. T. 56.

SOLICITOR:—

1. *Charging order in favour of solicitor—Application to discharge—Limit of time for application—Jurisdiction to make charging order—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 104.—Where property has been "recovered or preserved" by an order of the Court of Appeal, the court or judge of first instance which has seisin of that order when it comes down to be enforced is equally entitled with the Court of Appeal under section 28 of the Solicitors Act, 1860, to make a charging order in favour of a solicitor on the property so recovered or preserved.

An application to discharge a charging order must be made with promptitude, even although no steps have been taken to enforce the charging order.

*Semble*, a judge sitting in bankruptcy is entitled in that capacity to make a charging order under section 28 of the Solicitors Act, 1860.

The interpretation put upon *In re Suffield and Watts*, 36 W. R. 584, 20 Q. B. D. 693, by Vaughan Williams, J., in *In re Wood. Ex parte Fanshawe*, [1897] 1 Q. B. 314, 45 W. R. Dig. 155, criticised and questioned. — DEAKIN, RE, DANIELL, EX PARTE, *C.A.*, 678; 69 L. J. Q. B. 725; 82 L. T. 776.

2. *Charging order—Costs—Property recovered or preserved—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—A testator devised his estate to his wife for life, and after her death to his two daughters, of whom one was legitimate and the other illegitimate. The daughters having opposed probate of the will, an action was commenced by the executor, in which the will was upheld.

Held, that the solicitor of the executor was entitled to a charging order for his costs on the property devised, as being property preserved though his instrumentality.—TWEED, EX PARTE, *C.A.*, 4; [1899] 2 Q. B. 167; 69 L. J. Q. B. 794; 81 L. T. 1.

3. *Costs—Solicitor employed at a fixed salary—Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 5.—A public body employed a solicitor to do their legal and other work at a fixed annual salary. The costs of the public body in legal proceedings to which they were a party having been ordered to be paid to them by the other party to the proceedings,

Held, that they were entitled to charge, as part of such costs, sums in respect of the services of their solicitor, provided that such sums did not exceed an undue proportion of the solicitor's salary, having regard to the work done.—HENDERSON *v.* MERTHYR TYDFIL COUNCIL, *Q.B.D.*, 332; [1900] 1 Q. B. 434; 69 L. J. Q. B. 335.

4. *Costs—Taxation—Common order—Suppression of material facts—Agreement to refer.*—An agreement was made to pay reasonable and proper costs, and a bill of costs was delivered. The only real question was whether the negotiation fee was properly chargeable. It was agreed to refer the question to the Council of the Law Society, and a case was submitted to the respondents for approval. The respondents said they would have altered the case by stating that no negotiation in fact took place, and refused to proceed with the reference, and obtained the common order to tax. For the applicants it was said that an order of course would not have been made if the agreement to refer had been disclosed. The respondents said that only a special agreement going to the whole bill required to be mentioned, not an agreement as to one item, even if such an agreement was in fact concluded.

Held, that the test was that stated in *In re Gedye*, 15 Beav. 254, at p. 257: Was the matter omitted of sufficient moment and importance to require grave consideration or discussion? Only matters of real moment and importance require to be mentioned, and the fact that at one time the parties intended to refer the question to the Law Society was not such a matter.—COLLYER-BRISTOW, RE, FLETCHER, EX PARTE, *Ch.D. North, J.*; 81 L. T. 110.

5. *Costs—Taxation—Consolidated salvage suits—Country solicitor—Attendance at trial in London.*—In a consolidated salvage suit the two sets of plaintiffs were at issue at the trial as to the merits of the services performed by them respectively, and the judge at the trial directed that the costs of two counsel should be allowed to both sets of plaintiffs. The district registrar, upon taxation, disallowed the costs of the attendance at the trial in London of the country solicitor to that set of plaintiffs who had not had the conduct of the consolidated suit. Those plaintiffs appealed.

Held, that inasmuch as the judge at the trial had considered it reasonably necessary for the elucidation of the true state of the facts that both sets of plaintiffs should be represented by two counsel, it was also reasonably necessary that the country solicitor should be in attendance at the trial, and he ought to be allowed the costs of attendance.—"METROPOLIS," THE, *P.D. & Ad.D.*; 81 L. T. 236.

6. *Costs—Taxation—Pauper client—Taxation of costs in House of Lords—Liability to costs as between solicitor and pauper client—R. S. C.*, 1883, *ord.* 16, *rr.* 22-31.—Where a solicitor had been retained by, and acted for, a successful pauper appellant (since deceased) in the House of Lords, but in accordance with the practice in the House of Lords as laid down in *Johnson* v. *Lindsay*, [1892] A. C. 110, the respondent in the House of Lords was not liable for party and party costs,

Held, on an application by the solicitor against the estate of his deceased client for taxation of the costs of the appeal to the House of Lords—that the evidence showed that the bargain between the parties was that the solicitor should charge no costs other than out-of-pocket costs, and consequently that that was all the solicitor was entitled to.

Decision of Kekewich, J. (47 W. R. 330, [1899] 1 Ch. 853), reversed on the facts.—RAPHAEL, RE, SALOMON, EX PARTE, *C.A.*; 81 L. T. 479.

7. *Costs—Taxation—Sale by auction in lots—One title—Different purchasers—"Transaction"—Scale charge—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*Construction of General Order, rr.* 1, 7, 8.—Where real estate is ordered to be sold and is sold by auction in separate lots to different purchasers for prices under £100, with one title common to all the lots, the solicitor engaged to carry out the sale is, under rule 8 of Schedule I. (Part I.) of the General Order under the Solicitors' Remuneration Act, 1881, entitled to the remuneration of a minimum fee of £3 for deducing title and perusing and completing the conveyance in respect of each sale of a lot, each such sale being a "transaction" within the meaning of the rule.—THOMAS, RE, EVANS *v.* GRIFFITHS, *Ch.D. Stirling, J.*, 299;

[1900] 1 Ch. 454; 69 L. J. Ch. 219; 82 L. T. 105.

8. *Costs—Taxation—Shorthand notes of evidence—Patent action.*—On the trial of a patent action it was agreed in court, with the sanction of the judge, that a shorthand note should be taken of the evidence and used at the trial as the authentic record of the evidence, the expense being shared equally between the parties in the first instance.

Held, that the solicitor of the defendant company was entitled to be allowed on taxation as against his client the expenses of the shorthand note, which the solicitor had paid.

*In re Blyth & Fanshawe*, 31 W. R. 283, 10 Q. B. D. 207, discussed.—OSMOND *v.* MUTUAL CYCLE MANUFACTURING AND SUPPLY CO., *C.A.*, 125; [1899] 2 Q. B. 488; 81 L. T. 254.

9. *Costs—Taxation—Translations made in office.*—Certain letters and legal documents necessary to the conduct of an administration action were translated into English from French by competent clerks in a solicitor's office. On the taxation of the bill of costs, the taxing-master disallowed the the charges for translation.

Held, that the taxing-master must allow reasonable costs for the translation of such documents as had been used and entered as read in the orders of the court.—BOWERS, RE, STRATHMORE (EARL) *v.* VANE, *Ch.D. Cozens-Hardy, J.*, 604; [1900] 2 Ch. 251; 69 L. J. Ch. 544; 82 L. T. 673.

10. *Costs — Taxation — Trustee — Application by cestui que trust—Twelve months after payment—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 39, 41.—The power of the court to make an order for taxation of a trustee's bill of costs under section 39 of the Solicitors Act, 1843, is purely discretionary, and is not controlled by section 41. Such a bill may therefore be ordered to be taxed though paid more than twelve calendar months before the application by the *cestui que trust.*—WELLBORNE, RE, *Ch.D. Kekewich, J.*, 375; [1900] 1 Ch. 857; 69 L. J. Ch. 462; 82 L. T. 375.

11. *Married woman—Confidential relation—Benefit to solicitor's son—Independent advice—Confirmation.*—A person who enters into a transaction which has the effect of benefiting the solicitor employed or members of his family cannot be bound by such transaction unless he or she has had independent advice.

By a deed executed in 1890 property was settled on trusts in favour of a husband for life, then for his wife for life, then as the husband and wife should jointly appoint, and, in default of such joint appointment, as the survivor should appoint, with an ultimate remainder as to one moiety for one of the trustees of the deed, and as to the other moiety for the son of another trustee.

In 1891, by a subsequent deed, the wife's life interest was cut down to an interest during widowhood, and the funds were settled to go on trust as the husband alone should appoint, and in default (excluding the power of appointment in the wife if she survived her husband) upon the trusts of the deed of 1890.

By a third deed in 1894 (made after the death of the husband, who never exercised his power of appointment) the wife's life interest was restored to her, and in all other respects the deed of 1891 was confirmed.

All three deeds were prepared by the solicitor of the husband, who was one of the trustees of the deed of 1890, and whose son benefited under that deed. He explained the effect of the deeds to the wife, but she had no independent advice, and it was never pointed out to her, either by the solicitor or by anyone else, that she ought to have independent advice.

Held, that, under the circumstances, the rule of law laid down in *Huguenin* v. *Baseley*, 14 Ves. 273, applied, and the transaction must be set aside.

Decision of Cozens-Hardy, J. (*ante*, p. 26, [1899] 2 Ch. 578), reversed.—BARRON *v.* WILLIS, *C.A.*, 579; [1900] 2 Ch. 121; 69 L. J. Ch. 532; 82 L. T. 729.

12. *Practice—Unstamped documents—Undertaking to stamp—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 14.—Where a solicitor undertakes at the hearing to have a document stamped, such an undertaking is properly given by the solicitor and not by the client, and is a personal undertaking of the solicitor, and will be enforced against him by attachment. — COOLGARDIE GOLD FIELDS, RE, FLEMING, EX PARTE, *Ch.D. Cozens-Hardy, J.*, 461; [1900] 1 Ch. 475; 69 L. J. Ch. 215; 82 L. T. 23.

13. *Principal and agent—Revocation of authority by dissolution of defendant company—Notice of revocation—Liability of solicitor to pay plaintiff's costs—Companies Act*, 1862, *s.* 143.—A company had been dissolved by reason of the expiration of three months from the registration of the return made by the voluntary liquidator, to the Registrar of Joint-Stock Companies under section 143 of the Companies Act, 1862.

Subsequent to the dissolution of the company, an action against the company, which had been commenced before the dissolution, came on for trial. On the 16th of March, the day of the trial, the solicitor of the company was informed that the final meeting had taken place, but he did not use due diligence to ascertain whether the company was dissolved. Judgment was given against the company.

Held, that the solicitor of the company was liable to pay costs as from the 16th of March.

*Whiteley Exerciser (Limited)* v. *Gamage*, 47 W. R. 296, [1898] 2 Ch. 405, distinguished.—SALTON *v.* NEW BEESTON CYCLE CO., *Ch.D. Stirling, J.*, 92; [1900] 1 Ch. 43; 69 L. J. Ch. 20; 81 L. T. 437.

See also Mortgage, 2, 9; Practice, 9, 21, 29, 30, 51; Settlement, 6.

SOUTH AUSTRALIA, LAW of:—

*Covenant—Construction—"Intent to evade payment of duty"—South Australian Succession Duties Act*, 1893, *ss.* 16, 17.—Deceased in his lifetime covenanted to pay £200,000 to his children with interest at 1½ per cent. per annum, the debt being payable at call; he regularly paid the interest, but no portion of the capital.

Held, that the covenant, in absence of evidence to the contrary, conferred on the children complete ownership of the debt and was a non-testamentary disposition of property within section 16 of the South Australian Succession Duties Act, 1893, and not subject to duty under section 17, as the deceased died more than three months thereafter.

Held further, that it was not chargeable with double duty under section 27 as made "with intent to evade the payment of duty hereunder," in the absence of evidence of some device or contrivance for that purpose.—SIMMS *v.* REGISTRAR OF PROBATES, *P.C.*; [1900] A. C. 323; 69 L. J. P. C. 51; 82 L. T. 433.

SPECIFIC PERFORMANCE.—See Landlord and Tenant, 17; Vendor and Purchaser, 15, 16, 24-27.

STAMP ACTS.—See Inland Revenue, 22-32.

STATUTE:—

*Construction—Permissive or imperative—Water—Rights of adjoining proprietors—Irrigation—Negligence—Common law rights.*—Where the statutory provisions enabling a proprietor to irrigate his land from external sources are permissive merely, the right of action of neighbouring proprietors for injury done to their lands consequent upon any such irrigation are preserved; and this is so though the injury was not occasioned by the negligence of the irrigator.—CANADIAN PACIFIC RAILWAY CO. *v.* PARKE, *P.C.*, 118; [1899] A. C. 535; 81 L. T. 127.

STOCK EXCHANGE:—

1. *Defaulter—Assets—Official assignee—Right to sue—Stock Exchange Rules.*—Rule 176 of the Rules of the Stock Exchange, which says that the official assignee shall collect the assets of a defaulting member, applies to all his assets without any limitation. The official assignee is, by virtue of the rule, in the position of an equitable assignee of the assets, and, if he has allowed the defaulting member to sell any of the assets as his agent, he can recover the price from the purchasers.

*Tomkins* v. *Saffery*, 26 W. R. 62, 3 App. Cas. 213, considered.—RICHARDSON *v.* STORMONT, *C.A.*, 451; [1900] 1 Q. B. 701; 69 L. J. Q. B. 369; 82 L. T. 316.

2. *Principal and agent—Broker lumping several orders in one contract—Liability of principal to jobber on default of broker—Stock Exchange Rules, r.* 177.—Defendant employed a firm of brokers on the Stock Exchange to purchase for him shares in a certain undertaking, and instructed them to "carry over" 210 of these shares to the next account. The brokers, having orders from other clients for shares in the same undertaking, purchased by a single contract in their own name 360 of these shares for the next account from the plaintiffs, who were jobbers on the Stock Exchange, and they apportioned in their books 210 of these shares to the defendant. Before the next settling day the brokers were declared defaulters on the Stock Exchange, and, in accordance with the rules of that body, their transaction with the plaintiffs was closed by the official assignee, the price of the shares being fixed at the price then current. Plaintiffs, having ascertained that the brokers were acting for defendant as regarded the 210 shares, tendered those shares to him, and, on his refusal to take them, sold them on the settling day and claimed from the defendant the difference between the contract price and the selling price.

Held, that, since the brokers had lumped defendant's order with the orders of other clients, and had contracted in a single transaction with plaintiffs for the purchase of a larger number of shares than they were authorized to purchase for defendant, no such contractual relation existed between plaintiffs and defendant as would support the action.

Effect of rule 177 of the Stock Exchange Rules discussed.—BECKHUSON & GIBBS *v.* HAMBLET, *Q.B.D.*; [1900] 2 Q. B. 18; 69 L. J. Q. B. 431; 82 L. T. 459.

3. *Principal and agent—Default of broker—Liabilility of client to jobber—Privity of contract.*—The defendant employed a broker to purchase for him certain shares on the Stock Exchange, and afterwards directed him to "carry over" the shares to the next account. The broker, in accordance with the regulations of the Stock Exchange, purchased the shares in his own name from the plaintiffs, who were jobbers on the Stock Exchange, and afterwards carried over with them the same shares. The defendant's name was not disclosed. Before the next settling day the broker was declared a defaulter on the Stock Exchange, and in accordance with the rules of that body his contract with the plaintiffs was closed, and the plaintiffs took back the shares at a price fixed by the official assignee of the Stock Exchange, and known as the "hammer price." The plaintiffs, having ascertained that the broker was acting for the defendant in this transaction, called upon him to take up the shares. He declined to accept any responsibility for them; and the plaintiffs thereupon at once sold the shares for the best price then obtainable, and sued the defendant for the difference between the price at which the shares had been carried over and that at which they had sold them.

Held, that the defendant was liable for this amount, and not merely for the difference between the price at which the shares were carried over and the "hammer price."

*Dictum* of Kennedy, J., in *Beckhuson & Gibbs* v. *Hamblet*, [1900] 2 Q. B. 18, followed and approved. —ANDERSON *v.* BEARD, *Q.B.D.*; [1900] 2 Q. B. 260; 69 L. J. Q. B. 610; 82 L. T. 714.

4. *Stockbroker—Continuation account—Death of principal—Contracts for sale and repurchase after death—Liability of stockbroker for loss.*—Where a stockbroker having a continuation account with a client, on the death of the client, instead of closing the account immediately, upon his own authority enters into a fresh continuation and ultimately effects a sale of the securities at a loss, he is liable for the loss so incurred.—OVERWEG, RE, HAAS *v.* DURANT, *Ch.D. Byrne, J.*; [1900] 1 Ch. 209; 69 L. J. Ch. 255; 81 L. T. 776.

See also Bankruptcy, 21, 28.

SUNDAY:—

*Sunday trading—Barber—Words* ejusdem generis *—Lord's Day Observance Act*, 1676 (29 *Car.* 2, *c.* 7), *s.* 1.—A barber is not within 29 Car. 2, c. 7.—PALMER *v.* SNOW, *Q.B.D.*, 351; [1900] 1 Q. B. 725; 69 L. J. Q. B. 356; 82 L. T. 199.

TELEGRAPH:—

1. *Prohibition—Laying wires or tubes under a street—Jurisdiction of highway authority—"Difference"—Former jurisdiction of stipendiary magistrate or county court judge to arbitrate—Telegraph Act*, 1878 (41 & 42 *Vict. c.* 76), *ss.* 3, 4—*Telegraph Act*, 1892 (55 & 56 *Vict. c.* 59), *s.* 5.—By the Telegraph Act of 1892 the statutory power which a stipendiary magistrate or county court judge had to hear and determine an appeal from the refusal of a highway authority to permit a telegraph company licensed by the Postmaster-General to break up a street for the purpose of laying wires or tubes, has been rescinded; and the increased power given to such local authorities by that Act to veto the laying down of wires or tubes under any street within their district is now final.—NATIONAL TELEPHONE CO. *v.* TUNBRIDGE WELLS (MAYOR), *Q.B.D.*, 686.

2. *Telephone company—Public street—Licence from Postmaster-General—Right to lay wires—Power to open street—Consent—Person liable for repair—Tramway company—Telegraph Act*, 1863 (26 & 27 *Vict. c.* 112), *ss.* 10, 12, 13—*Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 32.—A telephone company, acting under a licence from the Postmaster-General pursuant to the Telegraph Acts, 1863, 1878, and 1892, need not obtain the previous consent of a tramway company before proceeding to break open a street or public road on which

tramway lines are laid for the purpose of laying telephone wires, even though the tramway company is liable for the repair of that street or public road.—BRISTOL TRAMWAYS AND CARRIAGE CO. *v.* NATIONAL TELEPHONE CO., *Ch.D. North, J.*; [1899] 2 Ch. 282; 80 L. T. 836.

See also Contract, 17.

TELEPHONE.—See Local Government, 24; Telegraph, 2.

TOLL:—

*Private carriage of officer on duty—Exemption—Army Act*, 1881 (44 & 45 *Vict c.* 58), *s.* 143.—A private carriage used by an officer on duty, in respect of which he is in receipt of no allowance, is not a carriage employed in her Majesty's military service so as to be exempt from tolls within section 143 of the Army Act, 1881.—CRAIG *v.* NICHOLAS, *Q.B.D.*; 69 L. J. Q. B. 608; 82 L. T. 765.

See also Bicycle; Market, 2, 3.

TRADE-MARK:—

1. *Disclaimer—Old and new marks—Patents, &c., Acts*, 1883 (46 & 47 *Vict. c.* 57), *s.* 62, *sub-section* 2; *s.* 64, *sub-section* 2; *s.* 74; 1888 (51 & 52 *Vict. c.* 60), *ss.* 10-16.—If application for registration of an old trade-mark has to be made under sub-section 2 of section 64 of the Patents, &c., Act, 1883, as amended by the Act of 1888, there is no distinction in reference to disclaimer between new marks and old marks.

Where, under section 62, sub-section 2, application is made to register a trade-mark which was used by the applicant or his predecessors in business before the 13th of August, 1875, it is not necessary in the application to state the names of the members of the firm for the time being since the alleged first user, nor even to insert the words "and their predecessors in business, members of the firm for the time being."—WRIGHT, CROSSLEY, & CO.'S APPLICATION AND ROYAL BAKING POWDER CO. OF NEW YORK, RE, *Ch.D. Byrne, J.*; [1900] 2 Ch. 218; 69 L. J. Ch. 589.

2. *Merchandize marks—Auctioneer—Sale of china—Suggestion as to forged mark—Merchandize Marks Act*, 1887, *s.* 2, (2) (*c*).—An auctioneer, having a suspicion that Dresden china sent to him as genuine to be put up for sale bore a forged trade-mark, told the bidders that he sold the lot "for what it is," thereby suggesting suspicion as to its genuineness in the minds of the buyers.

Held, that the auctioneer acted innocently within section 2, sub-section 2 (*c*), of the Merchandize Marks Act, 1887.—CHRISTIE *v.* COOPER, *Q.B.D.*; 69 L. J. Q. B. 708.

3. *Merchandize marks—Sale of goods—Trade description — Implied representation.* — Appellant asked for two half-pounds of tea at respondents' shop. The salesman took two packets off the counter, wrapped them in paper, and handed them to the appellant, who paid for them. The appellant afterwards found that though each packet, including its paper wrapper weighed more than a half-pound, the tea in each packet weighed less than half a pound. Upon each packet was a printed statement that its weight, including the wrapper, was half a pound.

Held, that the handing over of the packets by the salesman to the appellant, who had asked for a greater weight of tea than the packets in fact contained, did not amount to a false trade description of the foods so as to bring the case within the provisions of section 2, sub-section 2 (*c*), of the Merchandize Marks Act, 1887. — LANGLEY *v.* BOMBAY TEA CO., *Q.B.D.*; 69 L. J. Q. B. 752.

4. *Rectification of register—Mark registered under Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57)—*Order to expunge simply—Not subject to application to amend.—Semble*, leave should not now be given to amend a bad trade-mark, which was originally registered under the Act of 1883.

The court rejected the owner's contention that an order to expunge his mark, which had been registered under the Act of 1883, should only be made subject to an application to amend being made by him within a reasonable time, but made an order to expunge the mark absolutely.

*In re Wills' Trade-Mark*, [1893] 2 Ch. 262, 41 W. R. Dig. 252, not followed.—DAY *v.* RILEY, *Ch.D. Buckley, J.*, 556.

5. *Registration — Invented word — Patents. &c., Acts*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64; 1888 (51 & 52 *Vict. c.* 50), *s.* 10 (*d*).—To be registered as a trade-mark, an "invented word" need not be absolutely new, or invented for the purpose.

The word "Tachytype" had been used as part of the name of a foreign company who had advertised and made communications of patented inventions in their own name in England. An English company were allowed to register the word "Tachytype" as a trade-mark.—LINOTYPE COMPANY'S TRADE-MARK, RE, *Ch.D. Cozens-Hardy, J.*; [1900] 2 Ch. 238; 82 L. T. 794.

6. *Registration — Invented word — "Savonol"— Infringement—Rectification—Registered five years— Certificate of right to exclusive user—Patents, &c., Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 77*a*.—The word "Savonol," being meaningless, is an "invented word," and as such is capable of being registered as a trade-mark for soaps, notwithstanding that the French word "savon" had been used for many years in the soap trade. Even if "Savonol" does suggest "savon" and "soap," it is only a covert or skilful allusion to the character or quality of the goods, and may still be an "invented word." A meaningless affix like "ol" is distinguishable from such terminations as "ette" and "ine," which indicate resemblance.

*Eastman's Photographic Materials Co. v. Comptroller-General of Patents*, 47 W. R. 152, [1898] A. C. 571, commented on.

Where a motion to rectify the register by the removal of a trade-mark more than five years old is heard together with an action for infringement of the trade-mark as one matter, the court has power under section 77*a* of the Patents, &c., Act, 1883, to grant a certificate that the right to the exclusive use has come in question.—FIELD *v.* WAGEL SYNDICATE, FIELD'S TRADE-MARK, RE, *Ch.D. Buckley, J.*, 390; [1900] 1 Ch. 651; 69 L. J. Ch. 365; 82 L. T. 231.

7. *Registration — Non-user — Non-appearance of proprietor—Removal from register—Service abroad of notice of motion.*—A word was registered as a trade-mark in 1891 upon the instructions and in the name of an American giving Chicago as his address, with the name and address of an English firm of patent agents as his address for service. In 1899 an American company applied for the registration of the same word as their trade-mark, they having used it for a long time in America and also more recently in England. This application was objected to by the comptroller, in view of the previous registration. Thereupon inquiries were instituted by the company, the result of such inquiries being that the registered proprietor could not be found to have ever used the mark, or done any business

either in America or in England; that he could not be traced in Chicago or elsewhere; that letters addressed to him at Chicago were returned through the Dead Letter Office; and that the patent agents named as the address for service could give no information with respect to him. The company then gave notice of motion to rectify the register by expunging the mark, and left a copy of this notice at the address for service and sent another copy of it in a registered packet to Chicago, accompanied by a letter as directed in *In re Compagnie Générale d'Eaux Minérales et de Bains de Mer*, 40 W. R. 89, [1891] 3 Ch. 451.

On proof of these facts, and the registered proprietor not appearing, though more than twenty-eight days had elapsed since the dispatch of the packet and letter to Chicago.

Held, that the mark should be expunged.—ASHTON'S TRADE-MARK, RE, *Ch.D. Stirling, J.*, 389.

8. *Registration—"St. Raphael"—Geographical name—Descriptive name—Fancy word—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64 (1) (*c*) (2), 74 (*a*).—The company had registered under the Patents, Designs, and Trade-Marks Act, 1883, as their trade-mark a label upon which the words "St. Raphael" appeared several times. On the application by a rival company to have this mark removed from the register unless a disclaimer of the said words was entered,

Held, that the words, being contained in a distinctive label, registered as a whole under the Act of 1883, need not be disclaimed under section 74, inasmuch as they formed a part of the label and were not additions to it.

Decision of Kekewich, J. (47 W. R. 407), affirmed.—CLEMENT ET CIE.'S TRADE-MARK, RE, *C.A.*, 67; [1900] 1 Ch. 114; 69 L. J. Ch. 52; 81 L. T. 400.

TRADE NAME:—

1. *Defendant using his own name—Sale of same to a company—Imitation—Tendency to deceive—Fraud.*—A trader, if he is honestly carrying on a business in a particular article, cannot be restrained from using his own real name in connection with that business, because an old-established trader of the same name has made a reputation in a similar but distinct article.

The plaintiffs had long made and sold meat juice, put up in bottles, and used chiefly by invalids, and known on the market by various titles, including "Valentine's" simply. The defendant invented a method of putting up solid meat extract in the form of portable globules, chiefly used by travellers. Before any sales he sold his invention and the goodwill of the business "being created" to the defendant company, bearing his name.

Held, that an action for injunction must fail, as, although there were features of suspicion, want of good faith on the part of the defendants was not established either in the inception of the business or in the sale to the company.—VALENTINE'S MEAT JUICE CO. *v.* VALENTINE'S EXTRACT CO., *Ch.D. Stirling, J.*, 127.

2. *Right to injunction—Colourable imitation of name—What constitutes false representation.*—The appellant company, being the transferee of the assets and goodwill of the dissolved Sabiston and Lithographic and Publishing Co., sued to restrain the respondent from carrying on business under the name of the Sabiston Lithographic and Publishing Co., or any other name so framed as to lead to the belief that his business was in succession to that of the dissolved company.

Held, that the respondent had no right so to represent, but that there was no evidence that he had done so, and that the appellants were not entitled to an injunction against the mere use of the name.—MONTREAL LITHOGRAPHIC CO. *v.* SABISTON, *P.C.*; [1899] A. C. 610; 81 L. T. 135.

3. *Same name—Goods of same class—Misleading the public—Injunction.*—In 1895 J. & J. Cash, an old firm at Coventry, was converted into a limited company, J. & J. Cash (Limited), of which the defendant Joseph Cash was one of the directors. He retired in 1898, and set up in the same class of business at Coventry as Joseph Cash & Co.

Held, that, notwithstanding the defendant's surname happened to be Cash, he was not entitled to sell his goods in a manner calculated or likely to mislead or deceive the public into the belief that the business of the defendant or the goods manufactured by him were the business of and goods manufactured by the plaintiffs. Injunction granted.—CASH *v.* CASH, *Ch.D. Kekewich, J.*; 82 L. T. 655

TRADE UNION:—

1. *Strike and lock-out—"Watching or besetting"—Interlocutory injunction—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *sub-section* 3, 7—*Practice—Joinder of parties—R. S. C., ord.* 16, *rr.* 1, 4, 11.—The eight defendants, who were officials of various trades unions, met men who had been brought over by the plaintiffs under contracts from Ireland to replace workmen on strike, at the railway station of their destination, and persuaded many of them to leave the place or to refuse to work for the plaintiffs. The seven plaintiffs were several master builders and members of a master-builders' association.

Held, (1) that the action was properly constituted, since the seven plaintiffs were suing the eight defendants on one and the same series of transactions and to determine a question of combination; (2) that the acts complained of in two out of the eight cases were a "watching or besetting" within the meaning of section 7 of the Conspiracy Act, 1875; and an injunction was granted in those two cases accordingly.

*Charnock* v. *Court*, 47 W. R. 633, [1899] 2 Ch. 35, followed.—WALTERS *v.* GREEN, *Ch.D. Stirling, J.*, 23; [1899] 2 Ch. 696; 81 L. T. 151.

2. *Trade combination—Circular—Interference with business—Inducing persons not to deal with the plaintiffs.*—A statement of claim in effect stated that the defendants, in combination with others, had maliciously interfered with the plaintiffs in carrying on their business by issuing a circular asking persons not to deal with them.

It was alleged that the intention of the defendants and other signatories to the circular was to induce print-sellers to refrain altogether from dealing with any print publisher who might sell any goods to the plaintiffs, and to coerce printsellers into refusing to supply the plaintiffs with any goods; that the defendants had so coerced the majority of the printsellers in this country, and that the plaintiffs had suffered damage in consequence.

Held, by Bigham, J. (Phillimore, J., dissenting), that, as an action would not lie against persons who, for their own benefit, combined to induce others to refrain from dealing with a particular person, the plaintiffs' statement of claim disclosed no cause of action, since the acts complained of, if done by an individual, would have been lawful, and they did not become tortious because they were done by several in combination.—BOOTS' CASH CHEMISTS *v.* GRUNDY, *Q.B.D.*, 638; 82 L. T. 769.

See also [illegible]: Justices, 2.

TRAMWAY:—

1. *Corporation—Statutory powers—Construction of electrical tramway — Roadway and pavement — Nuisance—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 3—*Liverpool Corporation Tramways Act*, 1897 (60 & 61 *Vict. c. civ.*), *ss.* 36, 37.—The defendants, a corporation purporting to act in the exercise of their powers under their special Tramways Act, which incorporated the Tramways Act, 1870, and authorized the construction of an electric tramway, erected a pole and a fuse-box in the footpath close to the principal entrance of the plaintiffs' premises.

Held, that the defendants' statutory powers authorized them to use the pavement for the purpose of doing that which was necessary for making their tramway an electrical tramway; that the nuisance which the defendants were authorized to commit could not be interfered with unless the plaintiffs could prove that the powers conferred upon the defendants had been abused, which the plaintiffs had failed to do; and that therefore the action could not be maintained.—GOLDBERG *v.* LIVERPOOL (MAYOR), *C.A.*; 82 L. T. 362.

2. *Metropolis — Purchase by London County Council—Running omnibuses—London County Tramway Act*, 1896 (59 & 60 *Vict. c. li.*), *s.* 2.—A county council authorized by statute to purchase and work tramways, purchased certain tramways from a limited company which had, under its memorandum of association, power to run omnibuses in connection with its undertaking. The county council, on taking over the undertaking continued to run omnibuses.

Held, that the county council had no power to apply the county funds in running omnibuses.—ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL, *Ch.D. Cozens-Hardy, J.*; 69 L. J. Q. B. 241; 82 L. T. 671.

3. *Purchase of undertaking by local authority—Purchase, under special Act, before expiration of twenty-one years—Valuation—Contingency of purchase under Tramways Act*, 1870—*The Southampton Corporation Tramways Act*, 1897 (60 & 61 *Vict. c. cxxvi.*), *ss.* 1, 5.—The Tramways Act, 1870, by section 43, provides that "Where the promoters of a tramway in any district are not the local authority, the local authority . . . may, within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway . . . require such promoters to sell, and thereupon such promoters shall sell to them their undertaking . . . upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever) of the tramway and all lands, buildings, works, materials, and plant of the company."

The Southampton tramways were constructed by a company under a special Act passed in 1877. By a special Act in 1897 the Southampton Corporation were empowered to purchase "the undertaking of the company" upon such terms as, in case of dispute, might be settled by "arbitration under and according to the provisions of the Lands Clauses Act."

Held, that, in determining the price to be paid for "the undertaking of the company," the arbitrator should treat the undertaking as one which the company only enjoyed subject to the contingency of being compelled to sell the same under the provisions of section 43 of the Tramways Act, 1870.—SOUTHAMPTON TRAMWAYS CO. *v.* SOUTHAMPTON CORPORATION, *C.A.*; 81 L. T. 651.

See also Telegraph, 2.

TRESPASS.—See Highway, 2; Local Government, 3.

TROVER:—

*Waiver of tort—Wrongful sale of goods—Joint tortfeasors—Action against one in trover and for money had and received—Compromise by accepting proceeds of sale—Action of trover against the other—Election.*—The plaintiff's servant wrongfully sold goods of his master to the defendant, who knew that the servant was improperly dealing with them, and the servant paid the proceeds of the sale into his account at his bank. The plaintiff brought an action against the servant and the bank, claiming as against the servant damages for conversion of the goods, and in the alternative for money had and received, and as against the servant and the bank an injunction to restrain them respectively until the trial of the action from drawing out or parting with the sum of £1,500 then standing to the servant's credit at the bank. The plaintiff applied for an interim injunction as above upon an affidavit that £1,500 at the least could be specifically traced to the servant's account as being moneys paid by the defendant for the goods wrongfully sold. An interim injunction was granted, but no further steps in the action were taken, an agreement being arrived at between the plaintiff and the servant that £1,125 out of the £1,500 then at the bank should be paid to the plaintiff in full settlement of all claims against the servant, without prejudice to the plaintiff's claim against the defendant. This agreement was embodied in a judge's order, but no judgment was signed. Before the agreement was made the plaintiff had brought an action against the defendant claiming damages for the conversion of the goods.

Held, that the plaintiff had not, by his proceedings in the former action and by his dealings with the servant therein, elected to affirm the sale and to waive the tort, and the action against the defendant was maintainable.—RICE *v.* REED, *C.A.*; [1900] 1 Q. B. 54; 69 L. J. Q. B. 33; 81 L. T. 410.

See also Banker, 2.

TRUSTEE:—

1. *Breach of trust—American securities—One trustee in England and one in America—Delivery of such securities by former to latter—Loss of such securities*—Laches—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.—By his will a testator, who died in 1862, left his residuary estate to G. W. T. and others upon trust for his daughter A. H. T. for life for her separate use, with remainder in the events which happened as she should appoint. G. W. T., who survived the other trustees, died in 1879, having by his will appointed J. T. L. and W. H. S. executors thereof. J. T. L. resided in England and W. H. S. in America. Part of the testator's estate consisted of American securities, which J. T. L. when in America delivered into the custody of W. H. S., who regularly paid the income thereof to A. H. T., then the wife of J. B. A. In 1883 new trustees of the testator's will were appointed in England. Mrs. A. died in 1892, having by her will given her property to her husband. They both recognized W. H. S. as the American trustee. W. H. S. was then pressed to transfer these securities to the new trustees here, which he refused to do, and it then transpired that he had recently made away with them and was insolvent. In an action by the new trustees and J. B. A. against J. T. L. and W. H. S. to render J. T. L. liable for the loss,

Held, (1) that, as against the trustees, section 8 of the Trustee Act, 1888, was a good defence; (2) that as to J. B. A., inasmuch as he might at any

time since 1883, when the securities were intact, have brought an action in the name of his wife for the purpose of transferring the securities to the new trustees, and neglected to do so, he was guilty of *laches*, and could not now recover against J. T. L. —TAYLOR, RE, ATKINSON *v.* LORD, *Ch.D. Stirling, J.*; 81 L. T. 812.

2. *Breach of trust—Negligence—Immunity clause —Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 17 (3).—A fund consisting in part of a heritable bond was vested in trustees upon trust for a life annuitant and after his decease among the persons entitled in remainder absolutely. The bond was paid off on the 15th of July, 1887, but the trustees allowed their law agent to receive the money and retain it in his hands uninvested for more than six months, when the agent became bankrupt and the greater part of the money was lost.

Held (Lord Morris dissenting), that the trustees were guilty of a positive breach of trust and were liable to replace the money lost.—WYMAN *v.* PATERSON, *H.L.* (*Sc.*); [1900] A. C. 271; 69 L. J. P. C. 32; 82 L. T. 473.

3. *Charges for time and trouble—Will—Trustees' remuneration clause.*—A will provided that "Any trustee and executor hereunder, being a solicitor or other persons engaged in any profession or business, shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of my estate . . . whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person."

Held, that a trustee was not entitled to charge generally for his time and trouble in the management of the estate, but only for work done in the course of his profession or business.

*In re Fish*, [1893] 2 Ch. 413, distinguished.—ROBINSON, RE, CLARKSON *v.* DIXON, *Ch.D. Buckley, J.*, 698.

4. *Company—Sale by liquidator—Sale set aside—Interest on rents and profits—Breach of trust—Sale by trustee to himself—Liability of trustee.*—Where the sale of an undertaking of a company effected by its liquidator, nominally to another company, but really to himself, had been set aside on the ground of fraud, and the re-transfer of the undertaking to the original company had been ordered,

Held, that the liquidator, being in a fiduciary capacity, should repay the rents and profits which had accrued, but that he was not to be charged with interest on the same.—SILKSTONE HAIGH MOOR COAL CO. *v.* EDEY, *Ch.D. Stirling, J.*, 137; [1900] 1 Ch. 167; 69 L. J. Ch. 73.

5. *Felon—Removal from trusteeship—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53) *s.* 25—*R. S. C., ord.* 55, *r.* 13a.—The court has jurisdiction on an application by originating summons to make an order for the removal of a trustee who has been convicted of felony, but who is unwilling to retire.—DANSON, RE, *Ch.D. Byrne, J.*, 73.

6. *Resulting trust—Fund raised by means of circular inviting subscriptions—Death of objects of the fund—Unapplied surplus—Resulting trust for subscribers.*—Where funds are raised by circulars inviting subscriptions, and there is no declaration of trust, on the death of the objects of the fund there is a resulting trust for the subscribers.—ABBOTT FUND TRUSTS, RE, SMITH *v.* ABBOTT, *Ch.D. Stirling, J.*, 541; [1900] 2 Ch. 326; 69 L. J. Ch. 539.

7. *Will—Trust for sale of real estate—"Absolute and unfettered discretion."*—A direction to trustees to sell real estate at their absolute and unfettered discretion is not equivalent to a direction that they may sell or not at their absolute discretion; in the first case the time and mode of sale only were in their discretion, but they were not entitled to abstain from following the directions of the will because the tenant for life would then receive a better income; and, in consequence of the difficulty of deciding whether a sale would be beneficial in the interest of the tenant for life and those entitled in remainder regarded as one, the court ordered the application to stand over for three years, with liberty to the trustee to abstain, if he thought fit, from selling during that period, and with liberty for all parties to apply, but so as not to prevent the trustee from selling without application to the court if he considered a sale advisable.—ATKINS, RE, NEWMAN *v.* SINCLAIR, *Ch.D. North, J.*; 81 L. T. 421.

See also Administration, 8; Landlord and Tenant, 12; Practice, 9; Settled Land, 8; Solicitor, 10; Vendor and Purchaser, 21, 27; Will, 7, 24, 27.

VACCINATION:—

1. *Justices—Non-compliance with order—Evidence of non-vaccination—Burden of proof—Vaccination Act*, 1867 (30 & 31 *Vict. c.* 84), *s.* 31.—In proceedings under section 31 of the Vaccination Act, 1867, for non-compliance with a vaccination order, the burden of proving non-vaccination lies on the prosecution, and evidence that the fact of vaccination has not been notified to the proper officer is good *primâ facie* evidence from which non-vaccination may be presumed until the contrary is shown by the defendant.—OVER *v.* HARWOOD, *Q.B.D.*, 608; [1900] 1 Q. B. 803; 69 L. J. Q. B. 272.

2. Mandamus—*Alternative remedy—Legal remedy —Duty of guardians to appoint vaccination officer—Vaccination Act*, 1871 (34 & 35 *Vict. c.* 98), *s.* 5—The duty imposed upon guardians by section 5 of the Vaccination Act, 1871, to appoint a vaccination officer may be enforced by a writ of *mandamus* upon the application of the Local Government Board.—REG. *v.* LEICESTER UNION, *Q.B.D.*; [1899] 2 Q. B. 632; 81 L. T. 559.

VAGRANT:—

*Poor law—Person wilfully refusing or neglecting to maintain himself*—Delirium tremens—*Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.—A person who becomes chargeable to a parish or place during an attack of *delirium tremens* is not on that account a person who, being able to maintain himself, wilfully refuses or neglects so to do.—ST. SAVIOUR'S UNION *v.* BURBRIDGE, *Q.B.D.*, 685.

See also Justices, 3; Poor Law, 11.

VENDOR and PURCHASER:—

1. *Building scheme—Auction sale—Restrictive stipulations—Prior purchaser—Restrictive covenants—Benefit of covenants—Assigns of vendor.*—A vendor, the owner in fee of an estate, conveyed part of it to D., who, for himself, his executors, administrators, and assigns, entered into certain restrictive covenants with the vendor, his heirs and assigns. About the same time the vendor conveyed two other portions of the estate to two other purchasers, subject to restrictive covenants similar to D.'s covenants. The vendor subsequently sold the remainder of the estate in lots by auction subject to restrictive stipulations binding on each purchaser similar to D.'s covenants. The auction sale plan showed the whole estate sold and unsold. Action by the assigns of purchasers at the auction

sale to enforce against a lessee of an assign of D. the covenants entered into by D. with the vendor. The benefit of these covenants had never been expressly assigned to the purchasers at the auction sale.

Held, that there was a general building scheme affecting the whole estate; that D. was not bound by it for want of reciprocity; but that the plan and particulars of the auction sale raised an irresistible inference that the vendor intended the purchasers at that sale to have the benefit of D.'s covenants so that the purchasers at that sale could enforce D.'s covenants as assigns of the vendor.—NALDER *v.* HARMAN, *Ch.D. Kekewich, J.*; 82 L. T. 594.

2. *Conditions of sale—Construction—Liability for expenditure on property—Expense of compulsory sanitary work before completion — Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 141. —Conditions of sale provided for completion of the purchase on a certain day, and for the apportionment of rents, rates, taxes, and outgoings up to that day, and also in the event of completion being delayed beyond such day for the purchase-money bearing interest, or, at the vendor's option, he to receive the rents up to the day of actual completion of the purchase.

Held, that in the event of completion being delayed beyond the appointed day the vendor had the option of either claiming interest and accounting to the purchaser for rents since the appointed day, or of keeping all sums in fact received by the vendor since that day from tenants; but there being no words expressly relieving the purchaser from the obligation to discharge outgoings after the appointed day, and no ground for inserting anything by implication, the expense of complying with a sanitary notice under the Public Health (London) Act, 1891, after the appointed day and after the title having been accepted, must be borne by the purchaser.—BARSHT *v.* TAGG, *Ch.D. Cozens-Hardy, J.*, 220; [1900] 1 Ch. 231; 69 L. J. Ch. 91; 81 L. T. 777.

3. *Contract—Agreement by vendor to pay commission to undisclosed purchaser's agent—Action on contract by vendor—Claim by purchaser to set off agent's commission.*—The plaintiff was the owner of certain mineral rights in British Columbia, and he agreed with one Govan that Govan should have the option of finding a purchaser for the property, and that he would pay him, if successful, 10 per cent. of the price obtained from the purchaser. Govan succeeded in arranging a sale of the property to the defendant syndicate, of which, unknown to the plaintiff at that time, he was a director, and for whom he acted as agent in the transaction. Before the contract was entered into, however, and before the commission had become payable, the plaintiff learned Govan's position with regard to the defendants.

Held, that, the plaintiff having completed the contract without disclosing to the syndicate the agreement to pay commission to their agent, any part of the commission still in the plaintiff's hands could be recovered by the defendants.

By a second agreement between the plaintiff and Govan, made before the commission became due, it was agreed, in consideration of an immediate payment, that Govan should accept a less commission than he was entitled to under the original agreement. The syndicate subsequently became aware of this second agreement, and they demanded and received from Govan, in satisfaction of all claims from him, the amount he had received from the plaintiff.

Held (reversing the decision of Bigham, J.), that the defendants had not lost their remedy by their conduct after they had discovered the real facts of the case. Neither were they bound by the terms of the second agreement between the plaintiff and Govan as to a reduction of the amount of commission; and therefore, notwithstanding that second agreement and their demand and receipt from Govan of the reduced amount of the commission paid him, they were entitled to recover the balance from the plaintiff.—GRANT *v.* GOLD EXPLORATION Co., *C.A.*, 278; [1900] 1 Q. B. 233; 69 L. J. Q. B. 150; 82 L. T. 5.

4. *Contract for sale of lease of public-house—Date of completion—Deposit—Forfeiture—Conditions of sale—Time during which conditions imposed on vendor may be performed.*—When a lessee of a house, upon which there is a subsisting mortgage, agrees to assign the residue of his lease, and the purchaser agrees to buy it on the condition that the whole of the mortgage loan is transferred to him, and a deposit is paid by him and a time fixed for the completion of the contract, he is not justified in treating a refusal of the mortgagee, prior to the date fixed for completion, to transfer the whole, but only a part, of the loan as entitling him, the purchaser, to at once treat the contract as at an end, for the vendor has until the date fixed for the completion of the contract in which to obtain the consent of the mortgagee.—SMITH *v.* BUTLER, *C.A.*, 583; [1900] 1 Q. B. 694; 69 L. J. Q. B. 521; 82 L. T. 281.

5. *Conveyance—"All estate, term, and interest . . . in land coloured red in plan"—Covenant for title—Damages—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-section* 1 (a).—A conveyance expressed to be supplemental to a "principal agreement," wherein the vendor, "as beneficial owner," assigned and conveyed "all the estate, term, and interest . . . in the said piece of land coloured red in the said plan annexed to the said principal agreement, and a copy of which is annexed hereto," is a covenant by the vendor that he has the interest given to him by the principal agreement in the land coloured red.

Where the vendor has not all the land coloured red in the plan, he is liable to make good the damage which the purchaser suffers by the deficiency.—MAY *v.* PLATT, *Ch.D. Farwell, J.* 617; [1900] 1 Ch. 616; 69 L. J. Ch. 357.

6. *Conveyance—Land inclosed by purchaser in excess of parcels — Mistake — Expenditure — Acquiescence — Compensation—Costs.*—A purchaser in 1895 took possession of land in excess of that puported to be conveyed to him, and inclosed the land with a wall.

In 1899 the vendors brought an action for declaration of title.

Held, that the defendant was bound to give up so much of the land as did not pass by his conveyance; he was not entitled to compensation for his expenditure thereon; there was a duty on the part of the vendors under the conditions of sale to mark out the plots, which in this case they had not done, therefore there would be no order as to costs.—MARRIOTT *v.* REID, *Ch.D. Kekewich, J.* 82 L. T. 369.

7. *Conveyance—Parcels—Misdescription in deed—Evidence—Survey.*—A. was in possession of two contiguous estates, M. and P. In 1872 he sold M. to the respondents, and a survey was made on behalf of both parties to determine the boundary between M. and P., and the respondents thenceforward occupied the lands of M. as determined by the survey.

In 1881 the estate of P. was sold to the appellants

and in 1896 he commenced proceedings to establish that the respondents were occupying as part of the estate of M. lands which were really part of the estate of P.

It appeared that on measuring up the acreage of the plots of land specifically mentioned in the deeds as forming part of M., they were found to be less than the land actually occupied by the respondents.

Held, that the measurements in the deeds did not affect the title of the respondents to the lands included in the conveyance to them as determined by the contemporary survey.—BARNARD *v.* DE CHARLEROY, *P.C.*; 81 L. T. 497.

8. *Covenant—Restrictive covenant—Covenant running with the land—Intention—User—Restriction on number of houses—Private dwelling-house—Residential flats.*

Held (1) that when the benefit of a covenant has once been clearly annexed to a piece of land, it passes by assignment of that land, and may be said to run with it, as well in contemplation of equity as of law, without proof of special bargain or representation on the assignment; (2) that the erection of a block of flats is a breach of a covenant not to erect more than one messuage or dwelling-house on a piece of land; and (3) that such erection is also a breach of a covenant not to use such messuage otherwise than as a private residence.

Decision of Farwell, J. (*ante*, p. 202), affirmed as to (1) and (2), but reversed as to (3).—ROGERS *v.* HOSEGOOD, *C.A.*, 659.

9. *Covenant — Restrictive covenant — Meaning of "house" — Flats.* — The term "house" in a restrictive covenant in a conveyance on sale prohibiting the erection of more than a certain number of houses on a certain piece of land, will be construed, in the absence of indications to the contrary, as being equivalent to a block of flats, but not to each single flat.—KIMBER *v.* ADMAMS, *C.A.*, 322; [1900] 1 Ch. 412; 69 L. J. Ch. 296; 82 L. T. 136.

10. *Covenant—Restrictive covenant—Noxious or offensive trade — Business of fish-frying — Trade necessarily offensive.*—In an action to restrain a defendant from carrying on a fish-frying business in contravention of a covenant not to use his premises "for carrying on any offensive trade whatsoever,"

Held, that the business, although not necessarily offensive, must, having regard to its nature, the locality, and the manner in which it was carried on, be considered an offensive trade within the meaning of the covenant.—DEVONSHIRE (DUKE) *v.* BROOKSHAW, *Ch.D. Kekewich, J.*; 81 L. T. 83.

11. *Covenant—Restrictive covenant — Windows—"Buildings adjoining."*—Vendors sold and conveyed land, retaining adjacent land. The purchaser covenanted, "in the erection of buildings adjoin-the hereditaments of the vendors," not to insert windows overlooking their land. He nevertheless built houses with windows which did so overlook. Between the houses and the land of the vendors were gardens belonging to the purchaser, several yards long, and a fence.

Held, that the houses "adjoined" the land of the vendors within the meaning of the covenant. —IND *v.* HAMBLIN, *Ch.D. Buckley, J.*, 238; 81 L. T. 779.

12. *Covenant—Undisclosed restrictive covenant—Notice—Form of conveyance—Summons—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.—A vendor is not entitled to insert in the conveyance to the purchaser restrictive covenants or stipulations not expressly provided for in the contract. In determining such a question upon a summons under section 9 of the Vendor and Purchaser Act, 1874, it is not within the intention of that section that the court should be influenced by extraneous considerations, such, for instance, as the vendor's right to rescind the contract on the ground of mistake, or the fact that in omitting such restrictive covenants from his conveyance the vendor will be committing a breach of some other contract. The true intention of that section is to provide that distinct and isolated questions between the vendor and purchaser on the matters therein mentioned may be raised and determined in a summary way as and when they arise, and not to enable a general declaration as to title to be made.—WALLIS AND BARNARD'S CONTRACT, RE, *Ch.D. Kekewich, J.*, 57; [1899] 2 Ch. 515; 81 L. T. 382.

13. *Covenant not to use as an inn or beerhouse—Acquiescence in sale—Waiver.*—Acquiescence for a long period of years in the use of freehold premises in a manner inconsistent with the purpose of a restrictive covenant contained in the conveyance will amount to a waiver or release of the covenant.

*Gibson* v. *Doeg*, 6 W. R. 107, 2 H. & N. 615, followed.—HEPWORTH *v.* PICKLES, *Ch.D. Farwell, J.*, 184; [1900] 1 Ch. 108; 69 L. J. Ch. 55; 81 L. T. 818.

14. *Freeholds—Sale by executors—Executor named but not proving — Concurrence — Disclaimer — Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *Part I.*—Real estate under section 1, sub-section 1, of the Land Transfer Act, 1897, devolves to and becomes vested in all the executors named in the will who survive the testator, and in order that the legal estate may pass on a conveyance by the executors who have obtained probate, it is necessary for those executors to whom power to prove the will has been reserved, either to expressly disclaim or to concur in such conveyance.—PAWLEY AND LONDON PROVINCIAL BANK'S CONTRACT, RE, *Ch D. Kekewich, J.*, 107; [1900] 1 Ch. 58; 69 L. J. Ch. 6; 81 L. T. 507.

15. *Glebe—Contract for sale by vicar—Entry by purchaser—Payment of interest on purchase-money — Non-payment of principal — Ecclesiastical Commissioners — Action by — Specific performance — Vendor's lien—Ecclesiastical Leasing Acts*, 1842 (5 & 6 *Vict. c.* 108) *and* 1858 (21 & 22 *Vict. c.* 57).—In 1873 a vicar, with the approval of the Ecclesiastical Commissioners and with the consent of the patron of his living, agreed to sell the glebe lands of the vicarage under the powers of the Ecclesiastical Leasing Acts, 1842 and 1858, for £24,963, to the trustee of a settled estate who had power to invest trust funds in the purchase of land.

The contract was entered into with the consent of the then tenant for life of the settled estate, and the Ecclesiastical Commissioners were parties to and executed it.

The title was accepted and the then tenant for life entered into possession, and paid the vicar interest on the purchase-money. The vicar died, the estate devolved, and payment of the interest (which was more than an investment of the purchase-money would have produced) was continued by the tenant for life for the time being to the vicar for the time being until 1896, when, the purchase-money being still unpaid, the Ecclesiastical Commissioners brought an action against the present vicar, the tenant for life, and the legal personal representatives of the trustee, for specific performance of the contract and damages, or an account and a declaration that they were entitled to a lien on the lands and to enforcement thereof.

Held, that the contract was not enforceable against any person or persons subsequently becoming entitled to the estate; that the vendors were not entitled, by subrogation or otherwise, to be placed in the same position as the trustee would have been in had he personally discharged his liability on the contract, nor could they claim payment out of any assets in the hands of the trustees liable to be laid out in land or distributed in payment of portions to the relief of the settled estate; and that they were entitled to nothing more than a vendor's lien on the land sold.—ECCLESIASTICAL COMMISSIONERS *v.* PINNEY, *Ch.D. Byrne, J.*; [1899] 2 Ch. 729; 69 L. J. Ch. 139; 81 L. T. 536.

16. *Leaseholds — Assignment of public-house — Covenant by lessee not to assign without lessor's consent —Consent unreasonably withheld—Forcing title on purchaser—Specific performance—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78).—The lessee of a public-house contracted to sell the lease to a brewery company. The lease contained a covenant that the lessee would not assign, underlet, or otherwise part with the demised premises without the written consent of the lessor, but that such consent should not be unreasonably withheld. The lessor refused to consent chiefly on the ground that he wished to retain the house as a "free house."

Held, that the vendor had not made out a sufficient title which could be forced on the purchaser.—MARSHALL AND SALT'S CONTRACT, RE, *Ch.D. Byrne, J.*, 508; [1900] 2 Ch. 202; 69 L. J. Ch. 542.

17. *Leaseholds—Sale subject to consent of lessor—Duty of vendor to obtain consent—Vendor inducing lessor to refuse—Measure of damages.*—When a lessee whose lease prohibits assignment without the written consent of the lessor enters into an agreement, expressed to be subject to the lessor's consent, to sell the property, he is bound to do his best to obtain such consent. If the vendor does not perform that duty, and still more if he actually induces the lessor to refuse, he is liable to an action for damages in which the purchaser may recover not only his deposit with interest and costs, but also damages for the loss which he has sustained owing to the vendor's omission to obtain the required consent.

*Bain* v. *Fothergill*, 23 W. R. 261, L. R. 7 H. L. 158, distinguished.

In such a case, if it appears that the vendor has made no effort to obtain the lessor's consent, it will be presumed against him that he could have procured it; and it is then for him to prove that he could not have induced the lessor to accept the purchaser as a tenant.—DAY *v.* SINGLETON, *C.A.*, 18; [1899] 2 Ch. 320; 81 L. T. 306.

18. *Leaseholds—Title—Assignment of lease recited, but not abstracted in chief—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-section* 6—*Expense of verification of abstract.*—A vendor contracted to sell two leasehold houses held under separate leases. An assignment of one of the leases to an intermediate assignee was not abstracted in chief in the abstract of title, though it was recited in the abstract of a subsequent assignment in the same abstract of title.

Held, that the assignment must be abstracted in chief and verified at the vendor's expense.—STAMFORD BANKING CO. *v.* KNIGHT, *Ch.D. North, J.*, 244; [1900] 1 Ch. 287; 69 L. J. Ch. 127; 81 L. T. 708.

19. *Party wall — Adjoining owners — Implied contract to pay half cost of party wall.*—A building society, who were the mortgagees of a building estate, joined with the mortgagor in selling a site on the estate to a purchaser; the conveyance contained a covenant by the purchaser to perform the building and other conditions in the schedule, one of which was that the purchaser first building a party wall should be repaid half the value by the purchaser of the adjoining site. The purchaser, having built a house on the site, mortgaged it to the building society, who subsequently under their power of sale sold it to the plaintiff. At a later date the building society, in exercise of their power of sale under the original mortgage of the building estate, sold the residue of the estate to a company, who in their turn sold to the defendants a site adjoining the plaintiff's house, the agreement of sale containing a similar (though not verbally identical) condition as to party walls to that above mentioned. The defendants built a house on their site, making use for that purpose of the plaintiff's party wall, half of which (as provided by the building conditions) was built on the plaintiff's, and half on the defendants', land.

Held, that the circumstances raised an implied contract on the part of the defendants to pay half the cost of the party wall to the plaintiff as the owner of the adjoining house, notwithstanding that the wall had in fact been built by the plaintiff's predecessor in title.—IRVING *v.* TURNBULL, *Q.B.D.*; [1900] 2 Q. B. 129; 69 L. J. Q. B. 593.

20. *Principal and agent—Sale by agent—Authority —Contract for sale.*—An authority given by the owner of land or houses to an agent to sell them is *primâ facie* an authority to make a sale effectual in point of law, including the execution of a contract in writing where the law requires it.—ROSENBAUM *v.* BELSON, *Ch.D. Buckley, J.*, 522; [1900] 2 Ch. 267; 69 L. J. Ch. 569; 82 L. T. 658.

21. *Rescission—Common mistake—Settled land—Capital moneys.*—A tenant for life sold a public-house, portion of a settled property. After conveyance it was found that the public-house was subject to a reversionary lease, granted by the predecessor in title of the tenant for life, of which all parties were ignorant.

Held, that this did not furnish any ground for rescission.

But held, applying the principle of *Bennett* v. *Wyndham* (4 De G. F. & J. 259), that the repurchase of the public-house by the trustees out of capital moneys in their hands might be sanctioned.—TYRELL *v* WOODHOUSE, *Ch.D. Cozens-Hardy, J.*; 82 L. T. 675.

22. *Reversionary interest—Expectant heir—Unconscionable bargain—Sales of Reversions Act*, 1867 —*Reversioner of "full age and full intelligence."*—Where the plaintiff sold a share in a reversionary interest, to which he was entitled, for such a sum that the interest on the expectation was about 10 per cent., although the plaintiff was of full age and of full intelligence, and had written a letter prior to the sale showing that he understood the exact nature of the bargain into which he was about to enter,

Held, that the onus was on the defendent to show that there had been no unconscionable bargain.—BRENCHLEY *v.* HIGGINS, *Ch.D. Farwell, J.*; 82 L. T. 143.

23. *Sale by order of the court—Purchaser for value without notice of superior title—Conveyancing Act* 1881 (44 & 45 *Vict c.* 41), *s.* 70, *sub-section* 1.—An order of the court under the Conveyancing Act 1881, s. 70, sub-section 1, which purports to dest

with property belonging to the vendor, which turns out not to be his, does not confer a good title on the purchaser.

Decision of Romer, J. (47 W. R. 493), affirmed. —JONES *v.* BARNETT, *C.A.*, 280; [1900] 1 Ch. 370; 69 L. J. Ch. 242; 82 L. T. 37.

24. *Specific performance—Open contract—Restrictive covenants—Compensation.*—In the case of an open contract the court will not decree specific performance with compensation where a vendor has entered into an open contract to sell property which, unknown to the vendor, is subject to restrictive covenants, and where there is no condition in the contract as to compensation, as to decree specific performance with compensation in such a case would be making a new contract, and not enforcing the one which the parties agreed to.

The very great difficulty in assessing compensation in such a case is another ground for refusing such relief.—RUDD *v.* LASCELLES, *Ch.D. Farwell, J.*, 586; [1900] 1 Ch. 815; 69 L. J. Ch. 396; 82 L. T. 256.

25. *Specific performance—Payment by instalments —Purchaser's repudiation of contract before last instalment—Acts amounting to—Right to recover money paid.*—The plaintiff was the purchaser and the defendant was the vendor of certain land under a written agreement providing for payment of the purchase-money by certain instalments. By this agreement if the purchaser made default in payment of any instalment for thirty days the whole price was to become immediately due, but provision was made for this time being extended by agreement; and in the event of default being made for thirty days in payment of the whole of the unpaid instalments with interest the vendor was empowered to resell. The plaintiff took possession under this agreement and paid all the instalments except the last one; the defendant requested payment of it, but did not give the plaintiff notice that if it was not paid he would treat the contract as abandoned. The plaintiff then disappeared. More than a year afterwards the defendant let the property to B. with an option to purchase, and B. was now in possession. The plaintiff, having returned, thereupon made an offer to the defendant to "make the final instalment and settlement of the ground purchased," which offer was refused.

The plaintiff then brought an action for specific performance of the above agreement and damages, or alternatively damages for breach of contract and repayment of the purchase-money with interest. The claim for specific performance was practically abandoned at the hearing.

Held, that the plaintiff had not, in fact, by his conduct repudiated his contract; and the defendant was not justified in treating the contract as abandoned; and that the plaintiff was entitled to damages, but not to specific performance.

Decision of Cozens-Hardy, J. (*ante*, p. 42, [1899] 2 Ch. 710), reversed.—CORNWALL *v.* HENSON, *C.A.*; [1900] 2 Ch. 298; 69 L. J. Ch. 581; 82 L. T. 735.

26. *Specific performance—Property used as a disorderly house—Rescission of contract.*—Property sold by auction under the description of an eligible freehold property for investment, comprising a house and shop let on a quarterly tenancy, was discovered before completion to be used by the tenant as a disorderly house. Neither the vendors nor the purchaser knew previously that the house was being improperly used. The agreement of tenancy contained a covenant by the tenant not to use the house as a disorderly house, and a proviso for re-entry in case of breach of covenant.

Held, (1) (reversing Cozens-Hardy, J., 47 W. R. 479, [1899] 1 Ch. 879) that specific performance ought not to be granted, inasmuch as the purchaser, unless he took steps to prevent the improper use of the property by the tenant, would become liable as lessor to criminal proceedings under the Criminal Law Amendment Act, 1885, by reason of the state of the property at the time of the sale; (2) (affirming Cozens-Hardy, J.) that this was not a ground for rescission of the contract.

*Lucas* v. *James*, 7 Hare 410, distinguished.—HOPE *v.* WALTER, *C.A.*; [1900] 1 Ch. 257; 69 L. J. Ch. 166; 82 L. T. 30.

27. *Specific performance—Title—Trustee for sale who has purchased from himself—Effect of intermediate executory contract of sale to third party.*—Specific performance of a contract for the sale of land will not be enforced where the title disclosed by the vendor was a previous purchase made by him, from himself selling in the character of a trustee for sale.

A trustee cannot adopt for his own benefit an executory contract to purchase to which he is a party as vendor.

*Parker* v. *McKenna*, L. R. 10 Ch. App. 96, approved.—WILLIAMS *v.* SCOTT, *P.C.*; [1900] A. C. 499; 82 L. T. 727.

See also Contract, 10; Easement, 6; Frauds, Statute of, 3; Local Government, 18; Practice, 40; Settled Land, 4.

VOLUNTARY GIFT:—

*Misrepresentation—Inducement of gift—Right of donor to recover back gift.*—Where a voluntary gift is obtained by means of an innocent misrepresentation of fact on the part of the donee, the donor on discovery of the mistake has a right in equity to recover his gift.

*Wilson* v. *Thornbury* L. R. 10 Ch. App. 239, not followed.—GLUBB, RE, BAMFIELD *v.* ROGERS, *C.A.*; [1900] 1 Ch. 354; 69 L. J. Ch. 278; 82 L. T. 412.

WAIVER.—See Bankruptcy, 8; Company, 14; Landlord and Tenant, 19; Master and Servant, 8; Trover; Vendor and Purchaser, 13.

WASTE.—See Landlord and Tenant, 27; Will, 25, 26.

WATER:—

1. *Canal—"Waste water"—Wrongful abstraction of water—Damages for tort—Waiver of tort—Profits in lieu of damages.*—In 1792 power was obtained by a company of proprietors to construct the A. Canal, and provision was made for the waste water of that canal passing into a tunnel belonging to the Duke of B. which was connected with the B. Canal.

In 1794 power was given to a company by an Act of that year to construct the R. Canal, and to connect the same with the B. Canal. Provision was made for the A. Canal making a junction with the R. Canal at a specified place, and it was provided that the waste water of both canals when so joined together should be afterwards conveyed into the duke's tunnel. By the same Act the owners of lands within twenty yards of the R. Canal were empowered to draw therefrom such quantities of water as should be sufficient to supply steam engines with cold water for the sole purpose of condensing steam used for working such engines.

By a further Act of 1800 it was provided that all the waste water of the A. Canal, except such as should necessarily flow over the waste weirs of that canal, should be discharged into the R. Canal, and that the waste water so discharged and the waste water of the R. Canal, when so united in the said

canal, should be at all times conveyed either into the B. Canal or into the duke's tunnel at the expense of the R. Canal Co.

Since 1830 the R. Canal Co. had supplied water from their canal to works situate alongside the canal for purposes other than condensing steam, the quantity being stated to be many millions of gallons per week.

In 1885 the plaintiffs under statutory powers acquired the B. Canal, with the statutory obligations of maintaining and keeping it in good working order and condition and of preserving the supplies of water thereto, so that the canal might at all times be kept open and navigable for the use of all persons desirous to navigate and use the same without any unnecessary hindrance, interruption, or delay.

The plaintiffs brought an action for an injunction to restrain the alleged illegal abstraction and sale of water from the R. Canal by the defendants, and an account of profits and damages.

The plaintiffs contended that they had the right to waive the tort which had been committed and elect to affirm what had been done and take the profits made by the defendants in lieu of damages.

Held, that, as the defendants were a canal company and not a waterworks company, the true meaning of "waste water" in the statutes was water not legitimately needed for navigation purposes, or flowing over the waste weirs, or supplied for the purpose of condensing steam, and which would in the ordinary course pass down into and subsequently become the united water of the R. Canal and the A. Canal.

Held, therefore, that the plaintiffs were entitled to the injunction claimed by them, and an inquiry in respect of damages.—MANCHESTER SHIP CANAL CO. *v.* ROCHDALE CANAL CO.; *C.A.*; 81 L. T. 472.

2. *Riparian owner—Right to flow of water—Water flowing in defined channel—Artificial construction at source of spring—Local authority—Public well—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55).—The fact that the issuing point of a spring has at some remote period been built round and over in order to improve its issuing from the earth will not justify any interference with the water at its source, whereby its natural flow will be diminished.

*Dudden* v. *Clutton Union*, 1 H. & N. 627, 5 W. R. C. L. Dig. 242, followed.—MOSTYN *v.* ATHERTON, *Ch.D. Byrne, J.*, 168; [1899] 2 Ch. 360; 81 L. T. 356.

3. *Waterworks—Metropolis—Fire hydrants—Right of company to use—User for extinguishing fire—User for other purposes—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 3, 37-43—*Metropolitan Fire Brigade Act*, 1865 (28 & 29 *Vict c.* 90), *s.* 32—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *s.* 34—*London County Council (General Powers) Act*, 1894 (57 & 58 *Vict. c. ccxii.*), *s.* 4.—A waterworks company which, under statutory obligation, has provided hydrants at the request, and maintained and repaired them at the expense, of the London County Council, and which, by the various statutes above referred to, is bound to provide a supply of water for extinguishing fire and for certain other specified purposes, and to allow all persons to use the water for extinguishing fire without making compensation, may use the hydrants for other purposes in addition to the supply of water for extinguishing fires, and such additional user may take place without the consent of the London County Council, and the right may, with the permission of the water company, be exercised by other persons.—LONDON COUNTY COUNCIL *v.* EAST LONDON WATERWORKS CO., *Q.B.D.*, 252; [1900] 1 Q. B. 330; 69 L. J. Q. B. 304; 82 L. T. 268.

4. *Waterworks—Recovery of arrears of water rate — Bankruptcy — Adjudication — "Owner and occupier"—"Incoming tenant"—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 53—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *s.* 48.—A trustee in bankruptcy who takes over the bankrupt's premises is an "incoming tenant" within the meaning of section 48 of the Metropolis Water Act, 1871, and is entitled to a supply of water without being obliged to defray the arrears of water rate left unpaid by the bankrupt.—FLACK, RE, BERRY, EX PARTE, *Bkcy.*, 446; [1900] 2 Q. B. 32; 69 L. J. Q. B. 458; 82 L. T. 503.

See also Local Government, 20; Statute.

WAY.—See Contract, 4; Easement, 3-6.

WEIGHTS and MEASURES:—

1. *Barrel used as measure — No facility by local authority for verification and stamping—Weights and Measures Act*, 1878 (41 & 42 *Vict. c.* 49), *ss.* 29, 44.—A local authority are not precluded from prosecuting a person for using a measure not stamped in conformity with section 29 of the Weights and Measures Act, 1878, by reason of having failed to fix times and places for verifying and stamping weights and measures in accordance with section 44 of the same Act.—HAYLEY *v.* TAYLOR, *Q.B.D.*; 82 L. T. 803.

2. *False or unjust weighing machine—Weighing tea—Paper bag stuck into weighing machine—Weights and Measures Act*, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.—In order to facilitate and quicken the process of weighing out tea into small packets the respondent's servants placed a piece of paper, of somewhat less than the weight of the wrapper, in the weighing machine between the scoop in which the tea was and the cup which supported it, and kept it there while the tea was being weighed. The machine without the piece of paper weighed true, but with the piece of paper placed in the position described it weighed untrue.

Held, that the weighing machine was false or unjust within the meaning of section 25 of the Weights and Measures Act, 1878. — LANE *v.* RENDALL, *Q.B.D.*, 153; [1899] 2 Q. B. 673; 68 L. J. Q. B. 8; 81 L. T. 445.

WILL:—

1. *Accumulations—Direction to accumulate—Rents and royalties from mining leases—Tenants for life—Remaindermen.*—A testator devised his residue upon trust to convert with power to postpone conversion for twenty-one years and with a direction that the surplus income of the unconverted estate during the twenty-one years and all accumulations thereof should go in augmentation of capital. The residue was settled on trusts for tenants for life and remaindermen. The trustees under powers in the will granted a mining lease, and retained the leasehold property unconverted for more than twenty-one years.

Held, that the rents and royalties received under the mining lease during the twenty-one years ought to be invested, and that the income therefrom ought to be invested and accumulated.

Held, also, that after the twenty-one years the tenants for life of settled shares in the residue were entitled to receive out of the rents and royalties such an annual sum as in the opinion of the court would under all the circumstances of the case be a fair equivalent for the annual income that would have resulted if the estate had been converted.

The rule laid down in *Meyer* v. *Simonsen*, 5 De G. & Sm. 723, and *Brown* v. *Gellatly*, L. R. 2 Ch. 751, approved.—WENTWORTH *v.* WENTWORTH, *P.C.*; [1900] A. C. 163; 69 L. J. P. C. 13; 81 L. T. 682.

2. *Ademption—Gift by testator within the period of twelve months prior to his death of property to legatee—Advancement—Sum to be brought into account—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-section* 1 (c); *s.* 9, *sub-section* 1.—Where a gift *inter vivos* of property by a testator to a legatee constitutes an ademption *pro tanto* of the legacy to such legatee under the will, the sum to be brought into account by such legatee is the amount advanced less the estate duty charged on such gift.—BEDDINGTON, RE, MICHOLLS *v.* SAMUEL, *Ch.D. Byrne, J.*, 552; [1900] 1 Ch. 771; 69 L. J. Ch. 374; 82 L. T. 557.

3. *Ademption—Specific legacy.*—A testatrix by her will, made in February, 1897, gave a moiety of a trust fund of £8,000 on deposit at V. & Co., to which she was entitled, subject to a prior life interest, to her nephews and nieces. She bequeathed her residue, including money at her bankers and on deposit with V. & Co., to S. M. M.

In March, 1897, the prior life interest determined; and on the 14th of December, 1897, £4,000 was transferred by the trustee to the testatrix's deposit account with V. & Co.

Held, that the plain rule in cases of ademption was to inquire whether the specific thing given remained or not at the death of the testator. Here the £4,000 (the moiety of the trust fund of £8,000) was intact, and was not ademed either in whole or in part.—VICKERS *v.* MELLOR, *Ch.D. Kekewich, J.*; 81 L. T. 719.

4. *Construction—"Die unmarried"—Secondary meaning.*—Testatrix by her will directed her trustees to divide a certain fund between two beneficiaries if her brother "shall die unmarried and without leaving any children or a child who shall attain twenty-one years." The brother died leaving a widow, but no child, surviving him.

Held, that, in this case, the words "die unmarried" meant "die without leaving a wife," and that there was, therefore, an intestacy.—CHANT, RE, CHANT *v.* LEMON, *Ch.D. Cozens-Hardy, J.*, 646; [1900] 2 Ch. 345; 69 L. J. Ch. 601.

5. *Construction—"Eldest son" entitled to possession*—A will limited successive life estates in Blackacre to members of a class, other than and except an eldest or only son for the time being entitled to the possession or receipt of the rents of Whiteacre as tenant for life or a greater estate. A tenant in tail in remainder of Whiteacre joined with his father, the tenant for life, in a sale of which he had the benefit.

Held, that on the death of his father he became an eldest son within the exception, and incapable of succeeding to a life estate in Blackacre under the limitations of the will.—SHUTTLEWORTH *v.* MURRAY, *Ch D. Cozens-Hardy, J.*; [1900] 1 Ch. 795; 69 L. J. Ch. 423; 82 L. T. 668.

6. *Construction—Gift of real estate to A., but, should she die without child or children, gift over—Executory limitation—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 10.—A gift of real estate to A. for her absolute use—but, should she die without child or children, then over—vests in A. an absolute interest subject to an executory limitation over in the event of her not having any child who survives her or attains twenty-one years during her life.—BOOTH, RE, PICKARD *v.* BOOTH, *Ch.D. Byrne, J.*, 566; [1900] 1 Ch. 768; 69 L. J. Ch. 474.

7. *Construction—Trust for sale—Trustee's indemnity and reimbursement clause—Unexhausted residue—Resulting trust.*—A gift of property to trustees on trust for sale, followed by the declaration of a particular trust which does not exhaust the whole of the property thus given, will be treated as creating a primary general trust of the whole of such property, so that there be will a resulting trust of the unexhausted residue in favour of the testator's heir and next-of-kin. The insertion of a trustee's indemnity and reimbursement clause will further strengthen the conclusion thus drawn from the presence of the trust for sale.—WEST, RE, GEORGE *v.* GROSE, *Ch.D. Kekewich, J.*, 138; [1900] 1 Ch. 84; 69 L. J. Ch. 71; 81 L. T. 720.

8. *Construction — Vesting — Remoteness — Maintenance.*—A testator bequeathed £12,000, to be invested within ten years after his decease, upon trust for his daughter for life, then, as to £1,000, part thereof, for her husband for life, and subject thereto for all the children of the daughter, when they should attain twenty-five, but not before, in equal shares; and until the £12,000 should be invested, the testator directed the trustees to pay to his said daughter, or, in the event of her decease, to her said husband and children, interest on "their respective portions." In default of children the fund to form part of the residue. He bequeathed another sum of £12,000 upon similar trusts for another daughter, her husband, and children. The residue he devised and bequeathed to his two sons absolutely in equal shares. The testator empowered his trustees to raise any part (not exceeding one moiety) of the expectant share of any grandchild of his under his will, and apply it for the advancement of such grandchild. He also empowered them to apply all or any part of the income arising from the expectant share of such grandchild, after the death of the tenant for life, for the maintenance and education of such grandchild.

By a codicil the testator revoked the gift of one moiety of his residuary estate to one of his sons, and directed that such moiety should be held on trust for his said son during his life, and after his death for the child or children of his said son absolutely on attaining twenty-five. In the event of a child dying before attaining twenty-five, such child's share was to go to the testator's other son absolutely.

Held, that the children of the son and of the two daughters took under the will vested interests in their shares, and that, therefore, the gifts to them were not void for remoteness.

*Fox* v. *Fox*, 23 W. R. 314, L. R. 19 Eq. 286, approved. — TURNEY, RE, TURNEY *v.* TURNEY, *C.A.*, 97; [1899] 2 Ch. 739; 69 L. J. Ch. 1; 81 L. T. 548.

9. *Conversion—Bequest to trustees for the benefit of certain persons and their children—Direction to carry on testator's business—"Household furniture and effects"—Whether including jewellery, horses, and carriages.*—A testator gave all his real and personal estate to trustees upon trust as to one-fourth part for the children of A. E. L., as to another fourth for A. B. F., as to another fourth the income thereof to P. H., and as to the remaining fourth for W. H., in each case for their lives, and he declared that if any of them died without issue their share should form part of his residuary estate. And he gave his household furniture, books, pictures, painting, engravings, plate, linen,

china, and other effects to the said A. B. F. and P. H. in equal shares. On an originating summons asking (1) what estates and interests in the estate were taken by the above-mentioned persons, and (2) whether the testator's jewellery and horses were included in the above-mentioned gift of furniture and other effects,

Held, (1) that the rule in *Howe* v. *Lord Dartmouth*, 7 Ves. 137, was not applicable to any share except that given upon trust for P. H., and that the testator having directed his trustees to carry on his business the beneficiaries other than P. H. were entitled to the profits thereof as they arose; (2) that following the rule in *Parker* v. *Marchant*, 1 Y. & C. Ch. 290, the word "effects" must be limited to things of the same kind as previously enumerated. That the jewellery therefore did not, but that the carriages and horses did, fall under that description. —HAMMERSLEY, RE, HEASMAN *v.* HAMMERSLEY, *Ch.D. Stirling, J.*; 81 L. T. 150.

10. *Devise of real estate—Subsequent conveyance to testator—Revocation of devise by operation of law.*—A testator, by his will made in 1832, devised certain freehold property which he had contracted to purchase, but the purchase of which had not been completed at the date of the will, and all other his real estate wheresoever and whatsoever, to his three sons in manner therein mentioned. In 1834 the property which the testator had contracted to purchase was conveyed to him in fee to uses to bar dower. In 1835 the testator died.

Held, that the conveyance of 1834 operated as a revocation of the devise in the will of the freehold property so conveyed.—JACOB *v.* JACOB, *H.L.*; 82 L. T. 270.

11. *Evidence—Ambiguity—Admission of extrinsic evidence.*—In endeavouring to construe a will, extrinsic evidence is admissible in order explain an ambiguity in the words of the will themselves, but not in order to explain the intention of the testator.

A testator, after giving the usual direction as to the payment of his debts and funeral and testamentary expenses, and after bequeathing a number of general pecuniary legacies, gave and bequeathed "all the residue and remainder" of two specific mortgage funds, after payment of his just debts and funeral and testamentary expenses, to certain persons therein mentioned. There was no general residuary bequest. Extrinsic evidence was offered to show that the testator possessed at the time of his making his will no residuary property out of which to provide for the general pecuniary legacies already referred to. It appeared, however, that at the date of his death the testator possessed residuary property sufficient for the purpose in question.

Held (Rigby, L.J., dissenting), that, as a matter of fact, the words of the will, "all the residue and remainder" were themselves ambiguous; that extrinsic evidence was accordingly admissible to show the state of the testator's property at the time of his making his will; that the general pecuniary legacies were payable out of the mortgage funds; and that there was an intestacy with respect to the residuary property which the testator had at the date of his death.

*Per* Rigby, L.J.—The words of a will are not themselves ambiguous unless, after full consideration, it is determined judicially that no interpretation whatever can be given them.—GRAINGER, RE, DAWSON *v.* HIGGINS, *C.A.*, 673.

12. *Estate tail—Fee expectant in remainder on termination of estate tail—Direction to trustees to convey—Construction—Intestacy—Heir by purchase or by descent.*—A testator who died in 1815 by his will gave an equitable estate tail in certain lands to his daughter, and after her death directed his trustees (in whom was the legal estate) to legally convey the said lands unto such heirs of his daughter as should attain twenty-one, and to their several and respective heirs. The testator's daughter died without having barred her estate tail, leaving a son who attained twenty-one. He died in 1894 intestate and unmarried.

Held, that this grandson of the testator took an estate in fee simple under the will, and therefore his heir-at-law was entitled to the property.—FOXWELL *v.* VAN GRUTTEN, *H.L.*, 653; 82 L. T. 272.

13. *Estate tail — Intention — Revocation — Construction of will—Wills Act* (1 *Vict. c.* 26), *s.* 28.—A testator by his will devised his fee simple estates to trustees to give the rents to S. M.; but in case S. M. encumbered the lands or rents at any time the testator revoked the gifts of the rents "from S. M. and from his heirs male," or should S. M. not forfeit the same and should "die without male issue him surviving," he bequeathed the rents and estates to R. M. and his issue male in tail male,

Held, that upon the true construction of the whole will the testator's intention was clear that S. M. should take an estate tail.

Decision of Irish Court of Appeal, [1899] 1 I. R. 359, affirmed.—CRUMPE *v.* CRUMPE, *H.L.*; [1900] A. C. 127; 69 L. J. P. C. 7; 82 L. T. 130.

14. *International law—Conflict of laws—Unattested will—Valid according to French law—Bequest of leaseholds in England*—Lex rei sitæ—*Wills Act* (1 *Vict. c.* 26).—The will of a foreigner domiciled abroad, though valid according to the *lex domicilii*, and though admitted to probate in England, will not pass leaseholds in England unless executed in accordance with the formalities required by the Wills Act.—PÉPIN *v.* BRUYÈRE, *Ch.D. Kekewich, J.*, 671.

15. *International law—Foreign domicil of testatrix—Capacity to dispose of property—Power of appointment—Exercise by will.*—A domiciled Frenchwoman having, under an English settlement, a special power of appointment by will over funds in England, can exercise the power in such a way as to dispose of the property in a manner inconsistent with her position under the law of France. The exercise of such a power is not a disposition of property belonging to the testatrix.—POUEY *v.* HORDERN, *Ch D. Farwell, J.*; [1900] 1 Ch. 492; 69 L. J. Ch. 231; 82 L. T. 51.

16. *International law—Power of appointment in English will—Execution of power by will of French domiciled alien—Domicil—Wills Act* (1 *Vict. c.* 26), *ss.* 9 10, 27—*Lord Kingsdown's Act* (*Domicil*) (24 & 25 *Vict. c.* 114)—*Naturalization Act*, 1870 (33 *Vict. c.* 14).—M. F., the wife of a French subject domiciled in France, was the donee under an English will of a power of appointment of a fund of £2,000. By her holograph French will she declared that she bequeathed to her husband everything which she possessed or might possess, and declared that the will should be considered in England the same as in France. She had no other property but the fund in question. The will had been admitted to probate and letters of administration had been granted with the will annexed.

Held, that it was competent for her to exercise the power of appointment by such a will as was recognized by the Probate Division; that, as the law of France did not recognize the mode of disposition by appointment, and a French court

would consider and apply the English rules of law applicable to the construction of such a will for the purpose of carrying out the intention of the testatrix, such rules were to be applied here, with the result that there was a valid execution of the power.

*D'Huart* v. *Harkness*, 13 W. R. 513, 34 Beav. 324, followed.

*In re Kirwan's Trusts*, 32 W. R. 581, 25 Ch. D. 373, and *Hummel* v. *Hummel*, 46 W. R. 507, [1898] 1 Ch. 642, considered.—PRICE, RE. TOMLIN *v.* LATTER, *Ch.D. Stirling, J.*, 373; [1900] 1 Ch. 442; 69 L. J. Ch. 225; 82 L. T. 79.

17. *International law—Pre-nuptial will—Subsequent marriage of testator—Revocation—Domicil—Adoption of foreign matrimonial* régime *by express or inferred agreement—Wills Act*, 1837, *s.* 18.—The validity of a pre-nuptial will, so far as it affects movable property, depends not only on the law of the domicil of the testator at the time of his death, but also on the law of his domicil at the time of his making his will and at the time of his subsequent marriage; but the domicil of the testator on each of these occasions must be determined by the English Court of Probate in the English sense —*i.e.*, according to those legal principles which are recognised in this country and are part of its law.

To acquire an English domicil in the English sense, not only is a change of residence and place of business required, but there must be an intention to adopt the new residence permanently or for an indefinite period.

According to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends *primâ facie* on the domicil of the husband in the English sense at the time of the marriage; and, even assuming that it is possible for the parties to accept in this respect by express agreement (*e.g.*, by marriage settlement) a matrimonial *régime* different from that of the country of the husband's domicil at the time of the marriage, yet no such intention ought to be circumstantially inferred in the absence of such express agreement.

*Per* Vaughan Williams, L.J.—The rule that a pre-nuptial will is revoked by the subsequent marriage of the testator is part of the matrimonial *régime* of England.

Decision of Jeune, P. (68 L. J. P. 106), reversed. —MARTIN, RE, LOUSTALAN *v.* LOUSTALAN, *C.A.*, 509; [1900] P. 211; 69 L. J. P. 75; 82 L. T. 806.

18. "*Issue*"—"*Children*"—*Construction of will.* —Where in a deed, will, or other document a word has a clear and definite meaning when used in one part, but has not when used in another, the presumption is that the word is intended to bear the same meaning in the latter case as in the former.

Twelve distinct legacies contained gifts over to the "issue" of legatees dying in the testator's lifetime. Except in the case of the eleventh legacy, the gift over in each contained words clearly restricting "issue" to "children." In the eleventh case the gift over to "issue" contained no words of restriction whatever.

Held (reversing Kekewich, J., 47 W. R. 374, [1899] 1 Ch. 703), that the restriction of "issue" to "children" applied to the gift over in the eleventh legacy as well as to the gifts over in the other legacies.—BIRKS, RE. KENYON *v.* BIRKS, *C.A.*; [1900] 1 Ch. 417; 69 L. J. Ch. 124; 81 L. T. 741.

19. *Mortgage—Mortgagee in possession—Devise by mortgagee of mortgaged property.*—Where a mortgagee in possession devises the mortgaged estate as if he were absolute owner thereof, the mortgage debt passes to the devisee unless, on the facts, a contrary intention can be gathered.

*In re Clowes*, 41 W. R. 69, [1893] 1 Ch. 214, distinguished.—CARTER, RE. DODDS *v.* PEARSON, *Ch.D. Cozens-Hardy, J.*, 555; [1900] 1 Ch. 801; 69 L. J. Ch. 426; 82 L. T. 526.

20. *Name and arms clause—Use of surname.*—A devisee was directed to assume and use a prescribed surname "alone or together with" his own family name.

Held, that the use by the devisee of the prescribed surname before his own family name was a sufficient compliance with the direction.—EVERSLEY (LORD), RE, MILDMAY *v.* MILDMAY, *Ch.D. Byrne, J.*, 249; [1900] Ch. 96; 69 L. J. Ch. 14; 81 L. T. 600.

21. *Residuary devise—Gift of "all other my freehold" property—Restriction as to tenure—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 25.—A testator devised all other his freehold messuages and tenements at W. and elsewhere.

Held (following the decision in *Springett* v. *Jenings*, 19 W. R. 575, L. R. 6 Ch. 333), that this was not a residuary devise, there being no gift of copyholds.

A gift restricted as to tenure is not, any more than a gift restricted as to locality, a residuary gift. — MASON, RE, OGDEN *v* MASON, *Ch.D. Kekewich, J.*, 493; [1900] 2 Ch. 196; 69 L. J. Ch. 475; 82 L. T. 554.

22. *Residuary devise and bequest—Settlement—Power of revocation and new appointment—Wills Act* (1 *Vict. c.* 26), *s.* 27.—The principle that a general devise and bequest does not operate under section 27 of the Wills Act, 1887, as an exercise of a power of revocation and new appointment applies to the case where the power of revocation and new appointment is that contained in the instrument originally creating it, as well as to the case where the power is that reserved by an appointment made in exercise of the original power.—GOULDING'S SETTLEMENT, RE, DOBELL *v.* DUTTON, *Ch.D. Cozens-Hardy, J.*, 183.

23. *Reversionary interest—Gift to persons in succession—Absolute gift subject to executory limitation—Enjoyment in specie.*—Testator gave by his will all his property to his wife; by a codicil, which recited that M. was the adopted daughter of himself and his wife, and that he was desirous of providing for her in the event of his wife dying without issue leaving her surviving, be directed that in such event the gift in his will in favour of his wife should take effect as if the name of M. had been substituted therein for that of his wife. Part of the testator's estate consisted of a reversionary interest in a trust fund.

Held, that the testator intended the property to be enjoyed in specie and that the reversionary interest ought not to be sold.

*Howe* v. *Lord Dartmouth*, White & Tudor L. C. 68, distinguished.—BLAND, RE, MILLER *v.* BLAND, *Ch.D. Stirling, J.*; [1899] 2 Ch. 336.

24. *Secret trust—Joint tenants—Notice to one only.* —A secret trust of property bequeathed absolutely to two persons as joint tenants communicated only to one of them is not binding upon the other, unless it is made upon the faith of an antecedent promise by the one to whom the communication is made.—STEAD, RE, WHITHAM *v.* ANDREW, *Ch.D. Farwell, J.*, 221; [1900] 1 Ch. 237; 69 L. J. Ch. 49; 81 L. T. 751.

25. *Tenant for life—Full and absolute control—*

*Waste—Timber—Proceeds of sale.*—By his will G. P., who died in 1884, devised an estate to his wife M. E. P. for life with remainder to his brother F. P. in fee. M. E. P. was appointed sole executrix with full and absolute control over all the testator's property during her life. F. P. died in 1892, having by his will settled the estate subject to the life interest on the plaintiff in tail male with remainder over. M. E. P. having cut and sold timber, including oak, ash, and elm of twenty years of age and upwards, this action was brought claiming a declaration that this constituted waste and for an injunction.

Held, that on the true construction of the will the words "with full and absolute power over all my property" did not render the defendant dispunishable for waste, but merely conferred large powers of management. That the defendant had committed waste which did not fall within the exceptions in *Honywood* v. *Honywood*, 30 L. T. Rep. 671, and *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, and was not justified by such powers of management. That the defendant was only entitled to cut timber in a due course of management for the benefit and preservation of the estate, and must account for the proceeds of sale that had taken place.—PARDOE *v.* PARDOE, *Ch.D. Stirling, J.*; 82 L. T. 547.

26. *Tenant for life and remainderman—Leaseholds—Permissive waste—Liability of tenant for life.*—Where a claim was made by a legal remainderman against the estate of a deceased legal tenant for life on account of dilapidations on a freehold and leasehold estate,

Held, that in spite of covenants to repair, the estate of the tenant for life was not liable.—PARRY AND HOPKIN'S ARBITRATION, RE, *Ch.D. North, J.*, 345; [1900] 1 Ch. 160; 69 L. J. Ch. 190; 81 L. T. 807.

27, *Tenant for life and remainderman—Power for trustees to postpone conversion—Power of management—Direction as to income of unconverted property—Property not yielding income.*—If a discretionary power to trustees to postpone conversion is coupled with a direction that the tenant for life is to have the income of unconverted property, the rule in *Howe* v. *Lord Dartmouth*, 7 Ves. 137, is excluded by virtue of such direction, and the trustees can, in exercise of their discretion, postpone the conversion even of property that does not yield any income, so that the remaindermen are benefited at the expense of the tenant for life.

The discretionary power of the trustees is, however, only a power of management, and cannot be exercised so as to affect the rights of beneficiaries, except in the course of the management of the estate as a whole.

Where, therefore, the only item of outstanding estate consisted of a reversion to a sum of Consols set apart under a previous will to answer an annuity to the tenant for life,

Held, that the representatives of the tenant for life were entitled to be recouped the income which the tenant for life would have enjoyed if such reversion had been sold in her lifetime, inasmuch as the trustees had not in fact exercised their discretion, and could not properly—having regard to the state of the testator's property—have exercised their discretion, by postponing the conversion if their attention had been directed to the matter.—ROWLLS *v.* BEBB, *C.A.*, 562; [1900] 1 Ch. 107; 69 L. J. Ch. 562; 82 L. T. 633.

See also Administration, 1, 2, 4, 6, 7; Charity, 3; Inland Revenue, 7, 8; Limitation Statutes, 1, 5; Power, 1, 4, 5; Probate, 11-17; Settled Land, 8; Trustee, 3, 7.

WORKMEN'S COMPENSATION.—See Master and Servant, 1-28.

[THE END.]

Stanford Law Library
3 6105 063 511 633